**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CIVIL APPEAL NO. 71 OF 2012**

**LAKE BASIN DEVELOPMENT AUTHORITY.....APPELLANT**

**VERSUS**

**JOSEPH KIPKOECH KURGAT & MARGARET CHEPKOSKEI (***Suing as the personal representatives of the estate of* **GEOFFREY CHERUIYOT KOECH)....RESPONDENTS**

**RULING**

1. The respondents have moved this court through a Notice of Motion dated 19th February, 2016 praying that the appellant's appeal be dismissed for non-service of the record of appeal and for want of prosecution. They also pray for costs of the appeal and the application.

2. The application is brought under *Section 1A, 1B* and *3A* of the *Civil Procedure Act ; Order 42 Rule 35 (2)* of the *Civil Procedure Rules* and all other enabling provisions of the Law. It is premised on grounds that since the filing of the memorandum of appeal four years ago, the appellant had not served the respondent with the record of appeal; that the appellant had no interest in the appeal; that the continued pendency of the appeal was prejudicial and vexatious to the respondents and that the wider interests of justice required that the appeal be dismissed for want of prosecution.

3. The above grounds were buttressed by a deposition dated 19th February 2016 sworn by *Mr. Allan Rimui Mbugua Ngugi* learned counsel for the respondents. *Mr. Mbugua* deposed that the appellant's failure since 19th July, 2012 to serve the respondents with the record of appeal and to take any step to progress the hearing of the appeal was evidence that the appellant had lost interest and was not keen on prosecuting the appeal and that therefore, the appeal should be dismissed for want of prosecution.

4. The application is opposed through a replying affidavit sworn on 16th May, 2016 by *Mr. Henry Kenei* learned counsel for the appellant. In the main, counsel deposed that the delay in prosecuting the appeal was occasioned by an inadvertent oversight on the part of the appellant's advocates; that a mistake on the part of counsel should not be visited on a client; that the appellant is desirous of prosecuting the appeal and is in the process of concluding the process of preparing the record of appeal and is only waiting to receive a certified copy of the proceedings of the trial court; that the delay in the preparation of the record of appeal was occasioned by the delay by the trial court in issuing a certified copy of the proceedings which are the subject of the appeal.

5. The appellant further averred that the delay in the prosecution of the appeal will not occasion any prejudice on the respondent which cannot be remedied by an award of costs and interests; that the application has been brought after inordinate delay and that the applicants are estopped from relying on the ground of delay in support of their application; and finally that the appellant has a right under *Article*

*50(1)* of the Constitution to have the appeal determined on merit after a full hearing.

6. On 17th May, 2016, learned counsel for the appellant and the respondents appeared before me and made oral submissions reiterating their clients' respective positions in the matter. I have considered the rival arguments, the affidavits filed by the parties, the authorities cited as well as the court record.

7. Having done so, I find that it is not disputed that the appellant lodged its memorandum of appeal on 19th July, 2012 and that since then, about four years later, it has not filed or served the respondent with the record of appeal nor has it taken any other step to facilitate the hearing of the appeal. What is contested is whether the said delay is excusable given the reasons given by the appellant in a bid to explain the delay and whether the court should exercise its discretion in the appellant's favour by giving it another opportunity to prosecute the appeal.

8. I wish to start addressing the issues raised in this application by noting that it is the primary duty of an appellant to move the court to progress the hearing of an appeal. A reading of *Order 42 Rules 11, 12* and *13* of the *Civil Procedure Code* clearly demonstrates that this duty is solely imposed on the appellant and is not shared by the respondent.

9. Under *Order 42 Rule 11*, an appellant is required within thirty days of filing the appeal to cause it to be listed before a judge for either admission or rejection under *Section 79 B* of the *Civil Procedure Act* (the Act). If the appeal is not summarily rejected, the appellant is then required to serve the respondent with the memorandum of appeal. *Rule 13* thereof requires the appellant to set down the appeal for directions twenty one days after service of the memorandum of appeal.

10. In this case, it is not clear when the respondent was served with the memorandum of appeal since this has not been disclosed by the parties. What is however clear from the court record and from the submissions made by the parties is that the appellant since filing the appeal has not taken a single step towards facilitating its hearing including having it listed for directions under *Section 79 (B)* of the Act leave alone directions regarding its hearing considering that the record of appeal is yet to be filed.

11. *Order 42 rule 35* of the *Civil Procedure Rules* provides for dismissal of appeals for want of prosecution. It provides that an appeal can be dismissed for want of prosecution upon application by the respondent if it has not been set down for hearing within three months after the taking of directions under *Rule 13* or if it has not been fixed for hearing within one year after the service of the memorandum of appeal.

