



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 480 OF 2006**

**BARACK ALLAN ABUTO.....APPELLANT/RESPONDENT**

**VERSUS**

**SUDAN PRODUCTION AID.....RESPONDENT/APPLICANT**

**RULING**

By a notice of motion dated 1<sup>st</sup> July 2014, filed on 7<sup>th</sup> July 2014 the Respondent/Applicant Sudan Production Aid seeks from this court orders:

1. That the appeal herein be dismissed with cost for want of prosecution.
2. Those costs of this application and the appeal be awarded to the applicant/respondent.

The application is predicated on the grounds that the appeal herein was filed in 2006 and since then the appellant has lost interest in prosecuting the appeal.

Further, that it is in the highest interest of justice that the application be allowed as the pendency of the appeal is prejudicial to the applicant.

The said application is further supported by the affidavit of Watson Kagucia Burugu advocate for the applicant who deposes, reiterating the grounds in support of the application that since the appeal was filed on 19<sup>th</sup> July 2006 and served upon the respondent on 2<sup>nd</sup> August 2006, the appellant has never taken any steps to have the appeal set down for hearing, an indication that he has lost interest in the appeal and that it is only fair and just that the appeal be dismissed for want of prosecution.

The appellant/respondent Barack Allan Abuto opposed the application through a replying affidavit sworn by Zena A. Rashid advocate on 11<sup>th</sup> August 2014 and filed in court instant.

She deposes that it is not true that the appellant had lost interest in pursuing the appeal as he had done all that was required to be done under the law in that after lodging the appeal within the stipulated period, he applied for copies of proceedings, judgment and exhibits. However, that to date he has never been supplied with the said documents by the subordinate court.

In addition, counsel for the appellant deposes that the delay in filing the record of appeal has therefore been occasioned by failure on the part of the Chief Magistrate's court registry to supply them with the copies for which payments had been made as shown by annexure 'A'.

Further, it is contended that the dismissal of the appeal would condemn the appellant unheard which amounts to punishing him for mistake of the Chief Magistrate's Court registry. Counsel for the appellant

further asserts that as soon as they are supplied with typed copies of the proceedings, judgment, exhibits and decree for which they had already made applications, they would prepare and lodge the record of appeal.

In a rejoinder, the applicant filed a supplementary affidavit sworn on 26<sup>th</sup> November 2014 and filed on 27<sup>th</sup> November 2014 contending that there was no evidence of any follow up of the proceedings after the initial request made by letter dated 14<sup>th</sup> July 2006. Counsel for the respondent/applicant also annexed a copy of proceedings "WKBI" to show that the proceedings in the lower court had been typed and therefore it was not true as contended by the appellant that he had done all that was required to obtain the lower court record in vain.

The applicant's counsel also filed a list of authorities to be relied on at the hearing in support of the application for dismissal of the appeal for want of prosecution.

When the application came up for interpartes hearing on 21<sup>st</sup> May 2015, the record shows that the appellant had by letter dated 24<sup>th</sup> March 2015 been invited to fix a suitable hearing date but they did not attend court on 24<sup>th</sup> March 2015 and the applicant was given 21<sup>st</sup> May 2015 for hearing. The applicant effected service of a hearing notice upon the appellant's counsel M/S Otieno Omuga Advocate on 1st April 2015 at 3.00p.m. The said appellant's advocates did not attend court for the hearing of the application. I therefore allowed the applicant's advocate Miss Oloo to proceed and prosecute the application.

Miss Oloo submitted, replying on the grounds in support thereof the application, the supporting affidavit and the supplementary affidavit that the appellant was guilty of laches for 8 years since 2006 and that the replying affidavit did not explain the reasons for the prolonged delay in the matter. She urged the court to allow the application and dismiss the appeal for want of prosecution.

I have carefully considered the application by the respondent/applicant brought under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya and Order 51 of the Civil Procedure Rules. I have also considered the opposing affidavit by the appellant/respondent. I note that the appeal herein was filed on 19<sup>th</sup> July 2006 following the impugned judgment of Mrs A.N.Ongeri Ag principal Magistrate ( as she then was ) dated 27<sup>th</sup> June 2006 on the same day the Deputy Registrar of the High Court did issue notice to the CM's court to avail the original record in Milimani CM CC 480 of 2006.

The appellants annexures attached to his replying affidavit show that on 14<sup>th</sup> September 2006, 7<sup>th</sup> September 2006 his advocate requested for the necessary documents including proceedings, judgment, submissions and exhibits as well as decree and certificate of costs.

