



**Glory Chemist Ltd v Kenya Commercial Bank Ltd (Civil Appeal
24 of 2021) [2023] KEHC 4019 (KLR) (2 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 4019 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 24 OF 2021
SM MOHOCHI, J
MAY 2, 2023**

BETWEEN

GLORY CHEMIST LTD APPELLANT

AND

KENYA COMMERCIAL BANK LTD RESPONDENT

RULING

1. By an application dated 12th July, 2022, the Applicant seeks the dismissal of instant appeal for want of prosecution and costs.
2. The same is supported by affidavit of Situma Collins Sami, an Advocate for the Applicant, sworn on the even date and the grounds on the application namely: -
 1. That the Memorandum of Appeal herein was filed on 17th March, 2021 and the Appellant/Respondent has taken no positive steps to prosecute the Appeal to date.
 2. That the Appellant/Respondent has not filed and served Record of Appeal since filing the memorandum of appeal on 17th March, 2021.
 3. That the Appellant/Respondent unjustifiably continues to enjoy stay orders of the ruling dated 3rd June, 2021 pending the hearing and determination of the Appeal herein while the Appellant/Respondent has not taken any positive steps to prosecute the appeal herein.
 4. That the appellant/respondent is guilty of inordinate delay
 5. That the continued pendency of the appeal is not only against the principles of justice but also prejudicial to the respondent/applicant



6. That it is in the interest of justice that the Application be allowed as prayed.
3. The Application is opposed by the Respondent through Notice of Preliminary Objection on grounds that: -
 1. The Application offends the provisions of Order 42 Rule 35(1) of the Civil Procedure Rules.
 2. The Application is incompetent and should be struck out with costs.
4. The parties were directed to canvass application via submissions which they filed.

Respondent's/Applicant's Written Submissions

5. It is submitted that, the power to dismiss a suit for want of prosecution stems from Order 17 of the Civil Procedure Rules and from the Court's inherent power and by Court's Application of the overriding provision.
6. The Applicant contends that the case of *Mobile Kitale Service Station v Mobil Oil Kenya Limited & another* [2004] eKLR is instructive where Warsame J cited the case of *Nilani vs Patel & Others* [1969] EA page 341, Dickson J held: -

“It is only too trite to say that as in every civil suit, it is the plaintiff who is in pursuit of a remedy, that he should take all the necessary steps at his disposal to achieve an expeditious determination of his claim. He should not be guilty of laches. On the other hand, when he fails to bring his claim to a speedy conclusion, it is my view that a defendant ought to invoke the process of the Court towards that end as soon as it is convenient by either applying for its dismissal or settling down the suit for hearing - - - - - Delay in these cases is much to be deplored. It is the duty of the plaintiff's advisor to get on with the case. Every year that passes prejudices the fair trial. Witnesses may have died where a period of over nine years have elapsed. - - - documents may have been mislaid, lost or destroyed and the memory tends to fade.”

7. On whether the Appellant/Respondent is guilty of inordinate delay, the Applicant submitted that the respondent has not prosecuted its Appeal for more than one year and six months and is therefore guilty of inordinate delay. To buttress this fact, the Applicant relied on several cases. Namely: -*Omar Shariff & 2 others v M C* [2016] eKLR where the court stated that there being no plausible explanation for the delay, delay of two years seven months was inordinate and inexcusable. *Moses Otsyula v Children of God Relief Institute* [2015] eKLR where the court inter alia held that Dismissal of suit for want of prosecution is intended to prevent delayed justice or injustice and or abuse of court process and that a plaintiff who is in pursuit of a remedy should not be guilty of laches. *Ivita v Kyumbu* [1984] KLR as relied on by the defendant in his submissions in the case of *Hoswell Mbugua Njuguna v Celtel Kenya Limited* [2014] eKLR where the court found that the Plaintiff therein had not shown sufficient excuse for the delay in prosecution of his suit and that the delay therein was inordinate. *Capwell Industries Ltd v National Irrigation Board* [2015] eKLR where the court dismissed the Plaintiff's suit and the Defendant's counterclaim on grounds that there were guilty of inordinate delay in prosecuting their respective cases.
8. In respect to whether the Applicant's delay in prosecuting the Appeal is prejudicial to the Applicant, the Applicant contends that the delay in prosecuting the Appeal has given rise to substantial risk to a



fair trial and that it has incurred financial losses in this matter and if the appeal is allowed to drag, it would incur astronomical financial losses and expenses.

9. In view of the foregoing, the Applicant urged this court, in the interest of Justice, to dismiss the Appeal for want of prosecution.

Appellant's/ Respondent's Submissions.

