



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**HCC NO. 283 OF 2013**

**(FORMERLY NO. 6 OF 2004 COMMERCIAL COURT)**

**CHENGO & 21 OTHERS.....PLAINTIFFS/APPELLANTS**

**VERSUS**

**MOHAMED ALI BAJABER.....DEFENDANTS/RESPONDENTS**

**RULING**

1. By a Notice of Motion dated 8<sup>th</sup> July 2014, the Respondent in the Appeal moved the court seeking for orders;

***(a) This appeal be dismissed for want of prosecution.***

***(b) The costs of the application be provided for***

2. The motion is premised on the grounds that the appeal was filed on 15/6/2004 and since then, no steps have been taken to prosecute it. Secondly that on 20/2/2014 the court ordered that the lower court file be pursued and directions on appeal be taken but to date the appellant has not moved the court. Finally he said the Respondent should be allowed to enjoy the fruits of his judgment and further grounds as per the list on the face of the motion and contained in the affidavit in support.

3. The Appellants through one Paul Maina filed a Replying Affidavit dated 7th May 2013 which referred to the motion dated 30/11/12 that also sought dismissal for want of prosecution. He also filed a further dated 16/12/2014 and filed on the same date. The Appellants are opposing the orders sought against them. Their reasons for opposing include inter alia; that they need the primary file to enable them file a supplementary record which court file is missing. Secondly that they have written several letters to executive officer of the subordinate court to avail that file without success. The delay in prosecuting the appeal is occasioned by factors beyond their control.

4. The court directed parties to file written submissions. Mr. Mbetho for the respondent filed their submissions on 3/11/2014. Mr. Nyabena for the appellant did not file any. On 31/7/2014 when the matter was listed for mention before Mukunya J. the application dated 30.11.12 was withdrawn with no costs and parties ordered to file submissions within 14 days. The matter came up again before me on 8/12/2014 when Mr. Nyabena sought more time to put in his submissions and further affidavit as they had only been served on Friday. The matter was adjourned to 10.2.15. Mr. Nyabena had not filed any

submissions and sought time to file application for directions given the lower court was missing. The adjournment was refused as a ruling date fixed for 18/3/2015. Due to pressure of work, the ruling was not ready then.

5. The 1<sup>st</sup> application that sought to dismiss appeal was made on 30.11.2012. The appellant in the Replying Affidavit deposed that when they were ready to fix the appeal for directions, they could not trace this file because of the filed application. When the present application was filed, the delay in prosecuting the appeal was because the lower court was missing. This appeal was admitted to hearing on 19.1.2005 as per the records. On 13.7.2005, the Respondent moved the court to strike off the appeal for want of prosecution.

6. From the record, I noted that on 11/9/2009 the matter was taken out of the cause list to enable Mr. Nyabena file a supplementary record of appeal before directions could be taken. Later on 7/5/2013, it was fixed for directions on 13/5/2013 which was pushed to 13/6/2013 by consent. There was no mention of a lower court file missing until 28/11/2013 when the Kasango J. directed that the lower court file be brought to this court to enable the appeal to be heard. From November of 2013 to date, the appellant's Counsel has not made any steps to reconstruct the lower court file if indeed it is missing. This is also despite the fact that the Respondent/Applicant had made two attempts to have the appeal dismissed for want of prosecution.

7. There is lack of interest of the Appellant/Respondent in opposing the motion seeking to dismiss their appeal. The Replying Affidavit on record was in respect of the withdrawn application. There is no Replying Affidavit to the current motion. And in one of the annexures in a letter dated 18/7/2014 from court, they were advised to reconstruct a skeleton file by making a formal application. They are yet to move the court but they are enjoying orders of stay pending appeal. Under Order 42 rule 35 (2) dismissal is allowed where the appeal has not been set down for hearing for over one year. The Respondent/Applicant also invoked the inherent powers of the court and the overriding objectives under Section 1A, 1B and 3A of the Civil Procedure Act.

8. In the case of *Abdul & Another vs. Home Overseas Inscce Co. Ltd (1971) E.A. 564* where a suit was dismissed and the Court of Appeal held:

*i. The delays were not satisfactorily accounted for*

*ii. The fact that the periods did not fall within any of the periods provided by the rules did not prevent the court from exercising its inherent powers*

It quoted *Sir Charles Newbold in Mukisa Biscuit vs. West End dist (1969) E.A. 696* at page 701 That

***"It is the duty of a plaintiff to bring his suit early trial and he cannot absolve himself of this primary duty by saying the defendant consented to the position."***

The judge in the *Abdul* case exercised his discretion and dismissed the suit for want of prosecution.

9. Taking into account the chronology of events in this suit, I am satisfied that the Appellants/Respondents are not keen to prosecute their appeal. Twelve years to the date when they filed their Memorandum of Appeal, they are yet to bring this matter to trial. The Respondent/Applicant is prejudiced as they cannot execute the judgment in his favour due to the stay of execution orders in existence. For this laxity of the appellant I am satisfied the motion dated 8/7/2014 is merited. This appeal is dismissed for want of prosecution. The cost of the appeal and the application is awarded to the Respondent/Applicant.

**Dated and delivered in Mombasa in open court this 17th day of April 2015.**

**A. OMOLLO**

**JUDGE**

**17.4.2015**