REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 188 OF 2010

KENYA POWER & LIGHTING……APPELLANT

VERSUS

ROBERT KAMAU NJONJO

T/A MODERN BAR…..…….RESPONDENT

RULING

By a notice of motion dated 28th January, 2014 and filed in Court on the 31st day of January, 2014, the Respondent Robert Kamau Njonjo T/A Modern Bar filed the application pursuant to the provision of Order 42 Rule 35 (1) and (2) order 51 Rule 1 of the Civil Procedure Rules, Sections 3 & 3A of the Civil Procedure Act and all over enabling laws, seeking from this Court orders that;-

1) The Memorandum of Appeal be struck out for want of necessary steps to prepare the record of Appeal.

2) That costs of this application be provided for

The said notice of motion is premised on the grounds that:-

1. The suit herein was filed way back the year 2005.

2. The judgment was on 4th May, 2010.

3. The Memorandum of Appeal was lodged on the 26th May, 2010.

4. Since then no record of Appeal has ever been prepared by the appellant and/or his Counsel and is now over one year since the Memorandum of Appeal was filed in Court.

The application is further supported by the annexed sworn affidavit of Rumba Kinuthia Advocate wherein it is deposed, among other depositions that the appellant herein appears to have lost interest of having the appeal prosecuted as no steps have been taken since its filing in May, 2010 to have it prosecuted and that it is well over 3 years since 2010 without any action being taken in the appeal. That justice delayed is justice denied and that it would be fair and just that the memorandum of appeal is dismissed to end any further stress on the part of the applicant/respondent and that there is inordinate delay. The application was opposed with the appellant filing a Replying affidavit sworn by Bernard Owuor Advocate on 10th April, 2014 and filed on 14th April, 2014.

He deposes that the applicant has not satisfied the conditions set out in Order 42 Rule 35 of the Civil Procedure Rules for dismissal of the appeal for want of prosecution.

Further, that the appeal has never been admitted to hearing and as such the application is premature and that the appellant cannot set down the appeal for hearing before its admission. In addition, that no directions have been given pursuant to Section 79 B and Order 42 Rules 11 and 13 of the Civil Procedure Rules hence the appeal could not be set down for hearing.

In addition, the respondent/applicant contends that it did apply for proceedings but the same have never been supplied. That Rule 35 (2) of the Order 42 is not available to the Respondent for dismissal of this appeal for want of prosecution and that the applicant is usurping powers of the Registrar as he has not requested the Registrar to have the appeal listed before a Judge in chambers for dismissal or set the matter down for directions. That having deposited a sum of Ksh 300,000 in an interest earning account as security for costs following a conditional order of stay pending appeal, the appellant cannot be said to have lost interest in the appeal herein or at all

That the delay is not inordinate and no prejudice has been occasioned to the Respondent hence the appeal as filed should be allowed to be determined on its merits.

When the advocates for the parties appeared before me on 6th October, 2014 they agreed to have the application disposed of by way of written submissions.

The appellant/respondent filed theirs on 16th October, 2014 whereas the Respondent/Applicant filed his on 28th October, 2014. In their submissions, the appellant's advocates aver that the application is premature and lacks merit as the orders sought are not available to him pursuant to the provisions of order 42 Rule 35 (1) and (2) of the Civil Procedure Rules as the appeal has not been admitted to hearing pursuant to the provisions of Section 79 B of the Civil Procedure Act and Order 42 Rules 11 and 1B of the Civil Procedure Rules, relying on the case of ***Mini Bakeries Limited Vs Edward Mbuta Komu HCCA 836 OF 2005*** wherein the Hon. Judge observed that an appeal could not be dismissed for want of prosecution where the appeal had not been admitted to hearing. In addition, it is submitted that under Order 42 Rule 35 (2) only the Registrar can on notice to both parties concerned can issue Notice to Show Cause why the appeal cannot be dismissed for want of prosecution and that in this case, it is the Respondent usurping powers of the Registrar.

It is further submitted that the Respondent had not exhausted all the avenues or remedies provided in Order 42 which include writing to the Registrar with a request to have the appeal listed before a Judge in chambers for dismissal or set down the matter for directions as was observed in the case of **Ishmael Gichonge Muturi Vs Diana Laso HCCA 231/2003.** The other submissions reiterate what is deposed in the affidavit of Bernard Oduor Advocate as replicated in this ruling above, praying for dismissal of the Notice of Motion as filed.

The Respondent applicant filed their written submissions on 28th October, 2014 restating the contents of the application, grounds in support thereof and the deposition in the affidavit of Rumba Kinuthia Advocate. It is submitted that the appellant has shown an indifference in setting down the appeal for hearing despite several letters of reminders to do so which went unheeded hence the applicant was compelled to file the instant application.

According to Counsel, Order 42 Rule 35 (1) of the Civil Procedure Rules is relevant as it provides that:-

1. Unless within 3 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 to either set it down for hearing or to apply by summons for its dismissal for want of prosecution.

Further, that under sub rule 2, ***"If within one year after 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."