12. I have perused the court record. It shows that the appeal was listed for dismissal by the court on 18th April, 2016 under *Order 42 Rule 35 (2)* but since the instant motion for dismissal had already been filed and counsel for the appellant was not in attendance, the court directed that the application be heard instead of proceeding with the notice to show cause why the appeal should not be dismissed.

13. In his submissions, *Mr.Kenei* urged the court to find that the application was premature in view of the provisions of *Order 42 Rule 35 (1)* since no directions had been taken in the appeal. As stated earlier, it is the appellant's sole duty and responsibility to move the court to cause the appeal to be admitted and to list it for directions. Having failed to take any of the above steps with expedition, the appellant cannot now turn around and use its failure to take directions as a shield to the motion for dismissal. In my view, holding otherwise would allow the appellant to benefit from its own indolence.

14. As I held in ***John Wachenga Kiama V Daniel Kiboro Muchai Eldoret High Court Civil Application No. 53 of 2013*** which has been cited by the respondents, the court has discretion to dismiss appeals for want of prosecution even if they do not fall into any of the two situations envisaged by *Order 42 Rule 35* if the interests of justice so requires.

15. The test in applications of this nature was succinctly laid out in the case of ***Ivita V Kyumbu (1984) KLR 441*** which was cited with approval by the Court of Appeal in ***Rafesh Rughani V Fifty investment limited & another Civil Appeal No. 80 of 2007 (2016) eKLR.*** The test is whether the delay complained

about is prolonged and inexcusable and if it is, whether justice can still be done despite the delay. In that event, instead of dismissal, the court may exercise its discretion and set down the suit for hearing at the earliest available time.

16. In this case, the appellant has explained the delay in prosecuting the instant appeal by claiming that it was prevented from preparing the record of appeal by the trial court's delay in supplying it with a certified copy of its proceedings. The appellant contends that todate the said proceedings have not been obtained.

17. Thought I appreciate the fact that the record of appeal cannot be prepared without receipt of the trial court's certified copy of proceedings, it was the appellant's duty to apply for the said proceedings soon after filing the appeal and to follow up with the trial court to ensure that they were supplied within a reasonable time. The appellant has not availed any cogent evidence by way of correspondence to prove that it had in fact made reasonable effort to obtain the said proceedings before the instant application was filed. The letter annexed to the appellant's replying affidavit marked "HK1" was written on 16th May, 2016 well after the motion for dismissal was filed.

18. In view of the foregoing, I am not satisfied that the delay in this case has been well explained. The truth of the matter is that both the appellant and its advocates simply went to sleep after filing the appeal. I say so because even in cases where parties are represented by counsel, parties still have a responsibility to show interest and to follow up the progress of their cases with their advocates to ensure that the hearing in their cases was still on track.: See ***Habo Agencies Limited V Wilfred Odhiambo Musingo Civil Appeal (Application) No 124 of 2014 [2015] eKLR*** . There is no doubt in this case that both the appellant and his advocates demonstrated inertia in pursuing the hearing of the appeal.

19. That said, I note that unlike the appellant in ***John Wachenga Kiama V Daniel Kiboro Muchai Eldoret High Court Civil Application No. 53 of 2013*** who did not even bother to oppose the motion for dismissal, the appellant in this case strenuously opposed the application and strongly expressed its desire to prosecute the appeal if given another chance. In this connection, the appellant averred that it was in the process of preparing the record of appeal. Given these claims by the appellant, I find that this is a case in which this court is called upon to balance the right of the appellant to be heard on merit in its appeal against the respondent's right to enjoy the fruits of their judgment.

20. Though I wholly agree with learned counsel for the respondents *Mr. Ngige Mbugua* that there has been inordinate delay in the prosecution of this appeal and that it is a cardinal principle of law that litigation must come to an end, I am persuaded to find that the interests of substantive justice requires that in this case, the appellant be granted another opportunity to prosecute its appeal. However, given the appellant's past conduct and in order to accommodate the interests of the respondents given that justice is a two way street, I will grant the appellant a chance to prosecute the appeal but on condition that it meets two conditions which I will state shortly.

21. For all the foregoing reasons, I decline to allow the motion for the appeal's dismissal and purely in the interest of justice, I make the following orders: The appellant shall pay the respondents throw away costs of Kshs. 20,000 within the next thirty days. The appellant shall also ensure that all steps are taken to have the appeal admitted and set down for directions within sixty days of today's date. If the appellant fails to meet any of the two conditions within the set time, the appeal shall automatically stand dismissed with costs to the respondents.

It is so ordered.

**C. W. GITHUA**

**JUDGE**

**DATED, SIGNED** and **DELIVERED** at **ELDORET** this 22nd day of June 2016

In the presence of:

Ms Naomi Chonde Court Clerk

No Appearance for both the appellant and the Respondent.