



**Paul v Equity Bank Limited (Civil Appeal 168 of 2014)
[2023] KEHC 17289 (KLR) (Civ) (4 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17289 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 168 OF 2014

CW MEOLI, J

MAY 4, 2023

BETWEEN

LINUS MWITI PAUL APPELLANT

AND

EQUITY BANK LIMITED RESPONDENT

RULING

1. The motion dated January 06, 2022 by Equity Bank Limited (hereafter the Applicant) seeks *inter alia* that the court be pleased to dismiss the appeal herein for want of prosecution. The motion is brought under Section 1A, 1B & 3A of the [Civil Procedure Act](#), Order 42 Rule 35 & Order 51 Rule 1 of the [Civil Procedure Rules](#) *inter alia*. The grounds on the face of the motion are amplified in the affidavit of Esther Kiuluku, counsel having conduct of the matter on behalf of Applicant.
2. The gist of her affidavit is that Linus Mwiti Paul (hereafter the Respondent) lodged the instant appeal vide a memorandum of appeal dated April 30, 2014 and that the Respondent has never served the record of appeal upon the Applicant. That the Deputy Registrar further issued a notice dated June 19, 2020 to the Respondent to file his record of appeal, to no avail. She asserts that since lodging the appeal the Respondent has taken no steps to prosecute the appeal more than eight (8) years since the appeal was lodged. An indication that the Respondent is no longer interested in prosecuting the appeal. In conclusion, counsel asserts that it is only fair and reasonable as well as in the interest of public policy and justice that this appeal be dismissed for want of prosecution.
3. The Respondent despite failed to file any response despite being granted ample time to do so.
4. The motion was canvassed by way of written submissions. Counsel for the Applicant began by rehashing the events leading up to the instant appeal and underscored the fact that since filing of the appeal, the Respondent has failed to take any substantive steps to prosecute the same. Addressing the



- court on whether there has been inordinate and inexcusable delay on the part of the Respondent to prosecute the appeal, counsel anchored her submissions on Order 42 Rule 35 of the Civil Procedure Rules, the decision in *Ivita v Kyumbu* [1984] KLR 441 as cited in *Rajesh Rughani v Fifty Investments Limited & Another* [2016] eKLR and *Naftali Onyango v National Bank of Kenya* [2005] eKLR regarding factors to be considered in an application of this nature.
5. Further calling to aid the decisions in *Crossley Holdings Limited v Nagendrasaxena & 3 Others* [2016] eKLR and *Mobile Kitale Services Station v Mobil Oil Kenya Limited & Another* [2004] eKLR counsel submitted that it has been over eight years since the Respondent took any steps to prosecute his appeal and from his conduct it is clear that he is not interested in prosecuting the matter and no explanation for the delay has been proffered. That the delay herein is prolonged and inexcusable, and the appeal ought to be dismissed. Concerning the prejudice likely to be occasioned due to delay, it was contended that the Applicant continues to be vexed by the pendency of the appeal and rising costs in the matter. The decision in *Mwangi S Kimenyi v Attorney General & Another* [2014] eKLR was cited in respect of the above. In conclusion, the maxims that equity does not aid the indolent and justice delayed is justice denied were invoked. The court was urged to dismiss the appeal with costs.
 6. On the part of the Respondents, counsel contended that the appeal is yet to be admitted and directions given, hence the motion is premature. Raising factual matters, despite eschewing and or failing to file a response in opposition to the motion, counsel cited the case of *Morris Njagi & Anor v Mary Wanjiku Kiura* [2017] eKLR, *Rosaries (EPZ) Ltd v Stalex Mbithi James* [2015] eKLR and *Blessed Shelter Limited v Grace Waruguru Maina* [2022] eKLR in urging the court to dismiss the motion and give appropriate directions on hearing and disposal of the appeal.
 7. The court has considered the material canvassed in the present motion. The Respondent did not file a response to the instant motion. The Applicant has invoked the provisions of Order 42 Rule 35 of the Civil Procedure Rules and Section 3A of the *Civil Procedure Act*. The former provides for dismissal of an appeal for want of prosecution as follows; -
 - “(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.”
 8. Section 3A of the *Civil Procedure Act* to which the Applicant’s motion is expressed to be brought under provides that;
 - “Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”.
 9. As rightly pointed out by the Applicant, the Respondent lodged his appeal on April 30, 2014. After several reminders to the Executive Officer of the lower court by the Deputy Registrar of this court, the original record of the lower court was received on June 16, 2020 letter forwarding duly copied to the advocates appearing in this appeal. The Deputy Registrar thereafter issued a notice dated April 09, 2021 to the Respondent to file his record of appeal within 21 days failing which the matter would be placed before a judge for dismissal. The Applicant had earlier moved this court vide a motion dated



April 07, 2021 seeking to dismiss the instant appeal for want of prosecution. However the same was dismissed on June 30, 2021 for non-attendance by both parties.

