



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NUMBER 1 OF 2015**

**BIDCO OIL REFINERIES LTD.....APPELLANT/RESPONDENT**

**VERSUS**

**JANET WANGARI MWANGI.....1<sup>ST</sup> RESPONDENT/APPLICANT**

**CHARLES NDUNGU WAIRIUKO.....2<sup>ND</sup> RESPONDENT/APPLICANT**

**AND**

**JOHN KAMAU ICHUGA.....THIRD PARTY**

*(An appeal from Judgment of the Chief Magistrate dated 10<sup>th</sup> day of December 2014 in Nakuru Chief Magistrate's Court Civil Case No 193 of 2013)*

**RULING**

1. The Respondents by their application dated 11<sup>th</sup> May 2016 approached the court for an order of dismissal of this appeal for want of prosecution under the provisions of **Order 42 Rule 35(1)** of the **Civil Procedure Rules and Section 3A of the Act**. In the supporting affidavit sworn by the first Respondent, the main ground is that since the filing of the Memorandum of Appeal, more than one year had lapsed without the appellant taking any steps towards prosecution of the appeal, and therefore the appellant has lost interest in the appeal and its pendency in court is prejudicial to the Respondents.

2. The appellant and Respondent in the application oppose the application by its Replying affidavit sworn by the appellants advocate, Dilipsingh Mahinda. Reasons advanced for the delay are that the trial court file **CMCC No. 193 of 2013 Nakuru** has not been availed nor the proceedings to facilitate filing of the Record of Appeal despite requests evidenced by several letters to the trial court.

It is submitted that without those documents, it is not possible to take directions. The appellant also faults the application that it is filed under a Chamber Summons instead of a Notice of Motion as required by **Order 51 of the Civil Procedure Rules**.

3. Parties filed within submissions which I have considered.

**Order 42 rule 35(1)** provides for dismissal of appeals for want of prosecution. It states:

***“(1) unless within three months after the giving of directions under rule 3 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.”***

If the appeal is not fixed down for hearing within one year, subsection

***(2) provides that the Registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.***

4. I have considered the letters addressed to the Chief Magistrate's Court by the appellant requesting for copies of proceedings and judgment. They are indeed numerous, and all are copied to the Respondent's Advocates. I have also confirmed that the trial court file has also not been forwarded to the High Court. There is no communication from the said court as to why the file, the proceedings and judgment have not been forwarded to the High Court. As recent as May 2016, despite reminders, the Nakuru Chief Magistrates Court which is housed in the same building with the High Court has offered no explanation.

5. I have considered the authorities cited in support of the application.

In **Kariuki Wachaka -vs- Laddia Limited** as quoted in **Ezekiel Sirma & Another -vs- Mark Lettin (2013) e KLR**, it is the duty of the appellant to prosecute his appeal and any delay that can not be sufficiently explained cannot be allowed as it prejudices the rival party. In **John Wachanga Kiama -vs- Daniel Kiboro Muchai (2016) e KLR**, the court added that a party cannot be allowed to have his appeal pending in court indefinitely without a step being taken towards its prosecution.

The applicant blames the Appellant for the delay to prosecute the appeal. In my considered opinion, the appellant has been actively trying to move a step by numerous requests for the typed proceedings and judgment. The trial court file has not been forwarded. Without those documents and the trial court file, the appellant cannot possibly be able to file the Record of Appeal nor take directions or have the appeal admitted for hearing under **Section 79 B** of the **Act**.

6. I am satisfied that the appellant did not go to sleep after filing the appeal. The delay has been sufficiently explained. The party to blame in these circumstances is the Chief Magistrates Court at Nakuru. No explanation has been tendered or any reason advanced for failure to forward the primary court file to the High Court.

I agree that the applicant has been prejudiced by the delay running to over one year now.

For those reasons, I find the application dated 11<sup>th</sup> May 2016 with some merit as far as the delay is inordinate. As the reasons for the delay have however been explained, the appeal cannot be dismissed as yet.

Having said so, I now make an order directed to the Executive Officer of the Nakuru Chief Magistrates Court to urgently provide the typed proceedings and certified copy of the judgment in **CMCC No. 193 of 2015** within 60 days, and to forward the said file to the Deputy Registrar of this court within the said period of 60 days.

Should this direction not be complied with, either of the parties shall be at liberty to move this court for further orders.

There shall be no orders as to costs.

**Dated, signed and delivered this 27<sup>th</sup> Day of October 2016**

**JANET MULWA**

**JUDGE**