REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO.9 OF 2007

PROTEIN & FRUITS PROCESSORS LIMITED.....1ST APPELLANT/RESPONDENT

PATRICK KIRONO MWAURA.....2ND APPELLANT/RESPONDENT

VERSUS

DIAMOND TRUST BANK KENYA LIMITED.....RESPONDENT/APPLICANT

R U L I N G

The application before the court for determination is the Notice of Motion dated 17th December, 2012 brought under Order 42 Rules 35(2) of the Civil Procedure Rule seeking: -

1. ***That the honourable court be pleased to dismiss the appeal herein for want of prosecution.***

2. ***That in the alternative to prayer 1 above, the honourable court be pleased to direct the Registrar to list the appeal herein before a judge in chambers for dismissal.***

3. ***That the order of stay of execution granted on 15/02/2007 be vacated and the sums of Ksh 290,779/00 deposited in court on 17/04/2007 by the appellant be forthwith released to the Respondent.***

The application is supported by an affidavit sworn by **Elizabeth Hinga**, the head of Debt Recovery Unit of Respondent/applicant. She avers that the appeal was lodged by the appellant through a memorandum of appeal filed on 10th January 2007 which was served to their advocates on 16th January 2007. She claims that since the filling of the Memorandum of Appeal the appellant has not taken any steps towards the conclusion of the appeal and that to date same has never been set down for directions. She further stated that any progress done in this matter was through the effort of Respondent who requested for typed and certified copies of the proceedings after the appeal was lodged. The Respondent wrote to the appellant through registered mail advising that the proceedings were ready and urging them to take steps towards the conclusion of the matter to no avail.

The Respondent also stated that its advocates took the steps of requesting the Deputy Registrar in charge of the Civil Appeal Division to step in and exercise the power donated by **Order 42 Rule 35(2) of the Civil Procedure Rules** and cause the matter to be listed before a judge for dismissal but unfortunately, the letter did not attract any positive response and action. She further stated that the appeal has been dismissed for want of prosecution but subsequently reinstated on grounds of unsatisfactory service of that application on the appellant. The Respondent further claims that even after the ruling was delivered, the appellant has not taken any steps towards the conclusion of the appeal and it is clear that they do not have any intentions of doing so after a delay of six (6) years which delay continues to prejudice the Respondent by preventing it from enjoying the fruits of its judgment in the lower court.

The application is opposed through a replying affidavit sworn by the **Partrick Kirono Mwaura.** He avers that they filed their memorandum of appeal on 10/1/2007 and therefore proceeded with the application for stay pending appeal under which the court ordered him to deposit the entire decretal sum in court on 17/4/2007. On 1/3/2007 he appointed the firm of Ombachi, Moriasi & Co Advocates to act for him and a notice of appointment filed on the same day upon M/s Mohamed Madhani & Co Advocates for the Respondent. The advocates on record were informed by the Respondent advocates that the proceedings were ready for collection through the letter dated 16/5/2008. The Appellants thereafter, went to pick the proceedings but the same could not be used since they had corrections and amendments. They could not prepare the record of appeal and fix the appeal for hearing in the absence of the proceedings. On 26/8/2011 the Respondent filed an application for dismissal of appeal which came up for hearing and the application was allowed leading to the dismissal of the appeal.

The Respondent filed an application to set aside the dismissal order which was heard before this court, Onyancha J, and ruling delivered on 28/11/2012 reinstating the appeal which was previously dismissed. He also deponed that his advocates tried to look for the lower court file since that day to no avail. The advocates also wrote a letter to the court dated 14/1/2013 complaining about the file. The same was released to the main Registry for all files but it could not be traced either. The Advocates went to court again on 14/3/2013 when he was informed that the file cannot be traced and he was given the option of making a formal application to reconstruct the file. The Respondent argues that the court of appeal cannot be complete without certified proceedings. He also states that the applicants are aware that the court file cannot be traced in the registry . He further stated that both advocates have an equal obligation to of looking for the file to facilitate the finalization of the proceedings and the appeal.

The application was prosecuted by way of submission. The applicant submitted on service of the application. He stated that the application was served upon the appellant directly by way of registered post on 16th January 2013. The applicant explained that the Respondent had disclosed two addresses of service and also they had moved from their previous physical address. The Respondent submitted that service was properly effected upon the Respondent.

