



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NUMBER 28 OF 2009

1. LUCY SIMIYU1ST APPELLANT
2. STEPHEN MATHEKA.....2ND APPELLANT

VERSUS

1. STEPHEN CHEGE KARANJA.....1ST RESPONDENT
2. NEELCON CONSTRUCTION CO LTD.....2ND RESPONDENT
3. FRANCIS NGILA3RD RESPONDENT

(Being an Appeal from the Judgment delivered by Honourable Njagi Principal Magistrate in Naivasha CMCC No. 707 of 2006 on the 28th January 2009)

JUDGMENT

1. The appeal before this court was filed on the 19th February 2009 against the judgment of the trial court delivered on the 28th January 2009. After a full trial, the trial Magistrate apportioned liability between the first and second appellants at 25% and 75% against the third and fourth Respondents. The appellants being dissatisfied with the judgment lodged this appeal.

2. At the beginning of the hearing of the appeal, Mr. Mboga Advocate for the first Respondent informed the court that the first and second Respondents had already settled their 75% share of the decretal sum, and that the appellants had deposited in court their 25% share as security for the due performance of the decree. Ms. Mungai appearing for the Appellants told the court that the Record of Appeal has not been served upon the third and fourth Respondents whose vehicle Registration Number KAU 429M was insured by Blue Shield Insurance Company, now under receivership, as their advocates could not be traced.

3. The court was further informed that there are in force some stay of proceedings orders issued by the High Court at Nairobi against all insureds of Blue Shield Insurance Company Limited and urged the court to stay the hearing of the appeal. These orders were not availed to the court.

The first Respondent opposed grant of stay of proceedings orders stating that the appeal is very old and the respondents have been shut out of the decretal sum. He urged that the first and second Respondents be allowed to execute for the balance of the decretal sum against the appellants.

4. The court has considered submissions by counsel. The first and second Respondents have settled the decretal sum to the tune of 75%. The appellants whose 25% share is deposited in court is yet to serve the Record of Appeal upon the third and fourth Respondents eight years since the appeal was filed.

The only reason given for the failure to serve is that the parties advocates cannot be traced, and the purported stay of proceedings orders are in force.

5. It is trite law that service being the first step towards prosecution of a matter is so important that without it, and without informing the rival party of any court action having been taken against it, the court cannot move an inch. It is against judicial administration of Justice and rules of natural justice and to hear a case without giving the opposing party an opportunity to be heard and to present its side of the story to the court. Adverse orders cannot be issued against a party who has not been accorded an opportunity to defend himself.

It is the duty of the appellants to effect service of process to the respondents without which they cannot urge the court to hear them *ex parte*.

6. The Memorandum of Appeal was filed on the 19th February 2009 and the Record of Appeal filed on the 12th November 2009. It is now eight years since. Justice delayed is justice denied. The first respondent has urged the court to dismiss the appeal and order release of the money deposited in court to the first Respondent in satisfaction of the decree of the trial court.

7. I agree with the first respondent's submissions that the appellants have shown no interest in the prosecution of the appeal for eight years without any explanation. In the case **Ivita -vs- Kyumbu (1984) e KLR** the test on whether prolonged delay is inexcusable and whether justice could be done despite the delay were stated. Issues of lapse of human memory and lack of witnesses were considered, not to mention the prejudice that the delay causes to the respondents.

Section 1A of the Civil Procedure Act advocate for the facilitation of just, expeditious, proportionate and affordable resolution of civil disputes. **Section 1B** thereof mandates the court, in furthering the overriding objective stated in **Section 1A** above, to handle all matters for purposes of:

- (1) **the just determination of the proceedings**
- (2) **the efficient disposal of the business of the court and**
- (3) **the efficient use of available judicial and ministrations resources,**

8. The inordinate delay in effecting service of the Record of appeal to the Respondents is inexcusable. To allow the appeal records to remain in the court records is to negate the very essence and objective stated in **Section 1A and 1B of the Civil Procedure Act**.

For those reasons, the court finds that for Justice to be dispensed fairly to all the parties in this appeal, the appeal should be removed from the court registry shelves where it has been for the last eight years and placed where it belongs, the dustbin of dismissal.

The appeal is dismissed with costs to the first Respondent. The court proceeds to direct and order that the sum of Kshs.35,112.50 deposited in the trial court by the appellants be released to the first Respondent in satisfaction of the decretal sum ordered by the trial court.

It is so ordered.

Dated, signed and delivered in open court this 26th day of May 2016

JANET MULWA

JUDGE