10. The Applicant subsequently moved the court vide the instant motion. During the period between the filing of the appeal and the proceedings in respect of the instant motion, the Respondent took no action to progress the appeal. Save for a letter dated March 11, 2022 to the Deputy Registrar of this court requesting for proceedings and necessary documentation to enable him file his record. It appears that the said letter was prompted by the instant motion.
11. The Court of Appeal in *Pereira v Nation Media Group & 2 others* (Civil Appeal 122 of 2016) [2021] KECA 135 (KLR) while discussing the application of Article 159 (2) (d) had this to say;-

“Case law on the invocation and application of the above principle now form a well-trodden path. We take it from the cases of *Jaldesa Tuke Dabelo vs IEBC & Another* [2015]eKLR; *Raila Odinga and 5 Others vs IEBC & 3 Others* [2013] eKLR; *Lemanken Arata vs Harum Meita Mei Lempaka & 2 Others* [2014]eKLR; *Patricia Cherotich Sawe vs IEBC & 4 Others* [2015]eKLR. The principles enunciated therein and which we find prudent to highlight are as follows: Rules of procedure are handmaidens of justice; a court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties depending on the appreciation of the relevant circumstances and the requirements of a particular case; the exercise of the jurisdiction under Article 159 of the Constitution is unfettered especially where procedural technicalities pose an impediment to the administration of justice also that Article 159 (2)(d) of the Constitution is not a panacea for all procedural ills.”

12. The court went on further to discuss the import of the overriding objective in Section 1A and 1B of the Civil Procedure Act by stating that;

“Principles that guide the Court in the application of the above overriding objective principle also now form a well-trodden path. We take it from the case of *Hunter Trading Company Ltd vs Elf Oil Kenya Limited*, Civil Application No NAI 6 of 2010, stated *inter alia* as follows:

“It seems to us that in the exercise of our powers under the “02 principle” what we need to guard against is any arbitrariness and uncertainty. For that reason, we must insist on full compliance with past rules and precedents which are “02” compliant so as to maintain consistency and certainty. We think that the exercise of the power has to be guided by a sound judicial foundation in terms of the reasons for the exercise of the power. If improperly invoked, the “02 principle” could easily become an unruly horse.”

Further in *City Chemist (NBI) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli vs Orient Commercial Bank Limited* Civil Appeal No Nai 302 of 2008 (UR No 199 of 2008) (unreported) the Court reiterated that:

“That however, is not to say that the new thinking totally uproots well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the



validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application.”

13. Rule 35 (1) of Order 42 Civil Procedure Rules is the only express provision which permits an applicant to seek the dismissal of an appeal for want of prosecution. Under the provision, directions must have been given under Rule 13 before an applicant can move the court. In this case, Rule 13 has not yet applied; the Respondent not having moved the court as required, let alone file his record of appeal. Yet the original record of the lower court that was before the court contains certified typed proceedings, a fact well known to the Respondent.
14. As held in *Haron E Ongechi Nyaberi vs British American Insurance Co Ltd* HCCA No 110 of 2001, the duty of moving the court in terms of Order 42 Rule 11 & 13, lies with the Respondent. What option then is left to a respondent party, when the appellant goes into slumber after filing the appeal? Is the respondent without recourse? In my own view, such a party is not without options and may prod the Deputy Registrar to move under 42 rule 35(2) of the Civil Procedure Rules. Equally, such a party is not barred from seeking the court’s intervention under Section 1A, 1B & 3A of the *Civil Procedure Act*.
15. It was stated in *Osho Chemicals Ltd v Tabitha Wanjiru Mwaniki* [2018] eKLR that the court bears the duty imposed by Section 1B & 1A of the *Civil Procedure Act*, to further the overriding objective in Section 1 of the *Civil Procedure Act* which states:
 - “1A(1)the overriding objective of this Act and the rules made hereunder is to facilitate, the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act;
 - (2) The court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in sub-section (1);
 - (3) A party to civil proceedings or an Advocate for such a party is under a duty to assist the court to further the overriding objective of the Act, and to that effect, to participate in the process of the court and to comply with the directions and orders of the court.”
16. A court confronted with an application such as the present one is not hamstrung, and where circumstances demand, may invoke its inherent power to give meaning to the overriding objective principle, notwithstanding the absence of an express provision for the dismissal of an appeal which has not been set down for directions. An indolent appellant cannot be allowed to use the provisions of Order 42 Rule 35 (1) as both a sword and a shield in any event.
17. No explanation for the delay in this appeal has been proffered by the Respondent. Further, despite the Applicant having filed two motions seeking to dismiss the appeal, the Respondent has still not taken any steps to progress the appeal save for the letter to the Deputy Registrar. This court will agree with the Applicants’ observations that no explanation has been given for the delay herein or cause shown for the further sustenance of this old appeal. The cause of action in respect of the appeal arose in 2011, the appeal was filed in 2014. Litigation must come to an end. The delay in this case is inordinate, unjustified and must be ended by allowing with costs the Applicant’s motion. Anything short of that would amount to an abdication of the court’s duty to further the overriding objective.



18. Section 1B of the *Civil Procedure Act* states that; -

- “(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
- (a) the just determination of the proceedings;
 - (b) the efficient disposal of the business of the Court;
 - (c) the efficient use of the available judicial and administrative resources;
 - (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
 - (e) the use of suitable technology.

19. The motion dated January 6, 2022 is allowed and the appeal herein dismissed for want of prosecution. The costs of the motion and appeal are awarded to the Applicant.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 4TH DAY OF MAY 2023.

C MEOLI

JUDGE

In the presence of:

For the Appellant/ Respondent : Mr Nyaga h/b for Mr Kurauka

For the Respondent/Applicant: Ms Kiuluku

C/A: Carol