The applicant urges this Court to invoke its inherent powers to ensure the ends of justice are met as buttressed by the provisions of Section 3A of the Civil Procedure that ***"Nothing in this Act shall limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice to prevent abuse of the Court process."***

Further, that the appellant is abusing Court process by using or relying on legal provisions as there has been inordinate delay in prosecuting the appeal which calls for the Court to dismiss the appeal to ensure the ends of justice are met praying for the orders as sought. He did not rely on any decision.

I have carefully considered the application herein, the supporting affidavit, the replying affidavit and the rival written submissions by both advocates for the parties to this application and the authorities as cited and the relevant legal provisions relied on by both parties.

The sole issue for my determination is whether the application as field meets the conditions for granting an order for dismissal of the appeal for want of prosecution. For the orders sought to be granted or refused, the applicable law must be revisited. The relevant provision are order 42 Rule 35 of the Civil Procedure Rules. Under the said Rule, the law contemplates two different scenarios for the grant of the order dismissing an appeal for want of prosecution. These scenarios are:-

1) Three months after giving of directions under Order 42 Rule 13, no steps have been taken by the appellant to fix the appeal for hearing, the Respondent can either fix the appeal for hearing or apply by summons for the dismissal of the appeal as per Order 42 Rule 35 (1) of the Civil Procedure Rules.

What emerges from that rule is that before the Respondent can move the Court either to set down the appeal for hearing or apply for its dismissal for want of prosecution, directions must have been given as provided for under section 79 B of the Civil Procedure Act.

The second scenario contemplated under Order 42 Rule 35 (2) is that **unlike** in Rule 35(1), which requires that directions must have been taken before the appeal can be dismissed for want of prosecution, under sub Rule 35(2), if within one year after 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.

The appeal herein was filed on 26th May, 2010 by a Memorandum of Appeal dated the same day by Muthega & Company Advocates. The record shows that on 18th October, 2011 the appellants' advocates requested the Deputy Registrar Milimani High Court to return the original Lower Court file to the Milimani Chief Magistrate Court 9015/2005 to enable the advocates access certified copies of proceedings, Judgment and decree to enable them proceed with this appeal and the request was approved on 21st October, 2011 by the Deputy Registrar.

The Lower Court original Court file had earlier on been forwarded to the High Court Appeal file herein by a letter dated 25th August, 2011 by the Chief Magistrate Milimani Commercial Courts.

The record further shows that by a notice dated 26th September, 2011 the Deputy Registrar notified the appellants' advocates to prepare, file and serve the Respondents with a record of appeal to enable the appeal be placed before the Judge dealing with the Civil Appeals give directions under Order 42 Rule 13 (1) and (2) of the Civil Procedure Rules.

As at 28th November, 2012 when the appellant's advocates wrote to the Deputy Registrar asking that there be compliance with the letter of 18th October, 2011 requesting for the Lower Court file to be taken to the Chief Magistrates Court which letter had not elicited any response, it was noted on the said letter of 28th November, 2012 that ***"Proceedings already certified",*** which was over a year from 18th October, 2011 when the initial request was made and although remittance to the Lower Court was approved, there

is no evidence that the file was remitted to the Lower Court for certification of Proceedings or that the Deputy Registrar communicated the decision to the appellant's advocates.

Nonetheless, it is the responsibility of the appellant to follow up on their requests to ensure there is compliance. The record shows that proceedings and judgment were certified on 18th August, 2011 one year after filing of the appeal, and nearly a year after the appellant's advocates did request for the same 31st August, 2010. There is no decree extracted on record. Other than the correspondence from the appellant's advocates to the Court regarding the resubmission of the Lower Court file to the Chief Magistrates Court, there is no record of proceedings in this appeal until 31st January, 2014 when the Respondent advocates, fixed their application dated 28th January, 2014 for hearing on 15th April, 2014 on which date there is no record of what transpired and the subsequent refixing of the said application for hearing.

No doubt, the Court has played a role in delaying the preparation and disposal of this appeal as it has not facilitated the appellant as requested to enable them prepare the appeal for hearing and disposal. Whereas it asked the appellant to prepare, file and serve the record of appeal on 26th September, 2011 it was well aware that the decree had not been drawn and even though the Proceedings and Judgment were certified on 18th August, 2011 there is no evidence that the Court advised the appellant's advocates of the position when the latter note on 18th October, 2011 requesting for remittance of the file to the Lower Court. Still, the Deputy Registrar went ahead and approved the request in the full knowledge of their own letter of 25th August, 2011 submitting certified copies of proceedings and judgment and it took the Court over one year to note on the file following a reminder by Counsel for the appellants, that proceedings were already certified.