The last time there was such communication by the appellant to the lower court was by his letter of 14<sup>th</sup> September 2006, from there the matter was awakened by the respondent/applicant herein filing an application herein dated 1<sup>st</sup> July 2014 on 7<sup>th</sup> July 2014 seeking to have the appeal herein dismissed for want of prosecution.

The applicant invoked the overriding objectives of the Civil Procedure Act as well as the inherent jurisdiction of the court to urge this court to dismiss the appeal for want of prosecution due to the unexplained inordinate delay in setting down the appeal for hearing since no directions have been given under Section 79B of the Civil Procedure Act Precisely, from the time the appeal herein was lodged to the time the respondent/applicant sought for its dismissal was 8 years without any effort by the appellant being made to have the appeal reached for trial.

The appellant's explanation is that he paid for and requested for the supply of the necessary documents and that since September 2006 there has been no action by the Chief Magistrate's Court in availing the said records hence the said court is to blame for the delay.

Under Order 42 Rule 35 (1) of the Civil Procedure Rule where there is no action in the appeal for a period of I year, the respondent may set it down for hearing or apply for its dismissal for want of prosecution if within 3 months after giving directions under Rule 13, the appellant shall not have set the appeal down for hearing.

In this case, no directions have been given and the appeal has not even been admitted to hearing.

However, the court has inherent jurisdiction to order dismissal of an appeal for want of prosecution even when directions under Order 42 Rule 13 or Section 79B of the Civil Procedure Act and Rules have not been given.

This court has inherent power which may be exercised as may be necessary to prevent abuse of its process.

In my humble view, an appeal which is lodged and 8 years down the line there is no semblance of any effort or intention to ready it for hearing or to have it prosecuted is an abuse of the court process and calculated to delay and or obstruct the cause of justice.

Article 159 (2) of the Constitution of Kenya enacts that in exercising judicial authority, the courts and tribunals shall be guided by the principles that :

- a. Justice shall be done to all, irrespective of status;
- b. Justice shall not be delayed .
- c. ....
- d. ....
- e. The purposes and principles of the Constitution shall be protected and promoted .

The above provision of Article 159(2) (b) echo the well known equitable principle that justice delayed is justice denied, and that delay defeats equity. In addition, it is trite that equity aids the vigilant and not the indolent.

In my view, there is good and sufficient reason to have this appeal dismissed.

The parties and their advocates are enjoined under Section 1A and 1B of the Civil Procedure Act to assist the court in dispensing expeditious justice. There can be no justice for the parties if for 8 years the appellant has archived his pleadings before this court and only cries foul, blaming the Chief Magistrate's Court for inaction in failing to supply him with the documents necessary for the preparation of the appeal for hearing.

Not a single letter or reminder in 8 years was exhibited to show that the lower court has refused to act on the request. The annexed letters all written immediately after lodging this appeal were written between July and September 2006. There is no evidence that the appellant's advocates even made any physical attempt to see the chief magistrate or executive officer to explain to them the position or requested the Deputy Registrar of the High Court to request for the lower record in 8 years.

In my view, a delay of 8 years which is not explained is inordinate and contumelious. Justice cannot be served if parties simply file their pleadings and go to slumber, clogging the courts with the so called backlog while burdening the respondent with a pending appeal and denying it a legitimate expectation that the matter would be resolved expeditiously. Furthermore there is no evidence to show that the appellant indeed has any interest in this appeal. If that were so, nothing prevented him from availing himself to the court to swear the affidavit in person to explain his case out. Instead only his advocate attempted to explain the delay in an affidavit. Further lack of interest in the appeal is demonstrated by the non appearance by his counsel on the hearing of this appeal to defend their position as per the sworn affidavit. There is evidence that the respondent/applicant obtained a copy of proceedings of the lower court as annexed to the supplementary affidavit. The appellant has not demonstrated that he was denied the proceedings as requested and paid for, for the last 8 years.

In the end, I find that the appellant has not made any effort since 2006 to have this appeal heard and concluded. This application by the respondent is therefore justified on all fours. This court must zealously guard against abuse of its process and justice being delayed.

For those reasons, I allow the respondent/application dated 1<sup>st</sup> July 2015 and dismiss the appeal herein for want of prosecution, invoking the provisions of Sections 1A, 1 B and 3A of the Civil Procedure Act as well as Article 159(2) (b) of the Constitution.

The respondent/applicant shall have costs of this application and of the appeal as dismissed.

Dated, signed and delivered in open court this 31<sup>st</sup> day of July 2015.

**R.E. ABURILI**

**JUDGE**

**31/7/2015**