



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NUMBER 226 OF 2012

ROYAL MEDIA SERVICES LTD APPELLANT

VERSUS

ERIC ACHOKI NYAMANGA APPLICANT/RESPONDENT

R U L I N G

The application before the court is the Notice of Motion dated 9th October, 2013. It is brought by the Respondent and seeks dismissal of this Appeal on the grounds: -

- a) **That that the appeal had lacked prosecution.**
- b) **That the Appeal record was not filed within 4 months as ordered by the court.**
- c) **That the said order in this case, be discharged and the deposited sum deposited in court as a condition thereof, be released to the decree-holder/applicant.**

The grounds upon which the application is based are that the Appellant had not taken any steps to prosecute the Appeal; that the Appellant had failed to file and serve the record of appeal within 4 months ordered by the court; that the Appellant had lost interest in appeal since it had not prosecuted the appeal for a period of 11 months and; that the Appellant's present adverse conduct is because it is enjoying a stay order on the record.

The Respondent on being served with this application, did not file any replying affidavit to controvert the grounds of the application. It did not either oppose the application on any grounds of law. So, as things stand, the application is really not opposed.

There are two tests which should be satisfied under Order 17 Rule 2 of the Civil Procedure Act and Rules before a dismissal can be granted. The first one is whether the threshold of three months without action is proved. The second one is that the proven delay is inexcusable. As stated by Chesoni, J (as he then was) in **Ivita Vs Khumbu [1984] KLR 441**: -

“The test is whether the delay is prolonged and inexcusable, and if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and the Defendant; so both parties to the suit must be considered and the position of the judge too, because it is not easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time..... Thus, even if the delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay the action will not be dismissed, but it will be

ordered that it be set down for hearing at the earliest available time.”

In this case before the court, the Appellant had earlier delayed prosecution by failing to file and serve the relevant record of appeal. The court indulged the Appellant leave to file the record within 4 months and thereafter proceed to comply with the other steps required to bring the suit to finality. The record shows, however, that not only did the Appellant/Respondent fail to comply with time prescriptions indulging it by the court to assist it to bring the suit to an end, but showed no respect even for the favourable discretion that had been exercised by the court to protect the Appellant from the execution of the outstanding decree.

As if that was not enough, the Appellant not only failed to explain the cause of delay to file and serve the Record of Appeal but went ahead, after this application to dismiss was filed, to file the said record without leave of court, thus confirming that it held very little regard and respect for orders of court. To complicate matters more, the Appellant who, as earlier stated had not filed any replying affidavit or statement of grounds of opposition, told the court that it failed to comply with the court order because its counsel was too busy with other matters. That confirmed that the failure or delay to file the required Record of Appeal and the failure to file a reply to this application was either intentional or grossly negligent.

The practice of court as I understand it is generally to excuse any party or party’s counsel’s default to allow a fair trial of the issues in litigation before the court. Where however, the court, like in this case, is satisfied that the default has been intentional and contemptuous or grossly negligent, then the court is entitled to conclude that the delay or default is inexcusable and will give rise to a substantial risk of jeopardizing a fair trial.

As stated in the case of Allen Vs Sir Alfred McAlpine & Sons [1968] All E.R 543 page 555: -

“..... it is for the defendant to satisfy the court that one or the other of these two conditions is fulfilled. Disobedience to a peremptory order of the court would be sufficient to satisfy the condition. Whether the second condition is satisfied will depend on the circumstances of the peculiar case, but the length of the delay may itself suffice to satisfy this condition if the relevant issues would depend on the collection of witnesses of events which happened long ago.”

In the view of this court both conditions are satisfied. Coupled with the fact that the application is not really defended and considering also that the Constitution renders that justice must be to both parties as equally as the court can balance it, I am satisfied that this application should succeed.

ORDERS

- 1. The appeal is hereby dismissed for the reasons stated above, with costs to the Respondent.**
- 2. The decretal sum of Ksh.2,200,000/- deposited as security against execution, shall be released to the decree holder through his counsel M/s A. S Kuloba & Wangila, Advocates forthwith.**

Dated and delivered at Nairobi this 4th day of April, 2014.

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D A ONYANCHA

JUDGE