10. The Respondent relying on Order 42 Rule 35(1) argues that directions have not been issued and therefore the remedy sought herein is unavailable. In support of this position reliance was placed on the cases of Pinpoint Solutions Limited & another v Lucy Waithegeni Wanderi (as the Legal Administrator of the Estate of James Nyanga Muchangi) [2020] eKLR; John Njagi Karua v Njiru Gatumu [2021] eKLR; Municipal Council of Nyeri v John Wachira Kairebi [2018] eKLR; Rosarie (EPZ) Limited v Stanlex Mbithi James [2015] eKLR; & Morris Njagi & another v Mary Wanjiku Kiura [2017] eKLR where the common holding was that an appeal could not be dismissed if directions had not been given.
11. In regards to whether appeal can be dismissed under Order 42 Rule 35(2), the Respondent submits that dismissal herein can be achieved upon the Applicant writing a letter to the Registrar requesting for the matter to be listed for dismissal for want of prosecution. The respondent thus argues that this provision is also not available to the Applicant through an application.
12. The Respondent submits further that the law relating to dismissal of appeal for want of prosecution is provided for under Order 42 Rule 35 and not under Order 17 that is relied on by the Applicant.
13. The Respondent therefore urged this court to uphold its Preliminary Objection and to dismiss the Application with costs.

Issues for Determination:

14. After going through the material on record and the submissions by parties, I opine the only issue for determination is Whether the application is meritorious.

Analysis.

15. The Lower Court delivered judgment in Eldoret CMCC No. 780 of 2018 in favour of the Applicant on 11th March, 2021.
16. Subsequently on 17th March 2021, the Respondent/Appellant lodged the instant Appeal. To date no Record of Appeal has been filed.
17. Dismissal of an appeal for want of prosecution is provided for under Order 42 Rule 35.
18. The Applicant has not disputed that directions are yet to be issued in this matter.
19. Order 42 Rule 35 of the Civil Procedure Rules, 2010 envisages two (2) scenarios for the dismissal of an appeal for want of prosecution. The first scenario is when an appellant fail to cause the matter to be listed for directions under Section 79B of the *Civil Procedure Act* as is envisaged in Order 42 Rule 11 of the Civil Procedure Rules. The second scenario is that if after service of Memorandum of Appeal, the appeal would not have been set down for hearing, the registrar shall on notice to the parties list the appeal before the judge for dismissal.
20. Section 79B of the *Civil Procedure Act* provides as follows:

“Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering



with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily”.

21. It is evident from the provisions of Section 79B of *Civil Procedure Act* that a judge has to peruse the appeal before he can summarily reject the same. These are the directions contemplated in Order 42 Rule 11 of the Civil Procedure Rules that states as follows: -

“Upon the filing of the appeal the appellant shall within thirty days, cause the matter to be listed before a judge for directions under section 79B of the Act”.

22. The Purpose of the directions under Order 42 Rule 11 is to give the Judge an opportunity for purposes of perusing the appeal and determining whether to admit it or reject it summarily. Under Rule 12 of Order 42, it is only after the Judge has declined to summarily reject the appeal when the appellant can lawfully serve the memorandum of appeal on the respondents.

23. In the case of Stephen vs Christine Khatiala Andika [2019] eKLR, Kirinyaga General Machinery v Hezekiah Mureithi Ileri [2007] eKLR it was held that an appeal could not be dismissed if directions had not been given.

24. The Court in South Nyanza Sugar Co. Limited v Autolith Limited [2017] eKLR held that: -

“It is my understanding of this rule is that before the Appeal can be dismissed, the same should have been set down for directions and such directions issued in the first instance.”

25. The Court in the case of Suresh Ruginath Raniga & Another v Sagar Mohan S. M. Ram Civil Appeal No. 433 of 2012, agreed with the submissions made by the Appellants Counsel that until and unless directions are issued, an Appeal cannot be dismissed for want of prosecution.

26. The Court similarly in the case of Kirinyaga General Machinery v Hezekiel Mureithi Ileri HCC No. 98 of 2008 while interpreting Order XLI rule 31 (now order 42 rule 35), observed: -

“It is clearly seen from that rule 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 under rule 8B. Directions have never been given in this matter. The directions having not been given the orders sought by the respondent cannot be entertained.”

27. In view of the foregoing it is apparent that this Court cannot dismiss the Appeal for want of prosecution since directions are yet to be issued. In the circumstances, this Court should invoke the provisions of Section 1A of the *Civil Procedure Act* on the overriding objectives of the rules which are intended to facilitate the just and proportionate resolution of civil disputes; and decline to dismiss the application on the basis that it is unjust or not proportionate and thus direct that: -

1. The Respondent to take steps to have the file placed before a Judge within 15 days hereof for purposes of directions on whether the appeal should be admitted or rejected.
2. If the directions given above is in the positive, the Respondent/Appellant must within 60 days thereafter, take steps to have the appeal set down for hearing.
3. Costs of this Application to abide by the outcome of the Appeal.

SIGNED, DATED AND VIRTUALLY DELIVERED AT NAKURU THIS 2ND DAY OF MAY, 2023.



MOHOCHI S.M (JUDGE)

In the presence: -

Adongo holding brief for Situma Nyamweya for Respondent

