REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 828 OF 2007

KENYA NUT COMPANY LIMITED …….....…….APPELLANT

VERSUS

SAMSON OGUTU RACHAR ……..... RESPONDENT

RULING

Vide an application dated 7th May 2014, the respondent in this appeal Samson Ogutu Rachar seeks two prayers in his notice of motion:

a. Dismissal of this appeal for want of prosecution

b. That the orders of stay of execution of decree in Kandara RM CC 28/2007 be vacated .

The application is premised on the grounds that the appeal has been pending in court for too long and that it was last in court on 16th April 2009 and that only the respondent had taken steps to have the appeal heard in one way or the other.

Further, that the delay by the appellant to take steps in the matter is inordinate, unreasonable and inexcusable in the circumstances. Finally, that it is in the interest of justice that this matter be brought to an end.

The said application is further supported by the affidavit of Gachoka Mwangi advocate sworn on 7th May 2014 wherein he deposes that since the appeal was filed in October 2002, the record of appeal was filed on 16th April 2009 and thereafter no steps were taken by the appellant thereby prompting the respondent to file an application on 11th June 2012 seeking to have the Memorandum of Appeal dismissed for want of prosecution.

It is further deposed that the appellant did shift blame on the court by annexing several letters written to the court but not copied to the respondent's counsel and that the said application was compromised on conditions that the appellant pays costs of the application to the respondent and files certified copy of decree from the lower court within 45 days and the matter stood over to 8th November 2013 for further directions and confirmation of compliance of the said court orders.

That the appellant never complied with the said orders and since 29th January 2014 no action was taken and a proposal to pay 20,000/- as costs of that application has never been responded to, forcing

the respondent's counsel to file his bill of costs dated 21st May 2012. He urged the court to dismiss the appeal or invoke order 40 Rule 6 of the Civil Procedure Rules and vacate the orders of stay of execution.

The application was opposed, with the appellant Kenya Nut Company Ltd filing replying affidavit sworn by their counsel Ms Sylvia Matasi on 23rd June 2015 contending that they have taken necessary steps to have the appeal heard but the lower court file was not available and on 8th November 2013 Honourable Onyancha J did order for the lower court file to be availed to enable parties list the matter for directions but that since then, they had made concerted efforts to have the executive officer Kandara Law Courts forward the file to the High Court to no avail. They annexed several copies of letters addressed to that court.

Ms Matasi deposed that she had severally gone to the said Kandara court and on each occasion she was informed that the file would be forwarded as soon as possible but nothing had been forthcoming. She maintained that the delay is having the appeal prosecuted was not occasioned by them or the appellants but by the Kandara Court, which the appellant had no control over and therefore that fault should not be visited on the appellant.

Further, that their client is interested in prosecuting the appeal once the file from the lower court was availed. Ms Matasi contended that this application was also filed before the lapse of one year hence it was frivolous and therefore the same should be dismissed with costs to the appellant.

The parties' respective advocates argued the application orally on 23rd June 2015 and reiterated the contents of the rival positions as per the application, supporting affidavit and replying affidavit.

Mr Gachoka counsel for the respondent/applicant maintained that the appellant had to be pushed to take action and that this was the second time an application to dismiss the appeal for want of prosecution was made and similar reasons for inaction by the appellant given to the effect that the delay was occasioned by the court.

Counsel for the respondent challenged the appellant's honestly in this matter having failed to comply with the previous court orders to pay costs of the earlier application to the respondent and for failing to file decree. He contended that the conduct of the applicant is that of a disinterested litigant in the determination of the appeal as none of the letters to the court are copied to the respondent's counsel.

Mr Gachoka maintained that the appellant was guilty of inordinate delay and urged that should the court be inclined to sustain the appeal, it should vacate the stay orders and condemn the appellant to pay costs as earlier ordered and the costs of this application.

Mr Gachoka also contended that the conduct of the appellant disentitles them the discretion of this court and urged the court to grant the prayers sought in the application.

In response, Ms Matasi contended that no directions have been given to warrant dismissal of the appeal under Order 42 Rule 35 of the Civil Procedure Rules and that since 8th November 2013 when this court ordered the lower court file to be availed to Kandara court to facilitate preparation of decree, the respondent's counsel was in court and since then the appellant's counsel had written to the said court severally but with no response.

Further, it was submitted that he appellant had no control over the lower court but did receive decree and certificate of costs on 27th January 2014 and are ready to prosecute the appeal if the lower court file is availed.

Further, that stay of execution of decree was granted to safeguard the interests of the appellant.

In a brief rejoinder, Mr Gachoka submitted that if he had not filed this application, the appellants

would not have known that the lower court file is now availed and urged the court to give stringent conditions should it disallow the application.

I have carefully considered the respondent's application, the grounds and supporting affidavit . I have given equal consideration to the reply by the appellant, its annextures and the rival submissions of the parties' advocates on record.

The issues for consideration is whether the appeal herein should be dismissed for want of prosecution and if not, whether the stay granted pending appeal herein should be vacated and if not, what orders should this court make.

