REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 82 OF 2014

ROY SPARES LIMITED….....APPELLANT

VERSUS

LYDIA JEROP SIRMA, *Suing as the Administrator*

***of the Estate of* DANIEL KIBET NGETICH.....RESPONDENT**

RULING

1. The respondent prays that this appeal be *dismissed*. The notice of motion is dated 7th March 2016. The respondent pleads that the appeal was lodged on 19th June 2014. She avers that since that date, *no* steps have been taken by the appellant to set it down for hearing.

2. Those matters are buttressed by a deposition sworn by *Lydia Ng'etich* on 7th March 2016. The substance of the motion is that the delay is prejudicial her interests. She avers that her lawyers wrote two letters to the Deputy Registrar of the Court to list the appeal for *dismissal* but no action was taken. The letters are annexed marked *LTS2 (a)* and *(b).* I was implored to find that the appellant is *disinterested* in the appeal.

3. The appellant's learned counsel, *Mr. Isiji*, opposed the application. He conceded that the appellant has *not* filed a replying affidavit. He submitted that since appeal has *not* been admitted, the motion for dismissal is premature. He also submitted that the appellant has filed a record of appeal; and, that it is fair and just that the appeal be determined on its merits.

4. On 8th November 2017, learned counsel for the appellant and respondent made brief oral submissions. I have considered the rival arguments. I have also paid heed to the records before me, the pleadings, and depositions.

5. The memorandum of appeal was lodged on *19th June 2014* challenging the decree of the lower court of 21st May 2014. The motion for dismissal was filed *over one year* later on 9th March 2016. The record of appeal was only filed on 8th November 2017 on the date of hearing of the motion for dismissal. The appellant has *not* replied to the motion for dismissal. Quite obviously, the appeal has never been admitted or listed for directions. There is thus a clear *pattern* of *delays* by the appellant.

6. In our *adversarial* system of justice, it remained the primary obligation of the appellant to follow up on his appeal. See *Anne Chege & another v Peter Musasya*, Nairobi, High Court Civil Appeal 840 of 2003 [2006] eKLR, *Daniel Okoko v Dan Owiti*, Nairobi, High Court Civil Appeal 452 of 2003 [2006] eKLR.

7. The appellant has *not* filed a *replying affidavit* to explain the delay of *over three years*. The appellant's posture is that since the appeal has not been admitted, the motion is *premature*. That argument is prosaic. The argument would only hold if the appellant had filed a record of appeal within the prescribed time and taken necessary steps to have the appeal admitted. There is no explanation why the record of appeal was *only* filed on 8th November 2017, the date of the hearing of this motion for dismissal.

8. Order 42 rule 35 (1) expressly authorizes an aggrieved respondent to move the court for dismissal if the appeal is not set down for hearing *three months* after taking directions. When a year passed, the respondent wrote two letters to the Deputy Registrar [exhibits *LTS2 (a)* and *(b)*] to list the appeal in chambers before a judge for dismissal. That is what is contemplated by Order 42 rule 35 (2). The Deputy Registrar has not acted on the letters. Like I stated earlier, in our *adversarial* system of justice, it remained the principal duty of the *appellant* to follow up on his appeal. I agree with the respondent that the appellant went into deep slumber; and, has only been interrupted by the motion for dismissal. The application for dismissal is thus properly before the Court.

9. The test in a matter of this nature was well laid out in *Ivita v Kyumbu* [1984] KLR 441. It is whether the delay is *prolonged* and *inexcusable*, and if it is, whether justice can still be done. In that event, instead of dismissal, the court may exercise its discretion to set the suit down for hearing.

10. The blame for failure to progress the appeal rests entirely at the appellant's doorstep; or, that of its learned counsel. The appeal has lain

dormant for over *three years*. Inordinate delay has thus been established. There is *no* replying affidavit or other explanation. The delay has *not* been explained *at all*. It is thus *inexcusable*. See *Ivita Vs Kyumbu* [1984] KLR 441, *Allen v McAlpine* [1968] 1 All ER 543, *Ramuka Agencies Ltd v Esther Wanjira Maina and another* Nairobi, High Court ELC 1187 of 2007 [2012] eKLR.

11. I have also perused the decree that was appealed against. The claim in the lower court was for the tort of *negligence*. Judgment was entered against the appellant for Kshs 910,000 together with costs. Granted the decree, I would have expected the appellant or its counsel to be a little more diligent in the matter.

12. I am alive of the overriding objective to do justice to the parties. It is in the interests of a fair trial that disputes be resolved expeditiously. Sections 1A and 1B of the Civil Procedure Act speak strongly to the duty of parties and counsel to assist the court to expedite justice. The respondent is obviously *prejudiced* by a *stagnant* appeal. There are costs that go with it. The dictates of justice and the inherent power of the court require, in circumstances such as these ones, to free the respondent from the hold of the appellant's inert grip.

13. The upshot is that the appeal is hereby *dismissed* with *costs* to the respondent.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 14th day of December 2017.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

Mr. Odhiambo for the respondents instructed by Gicheru & Company Advocates.

Mr. Kivuva for Mr. Isiji the appellant instructed by Kimaru Kiplagat & Company Advocates.

Mr. J. Kemboi, Court Clerk.