The applicant states that the Respondents have yet to file any replying affidavit or grounds of opposition to the application from the simple reasons that the firm of M/s Ombachi Moriasi & Company Advocates are not properly on record for the appellant. He stated that this court in its ruling delivered 28/11/2012 highlighted the fact that the M/s Ombachi Moriasi & Company Advocates had not obtained leave of the court to represent the Respondent. The applicant states that the Respondent did not take any step even after the court guidance on the same issue. They submitted that **Order 9 rules 5, 7 and 9 of the civil procedure rules** are very clear on how an advocate may come on record at the appeal stage. The applicant urged the court to consider the holding in the case of **Aggrey Ndombi & Another Vs Grace Ombara (2008) eKLR.**

On the dismissal for want of prosecution the applicant submitted that the appeal was lodged on 10/1/2007, the appeal has been pending for 6 years since the lodging and nothing has been done to dispose of it expeditiously. The applicant submitted that the delay is not only inordinate but gross misuse of court process. The applicant stated that the evidence before the court shows that it is the applicant who took all the steps to ensure that the appeal was heard quickly. The applicant claims that the record shows that there has been inactivity from the year 2008 till 2012 and no explanation and supporting evidence has been provided by the Respondent. They further submitted that M/s Ombachi Moriasi & Company Advocates is a stranger to this suit and it has no business carrying on any alleged action stated in the replying affidavit of the 2nd Respondent.

The applicant also submitted that the stay of execution should be vacated. They stated that stay of execution is an equitable remedy, and in this case equity will look at the conduct of the parties. The applicant explains that the there has been serious inaction on the part of the appellant for 6 years. It submitted that the appellant is clearly wanting and it would be unjust for the applicant to be restrained from the fruits of judgment whilst on the other hand the Respondent refused to prosecute the appeal.

The Respondent submitted on five issues: -

1. whether the firm of M/s Ombachi Moriasi & Co. Advocates is properly on record for the appellant,

2. the replying affidavit drawn and filed by m/s Ombachi, Moriasi & co Advocates appellant valid

3. whether the application herein and hearing notice served upon the appellant in person for hearing and what is the effect thereof when they have an advocate on record.

4. whether the appeal should be dismissed for want of prosecution,

5. whether the court should allow the setting aside of the stay of execution orders.

On the first issue, the Respondent submitted that the M/s Ombachi Moriasi & Company Advocates came on record on 1/3/2007 by filling a notice of appointment of advocates in **CMCC NO 2529 of 2005 Diamond Trust Bank Vs Patrick Kirino Mwaura**. They stated that by time of filling the notice of appointment of advocate in March 2007 the Respondent were appearing in person. They submitted that they came on record to replace appellant acting in person not a firm of advocates. They stated that the advocates did not need leave to act for the Respondent. The Respondent referred the court to the case of **Aggrey Ndombi Vs Paul Ndiangui & Another HCA 141/2007.**

The Respondent submitted that the service of the application herein upon the appellants personally is against the known professional conduct and the applicants should be reprimanded by the honourable court. The appellants having justly and validly engaged an advocate the applicants have no business filling a replying affidavit separate from one filed by the advocates on record.

The Respondent further submitted that it is the duty of both parties to look for the file and in its absence applies for reconstruction. The Respondent having the knowledge that the file is not available should have made efforts to reconstruct the file and not dismiss the appeal as it is being done now. The Respondent also submitted that the appeal cannot be dismissed under **Order 42 Rule 35(1) (2)** since they had not taken directions under 13 of the appeal and normally given after the filling of the record of appeal which the appellant herein has been unable to do in the absence of the court file and proceedings from the lower court.

The following in my view are the issues for determination:

1. ***Whether the firms of M/s Ombachi Moriasi & Company Advocates are properly on record?***

2. ***Whether the appeal should be dismissed for want of prosecution.***

3. ***Whether the stay of execution pending appeal should be vacated or set aside.***

On whether the firms of M/s Ombachi Moriasi & Company Advocates are properly on record. The Respondent contention is that they defended the suit in person at the lower court and the firm of advocates was appointed at the appeal. It was, therefore, not necessary to seek leave of the court. Order 9 Rule 9 provides as follows: -

> ***When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—***
>
> ***(a) upon an application with notice to all the parties; or***
>
> ***(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be"***

My understanding is that the Rule envisages two scenarios,

1) where there is change of advocate

2) where a party decides to act in person.

The commonality in the two scenarios is that there is previous advocate and the change is happening after judgment has been passed. In the first scenario the new advocate or the party in person makes a formal application to the Court with notice to all parties who participated in the suit for grant of leave to come on record or act in person. Under this first scenario, the consent of the previous advocate is not necessary, but the party must give notice to the other parties and then satisfy the Court to grant leave. In the second scenario the new advocate or party in person needs to secure the written consent of the previous advocate on record, file the consent in Court and then seek leave to come on record. Under the second scenario a formal written application is not necessary and that once the written consent has been filed, an oral or informal application would be sufficient to move the Court.

