REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL CASE NO. 356 OF 2008

NDUNDA MUSAU.....APPLICANT

PETER LEMMY MUHURI .....APPLICANT

MRS. CATHERINE M KOLA .....APPLICANT

KENYA NATIONAL ASSOCIATION

OF PARENTS (KNAP).....APPLICANT

VERSUS

1. ACTION AID INTERNATIONAL KENYA..... RESPONDENT

2. OXFAM GB KENYA..... RESPONDENT

3. WILLIAM MIGWI

(Being sued as the Commonwealth Fund Coordinator) **..... RESPONDENT**

RULING

1. The application dated 10th September, 2010 seeks orders that the Respondents civil appeal herein be dismissed for want of prosecution.

2. It is stated in the affidavit in support that the appeal has not been fixed for hearing since the 29th October 2008. That the delay has prejudiced the Applicants as they have not been able to meet their obligations to pay their workers and creditors. The Applicants have further stated that if the decretal sum that was deposited in Court is released to them, they can refund the same in the event that the appeal is successful.

3. The application is opposed. The Respondents filed the grounds of objection dated 15th October, 2010. The said grounds are as follows:

> **"1. That the Notice of Motion dated 10th September 2010 is misconceived as it seeks to dismiss and Appeal for want of prosecution which appeal has not yet been filed.**
>
> **2. That the Notice of Motion is brought under non-existent provisions of the Civil Procedure**

Act.

3. That there is no Appeal yet on record and as such there is non that is capable of being dismissed for want of prosecution.

4. That the proceedings and judgment in Milimani Commercial Court – CMCC No. 2392 of 2008 are yet to be issued and as such no record of Appeal can be filed without the issuance of the Court proceedings by the Lower Court.

5. That the Notice of Motion lacks merit and ought to be dismissed with costs.

6. Other grounds to be adduced at the hearing of the matter."

4. The application was canvassed by way of written submissions which I have duly considered.

5. Appeals to the High Court are governed by Order 42 of the Civil Procedure Rules. Order 42 rule 35 provides as follows in regard to dismissal of Appeals for want of prosecution:

"35. (1) Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.

(2) If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal. "

6.The principles to be applied in a case like the one at hand were restated by the Court Appeal when it stated in the case of **Salkas Contractors Limited v Kenya Petroleum Refineries limited [2004] eKLR** as follows while referring to the case of **Allen v Sir Alfred McAlpine & Sons (Ltd 1968) 1 ALL ER 543:**

"A defendant may apply to have an action dismissed for want of prosecution either (a) because of the plaintiff's failure to comply with the Rules of the superior court or (b) under the court's inherent jurisdiction. In my view it matters not whether the application comes under limb (a) or (b), the same principles apply. They are as follows: In order for such an application to succeed, the defendant must show:

(i) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case but it should not be too difficult to recognise inordinate delay when it occurs.

(ii) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.

(iii) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial."

The above principles have been followed in Kenya consistently. In the case of Inter vs. Kyumba (1984) K.L.R 441, it was held as follows *inter alia* :-

"3. The test applied by the courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter in the discretion of the court."

That was a decision of the superior court and is thus only of persuasive authority to us, but it will be clear that it consistently followed the decision of Salmon, L. J. in the case of Allen vs. Sir Alfred McAlpine (supra). The principle that pervades these decisions is that the court has to be satisfied that the inordinate delay is excusable and if so satisfied, then the court has to consider whether justice can still be done to the parties notwithstanding the inordinate delay. If the court is satisfied that justice can still be done, then it will, in the exercise of its discretion, refuse the application for dismissal for want of prosecution. It follows that if the court is not satisfied that the inordinate delay is excusable, then it will, again in its discretion, allow the application and dismiss the suit for want of prosecution.

7. It has been argued by the Respondents counsel that the application is brought under non-existent provisions of the Civil Procedure Act. It is observed that the application is expressed to be brought **" pursuant to Order XVI Rules (d) and order (rule 1 of the Civil procedure Rules Section 3A of the Civil Procedure Act and all the enabling provision of the law"**

However, failure to state the correct provisions of the Civil Procedure Act and Civil Procedure Rules is not fatal to the application.

Order 51 rule 10(1) Civil Procedure Rules provides as follows:

" Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule."

The constitution also enjoins the court to administer justice without undue regard to technicalities of procedure.

8. The memorandum of appeal was filed herein on 7th July, 2008. An application for stay of execution was filed on 16th July, 2008. The same was allowed on 29th October, 2008 on condition that the sum of Kshs. 300,735/= be deposited in court. The deposit was made. The record thereafter reflects that parties entered into negotiations. The case was mentioned in court severally up to 5th May, 2015 when the court was informed that the parties had failed to record a settlement. The record does not reflect any step taken by the Respondents thereafter. Indeed the Court record shows that the Applicants' advocates are the ones who have been active in the matter in requesting the Deputy Registrar to fix a date for directions. The Applicants finally filed the application at hand. It seems after the deposit of the money and the failed negotiations, the Respondents went to sleep.

9. The Respondents have not explained their failure to diligently prosecute the appeal. In their grounds of opposition, the Respondents have stated that there is no appeal on the record capable of being dismissed for want of prosecution and that the lower Court proceedings are yet to be supplied.

However the record of the Lower Court has been availed to this court. Although the appeal has not been admitted in accordance with the provisions of Order 42 rule 11 Civil Procedure Rules, this court can exercise its inherent powers as provided under Section 3A, 1A and 1B of the Civil Procedure Act as well as articles 159 (2)(b) of the Constitution to prevent the abuse of the court process. A party cannot file an appeal then sit back without taking any steps to prepare the appeal hearing. It is evident that no record of appeal has been filed despite the availability of the Lower Court record.

10. With the foregoing, I find merits in the application for the dismissal of the appeal herein.

Consequently, I allow the application with costs to the Applicant.

Dated, signed and delivered at Nairobi this 22nd day of Sept, 2016

B. THURANIRA JADEN

JUDGE