The law governing dismissal of appeals for want of prosecution is contained in Order 42 Rule 35 of the Civil Procedure Rules. Under Order 42 Rule 35(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 either to set down the appeal for hearing or to apply by summons for its dismissed for want of prosecution.

If, within one year after the service e 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 chamber for dismissal. A reading of the above provisions reveals that an appeal can dismissed for want of prosecution in two instances.

First, is where there has been failure by the appellant to list the appeal for hearing three months after directions under Order 42 Rule 13 of the Civil Procedure Rule have been give, or second, if after one year of service of the Memorandum of Appeal the appeal is not listed for hearing.

In the instant case, the first scenario is the one contemplated by this application by the respondent.

Nonetheless, the record is clear that no directions have been given under Order 42 Rule 13 of the Civil Procedure Rule, although the appeal was admitted to hearing on 8th November 2013. The applicant has also invoked the inherent jurisdiction of the court under Section 3A of the Civil Procedure Act and all other enabling provisions of the law.

Albeit the cited relevant provision of the rules require that for an appeal to be dismissed under Order 42 Rule 35(1) of the Civil Procedure Rules, directions must have been given, Judicial precedent seem to favour that position (see **Suresh Ruginath Ramga & Another V Sagar Mohan S.M Ram CA 433/2012** where the court held:

" The appellants counsel submitted that until and unless directions are issued, an appeal cannot be dismissed for want of prosecution; and that the procedure of dealing with an appeal where directions have not been issued is that contemplated in Order 42 Rule 35 (2) and not Order 42 Rule 35(1). I am in agreement with these submissions. In **Kirinyaga General Machinery V Hezekiel Mureithi Ireri HCC 48 of 2008** while interpreting Order XL1 Rule 31 now Order 42 Rule 35, Kasango J, observed: ***" It is clearly seen form the rue that before the respondent can move the court either to set the appeal down for hearing or to apply for dismissal for want of prosecution , directions ought to have been given as provided for under Rule 8B. Directions have never been given in this matter. The directions not having been given the orders sought by the respondent cannot be entertained."***

From the record in the instant appeal filed on 3rd October 2007 under certificate of delay dated 11th February 2009, no directions have been given under the old Order 8B or the new order 42 Rule 13 of the Civil Procedure Rules.

In addition, the lower court record has kept being shuttled between this court and Kandara Law Court. It was first forwarded to this court on 28th April 2009 but without a decree. The same had to be returned to Kandara Court for extraction of decree to be included in the record of appeal. It was then archived

there and it has taken ages to return to this court on 19th June 2015 after this application to dismiss suit was filed.

The new 2010 Civil Procedure Rules nonetheless impose a legal obligation on the appellant to be proactive to take all necessary steps to prepare the appeal for hearing, including ensuring that the file is placed before a judge for directions. The appellant has exhibited copies of letters dated 10th June 2014, to the Deputy Registrar High of this court asking for a date for directions as the file was not listed on 29th January 2014 and seeking a confirmation whether the lower court file was transferred to the High Court; a letter dated 13th November 2014 to the Executive Officer Kandara Law Courts seeking for transmission of the lower court file to the High Court to facilitate hearing and enclosing letter written by the Deputy Registrar to Kandara Law Courts dated 22nd October 2014 calling for the file; a letter of reminder dated 30th March 2015 referring to the Deputy Registrar's letter above and counsel's several visits to that court; another letter dated 11th May 2015 all from the appellant's counsel to that court, which letters have evinced no response or at all.

The record shows that the respondent had initially sought dismissal of the appeal for the same reasons but the application was compromised on terms.

On 19th June 2015, the lower court file was received in the High Court vide forwarding letter dated 26th May 2015. The said forwarding letter was never copied to any of the parties advocates to prompt them take action.

I have perused the said lower court file CC 28/2007 and among correspondence are a letter by the Deputy Registrar of this court to that court dated 3rd March 2015 calling for the said file, and referring to the letter of 4th October 2007. There is also a letter dated 11th May 2015 received on 14th May 2015 written to the Executive Officer of Kandara Law Courts by the appellant's counsel complaining of failure to remit the file to the High Court. Another letter is dated 17th December 2013 received on 8th January 2014 asking for copy of decree and certificate of costs which they duly paid for. Another communication by the Deputy Registrar dated 22nd October 2013 returning the file to Kandara Court to facilitate extraction of decree. Regrettably, the decree was only extracted on 27th January 2014 and file resubmitted to this court over one year later.

This court cannot imagine the kind of frustrations parties go through trying to have their cases heard, where there is inertia on the part of the judicial staff to respond to the need for expediency.

Indeed, public policy demands that cases be heard and determined expeditiously since delay defeats equity, and denies the parties legitimate expectations that their disputes would be resolved expeditiously.

In addition, the Constitution Article 159(2) (b thereof commands courts to administer justice without undue delay.