It is not disputed that the Respondents/Appellants were acting in person in the lower court. The record shows that the firm of Ombachi, Moriasi & Company advocates filed a Notice of appointment dated 1st March 2007 at the Chief Magistrate court in Nairobi. The said Notice was also served upon the firm of Mohamed Madhani & Co. Advocates. In my view Order 9 Rule 9 does not apply in this case and therefore the firm of Ombachi, Moriasi & Company Advocates is properly on record. In my understanding the principle behind the provision of **Order 9 Rule 9 of the Civil Procedure Rules** is to give notice to the previous advocates and those of opposite parties of the entry of a new advocate on the record. I also find that the replying affidavit filed by M/s Ombachi, Moriasi & Company is valid.

On the whether the appeal should be dismissed for want of prosecution, it is the Respondent contention that the Order 42 Rule 35 does not apply in this case. The law concerning dismissal of an appeal for want of prosecution is contained in **Order 42 Rule 35 of the Civil Procedure Rules**. The Rule provides:-

> ***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.***

From the above rule, it is clear that an appeal can be dismissed for want of prosecution on two instances. Firstly, where there has been failure to list the appeal for hearing for three months after directions have been made under Order 42 Rule 13 or; secondly, if after one year of service of the Memorandum of Appeal the appeal has not been listed for hearing. In respect of each of these two scenarios, the procedure is different. In the first scenario, the Respondent is given the option to either list the appeal for hearing or to apply for its dismissal. Under that scenario however, the appeal can only be dismissed if it has been admitted and directions have been given.

The record shows that the memorandum of appeal herein was filed on 10th January 2007, three years later the appeal was dismissed for want of prosecution. The appeal was later reinstated on 28th November 2012 on the ground that the return of service was not satisfactory and the service was not effected. Three years later the applicant is seeking dismissal of the appeal. It is not disputed that directions have not been given in this appeal, in my view the appeal cannot therefore be dismissed under Rule 35 (1) since the appeal has not be placed before the judge for direction. As it is, the appeal is incomplete and the Appellants have not furnished the court with the record of appeal. The only alternative the applicant is left with is under Rule 35(2) which requires the Deputy Registrar to list the appeal for dismissal by a Judge. In the current application the applicant is seeking an order that the Deputy Registrar be directed to list the appeal for dismissal before a judge in chamber. I have no reasons not to grant the prayer, the appeal hearing has been pending in court for six years and it is only fair if the matter can be

finalised. In the circumstances of this matter I will not order the Deputy Registrar to place the file before a judge for dismissal;

instead I will dismiss the appeal. This court has the inherent discretion to do so under **Section 3A,** to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process. The court is also enjoined under **Article 159(2) b of the Constitution** to do justice without any delay.

On whether the order of stay of execution in this case should be set aside, the power to set aside an order or judgment is also an exercise of discretion. The court of appeal in **Simon Thuo Mwangi Vs Unga Feeds Limited Civil Appeal No.181 of 2003 [2015] eKLR** observed that:

> ***The court is not bound to set the judgment aside. On reasons presented, it takes course to set aside or refuse to set aside. The court thus exercises a judicial discretion all the time having in mind what is just and fair in the case. The reason to set aside must therefore be based on good grounds or reasons advanced not on a whim or caprice.***

The ground advanced by the applicant for setting aside the order is that the conduct of Respondents does not warrant them to enjoy the stay order since he has refused to prosecute the appeal. The Respondent case is that the lower court file has been missing for the last six years. The evidence before the court shows that the Respondent has not been keen on prosecuting the appeal. By a letter dated 16/5/2008 the applicant herein took the initiative to follow up on the proceedings and informed them that the proceedings were ready. Five years later the Respondent has not shown any signs of interest in this matter. I am therefore convinced that the Respondent does not deserve the orders of stay granted pending the appeal. The orders were granted to allow them proceed to prepare and prosecute their appeals but that *right of appeal must be balanced against an equally weighty right of the applicant to enjoy the fruits of the judgment delivered in his favour. The Respondent went to a deep sleep after the orders were granted which in my view has prejudiced the applicant. I find that the orders of stay granted ought to be vacated.*

In the circumstances, I hereby dismiss the appeal for want of prosecution. Were the appeal not so dismissed, I would have in any case discharged the orders of stay as good reasons to do so exist. Orders accordingly.

Dated and delivered at Nairobi this 22nd day of June, 2015.

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D A ONYANCHA

JUDGE