The Court is expected to facilitate expeditious determination of disputes. The record herein shows that the Court was not facilitative of that process. In any event, nothing prevented the Registrar from placing this file before a Judge in chambers for taking of Directions under Section 79 B of the Civil Procedure Act. The section provides that:- ***"Before an appeal from a subordinate Court to the High Court is heard, a Judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decreed or order appealed against, he may, not withstanding section 7ac reject the appeal summarily."***

Under order 42 rule 12, ***"After the refusal of a Judge to reject the appeal under section 79 B of the Act, the Registrar shall notify the appellant who shall serve the Memorandum of appeal on every respondent within 7 days of receipt of the notice from the Registrar."***

However, it is not disputed that it is the responsibility of an appellant in an appeal to cause the appeal to be placed before a Judge for consideration under Section 79 B of the Civil Procedure Act, especially having been served with a Notice by the Registrar to compile, file and serve the record of appeal, which could have been done to precipitate the placement of the appeal before a Judge for giving of directions. Under Order 42 Rule 11 of the Civil Procedure Rules, upon filing of the appeal, the appellant shall within 30 days cause the matter to be listed before a Judge for directions under Section 79 B of the Act. This was never done by the appellant.

Nonetheless for the Respondent to make out a case for the appeal to be dismissed for want of prosecution, notwithstanding the noncompliance by the appellant with Order 42 Rule 11 of the Civil Procedure Rules which requires that within 30 days of filing of the appeal, cause the matter to be listed before a Judge for directions under Section 79 B of the Civil Procedure Rules and hence the appeal should have been so listed for consideration by 25th June, 2010, it is worth noting that by that time, the Lower Court file had not yet been certified and or availed to this Court meaning that even if the appeal had been listed before a Judge for consideration and for directions under Section 79 B, within the 30 days, the Court could have been unable to admit it and set it down for directions. The Lower Court record was availed over one year after the request for proceedings was made.

I accept that there is delay in processing this appeal for hearing but I reject the contention by the

Respondent that the delay has been inordinate or solely occasioned by the appellant.

This Court employs the cardinal principle that a party who avails themselves to the jurisdiction of the Court seeking to ventilate their grievances should not be ousted from the judgment seat. Since the enactment of sections 1 and 1B of the Civil Procedure Act and Article 159 (2) of the Constitution of Kenya 2010, the Courts are reluctant to dismiss suits or disputes on procedural technicalities which can be cured by an award of costs (see my previous Ruling in **HCCA 648/2012 Benson Mang'era & Another Vs. Wambua Mbuva.**

In deciding whether or not to dismiss this appeal for want of prosecution, the Court is enjoined to consider the length of delay, the cost and the prejudice that is likely to be suffered by the Respondent as well as the appellant. The Court of Appeal is **Abdirahman Abdi Vs Safi Petroleum Product Limited & 6 Others (2011) eKLR** held that ***"The overriding objective in Civil Litigation is a policy issue which the Court invokes to obviate hardship, expense, delay and to focus on substantive justice … in the days long gone, the Courts never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of section 3A and 3B of the jurisdiction Act Cap 9 Laws of Kenya and later, Article 159 2 (d) of the Constitution of Kenya, 2010, changed the position. The former provision introduced the overriding objectives in civil litigation in which the Court is mandated to consider aspects like delay likely to be occasioned, the cost and prejudice to the parties should the Court strike out the offending document. In short, the Court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or another. Article 159 (2) (d) of the Constitution makes it abundantly clear that the Court has to do justice between the parties without undue regard to procedural technicalities. That is not however to say that procedural improprieties are to be ignored all together. The Court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending parties if the Court strikes out its document. The Court in that regard exercises judicial discretion."***

Although in the above case the Court of Appeal was dealing with the striking out of a Notice of Appeal on the basis that it was served upon the Respondent out of time and without leave of Court, the principles laid by the Court of Appeal is that a Court in exercising its discretion to dismiss a suit or strike out pleadings should first weigh the prejudice that is likely to be suffered by the innocent party against the prejudice to be suffered by the offending party if the Court dismisses the appeal/suit.

In this case, the appellant did deposit the decretal sum as security for the due performance of the decree should the appeal be unsuccessful. The said money is held in an interest earning account. Examining the circumstances giving rise to the delay occasioned in the prosecution of this appeal, I think that is in the wider interest of justice to excuse the appellants' delay and accord them an opportunity to take appropriate steps to ensure that the appeal herein is set down for taking of directions hearing and determination on merit. The prejudice that is likely to be suffered by the appellant should the appeal be dismissed is likely to be graver than the prejudice that the Respondent would suffer if the appeal is ordered to proceed. The appellant has in opposing this application demonstrated the willingness to expeditiously have the appeal readied for hearing.

I have perused the Memorandum of Appeal as filed and considered it as provided for under Section 79 B of the Civil Procedure Act. I decline to summarily reject the said appeal.

The right to a fair hearing cost enshrined in Article 50(1) of the Constitution cannot be attained if the appellant's appeal is dismissed for the fault that is not solely theirs.

For the foregoing reasons, I decline to dismiss the appeal for want of prosecution and direct the appellant to prepare, file and serve the Respondent with a complete record of Appeal inclusive of a certified Decree of the subordinate Court within the next 60 days from the date of this Ruling.

I further direct that the appellant shall, upon filing of such complete record of appeal, ensure that the matter is listed before a Judge for the taking of directions within 30 days.

In default of any of the steps named above, the appeal herein shall stand dismissed.

Each party to bear their own costs of this application.

Dated, signed and delivered at Nairobi this **24th** day of **March, 2015.**

R.E. ABURILI

JUDGE