The respondent herein squarely blames the appellant for inertia and for the delay in prosecuting this appeal. I am of a different view, from my perusal of both the High court and lower court record. The delay has been substantially contributed to by the court's inability to act on the many requests and pleas by the appellant's counsel, which is a very unfortunate scenario. I agree that where an appellant files an appeal and goes to slumber especially after obtaining a stay of execution pending appeal, this court can invoke its inherent jurisdiction under Section 3A and the overriding objectives of the Act (Civil Procedure Act) under Sections 63(e) thereof and Article 159(2) (b)of the Constitution, which provisions enjoin this court to do all that it can to prevent abuse of its processes, to expedite the delivery of justice for the parties in a just, fair, proportionate and at a cost that is affordable to all, and finally ensure that justice shall be administered without undue delay; and the court may dismiss the appeal.

Nonetheless, all parties and their advocates are enjoined by the overriding objectives of the law to assist the courts to achieve the overriding objectives of the Civil Procedure Act as espoused in Sections 1A

and1B of the Act. This court is enjoined to exercise its discretion, where it is so prescribed, in order to salvage justice from defeat and to make such orders as appeal to the court to be just and convenient.

I quite agree with submission of learned counsel for the respondent that indeed there has been delay in prosecuting this appeal. However , I am persuaded that the appellant has been failed by our courts and especially the Kandara Law Courts; and I am further persuaded that the appellant had done all it could through its advocates on record to have the lower court record availed to this court to facilitate prosecution of the appeal herein to no avail. The appellant have indeed, and in the full view of this court, acquitted themselves of blame and demonstrated that it is has been a helpless party who deserves the unfettered discretion of this court to be exercised in its favour.

It therefore follows that this court cannot do any more injustice to the appellant by dismissing the appeal herein for want of prosecution or even vacate the orders of stay pending appeal as to do that would expressly occasion an injustice to the appellant. Courts of law ought not to do injustice to the parties who knock on the doors of justice and thereby oust the parties from the judgment seat for no fault of their own.

This court nonetheless commends the respondent for being vigilant in pushing for dismissal of the appeal, which has led to the unveiling of the many ailments bedeviling our judicial and justice system. Even when there is a challenge and indeed there are a myriad of challenges in the judicial system in the administration of justice which are being addressed. However, a response to the parties' queries with relevant information is critical. In this case, the courts put the appellant in a dire situation, not that the appellant was indolent. There is need for an enforceable service delivery charter just to remind those in administration that they exist to facilitate the just, fair and expeditious delivery of justice. They lubricate the wheels of justice and if they lax, then justice will suffer delay and denial.

In addition, in my view, the prejudice that the appellant is likely to suffer if the appeal herein is dismissed is likely to be graver than the prejudice that the applicant/respondent would suffer if the appeal is ordered to proceed, given that the decretal sum is secured and the lower court file is now available. I am enjoined by the decision in the Court of Appeal **Abdurahman Abdi V Safi Petroleum Products Ltd & 6 Others (2011) e KLR CAPP Nairobi 173/2010** wherein the Court of Appeal stated thus:

> ***" 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 party if the court strikes out its document. The court in that regard exercises judicial discretion".***

I have also previously in **Allan Otieno Osula V Gurder Engineering & Construction Ltd (2015) e KLR** pronounced myself in similar circumstances thus:

> ***"……..I employ the principle that the right of appeal is a constitutional right and in as much as there has been delay which has not been satisfactorily explained by the appellant, this court has to weigh the cost and prejudice that is likely to be occasioned to the appellant as well as the respondent, if the appeal is struck out at this stage without according the appellant an opportunity to be heard on the merits of the appeal".***

I adopt the above positions and add that in the circumstances of this case, the court will be driving the appellant away from accessing justice if the appeal herein was to be dismissed and stay as granted lifted. The appellant has demonstrated that it has never lost interest in prosecuting the appeal herein. This is clearly evident from the record and their concerted efforts to get the lower court file availed to this court for directions under Order 42 Rule 13 to be given.

Furthermore, the matter had even been listed for directions on 16th September 2013 and 8th November 2013 when it was moved to 29th January 2014 even without the lower court file being availed but the matter was adjourned for want of the said file.

Albeit the respondent's counsel laments that the costs awarded for the initial application on 16th September 2013 by Waweru J which was compromised have not been settled, I have not seen any taxed costs which the appellant has refused to settle since the order for costs did not quantify the same. Where costs are not quantified or agreed upon, then the party in whose favour the costs are made is entitled to have the costs assessed and if not settled, execute for recovery.

For the foregoing reasons, I decline to grant the orders sought in the application and dismiss it. As the delay is not attributed to the appellant and the respondent was only undertaking a legal duty in this matter, to ensure expedition, I order that each party bears their own costs of the application.

To ensure that there is no further delay in prosecuting this appeal, now that the lower court record is available, I order that directions shall be given on 19th October 2015. Upon which a hearing date shall be directed.

As sated, each party shall bear their own costs of the application herein.

Dated and signed and delivered in open court at Nairobi this 29th day of September 2015 .

R.E. ABURILI

JUDGE

29.9.2015

Coram R.E. Aburili J

C.A. Adline

Miss Matasi for appellant /respondent

Miss Mutua for Gachoka Mwangi for respondent

Court – Ruling read and delivered in open court as scheduled .

R.E. ABURILI

JUDGE

29.9.2015

COURT –Directions on 19th October 2015 by consent. Ruling to be typed.

R.E. ABURILI

JUDGE

29.9.2015