



Registered Trustees of Changamwe Pentecostal Church v Smep Microfinance Bank Limited (Civil Appeal 124 of 2019) [2023] KEHC 17374 (KLR) (11 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17374 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 124 OF 2019**

OA SEWE, J

MAY 11, 2023

BETWEEN

THE REGISTERED TRUSTEES OF CHANGAMWE PENTECOSTAL CHURCH APPELLANT

AND

SMEP MICROFINANCE BANK LIMITED RESPONDENT

RULING

1. The application that is the subject of this ruling is the one dated April 6, 2022. It was brought by the respondent, SMEP Microfinance Bank Limited against the appellant, The Registered Trustees of Changamwe Pentecostal Church, pursuant to Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya and Order 42 Rule 35(2) of the *Civil Procedure Rules, 2010*, for orders that:
 - (a) This appeal be listed before a Judge in Chambers for dismissal;
 - (b) In the alternative, if the appeal is to proceed, the injunction issued on October 31, 2019 be lifted and the appellant be ordered to clear all loan arrears within thirty (30) days.
 - (c) Costs of the appeal as well as the application be met by the appellant.
2. The application was predicated on the grounds that the appellant filed and served a Memorandum of Appeal on June 28, 2019, and that since then no Record of Appeal has been filed or served by the appellant; and therefore no directions have been taken to pave way for the hearing and determination of the appeal. The appellant further complained that over two (2) years have since passed in which the respondent has suffered grave injustice and prejudice in being condemned to live with the anxiety of having a pending appeal hanging over its head indefinitely. Thus, the respondent asserted that it is unfair and unjust for the appellant to fail to endlessly enjoy the injunction it was granted on October 31, 2019, as the loan remains unpaid.



3. The application was supported by the averments set out in the Supporting Affidavit sworn by the respondent's Legal Officer, Ms Yvonne Kariuki. She reiterated that it is now over two years since the Memorandum of Appeal was filed; and yet no steps have been taken by the appellant to prosecute the appeal. She annexed to her affidavit copies of the Memorandum of Appeal and the ruling of the Court (Hon Chepkwony, J) delivered on October 31, 2019 vide which the appellant was granted a temporary injunction pending the hearing and determination of the appeal. In addition, the respondent exhibited a copy of the appellant's bank statement to demonstrate that, in the meantime, the loan has remained unpaid and continues to accrue interest.
4. In response to the application, the appellant filed a Replying Affidavit on July 5, 2022, sworn on its behalf by Alice Mkalla, a senior pastor of the appellant church. She explained that the delay in prosecuting this appeal was initially caused by the COVID 19 pandemic which necessitated the scaling down of the operations of the Court. Ms Mkalla added that, at the same time, the parties were engaged in negotiations, which negotiations have been protracted due to no fault of either party. She expressed optimism that the negotiations will yield a positive outcome for the parties.
5. It was further the assertion of the appellant that, since the respondent holds the title to the suit property, being Plot No 3710 (Orig No 2562/R), Section VI/MN as collateral, no prejudice will be suffered by it; on the other hand, the appellant stands to suffer irreparable harm should the appeal be dismissed and the injunction lifted. Thus, Ms Mkalla concluded by stating that it would be in the larger interest of justice for the appellant to be given an opportunity to prosecute the appeal.
6. The appeal was urged by way of written submissions, pursuant to the directions given herein on May 12, 2022. Thus, on behalf of the respondent, written submissions were filed herein by Mr Amadi on July 4, 2022. He surmised that the appellant has lost interest in the appeal; granted that it had opted to take no action for over three years since the appeal was filed. Counsel relied on [*James Migwi & Another v Susan Wanjiku Mwangi \[2011\] eKLR*](#) and [*Charity Wangechi Rukwaro v Josphat M Thiongo \[2018\] eKLR*](#) in urging for the dismissal of the appeal.
- 7) The appellant relied on its written submissions, prepared by M/s Kadima & Company Advocates. It urged the Court to be guided by the principles laid down in *Ivita v Kyumbu [1984] KLR 441* in addition to Order 17 Rule 2 and Order 42 Rule 13 and 35 of the Civil Procedure Rules in determining the instant application. Thus, the appellant urged the posturing that under Order 42 Rule 35, an appeal can only be dismissed for want of prosecution after admission of the appeal and not before. Reliance was also placed on [*Civil Appeal No 17 of 2019: AIG Insurance Company Ltd v Benard Kiprotich Kirui*](#) for the proposition that, even where it is shown that the appellant was not diligent in prosecuting the appeal, the pertinent question would be whether the interest of justice can still be served despite the delay.
8. It is a constitutional imperative that justice be administered without undue delay, per Article 159(1) (c) of the [*Constitution*](#). There is no dispute that the appellant has taken no action in this appeal since the ruling dated October 31, 2019 by which it was granted a temporary injunction pending appeal. Thus, the respondent took the view, and justifiably so, that being content with the injunctive relief it obtained, the appellant has seen no urgency in prosecuting the appeal. Thus, the appellant needs to be reminded of the words of Lord Denning MR in the case of [*Allen vs Sir Alfred McAlpine \[1968\] All E.R 543 at 546*](#), that any delay in the administration of justice is to be deprecated. He stated thus:

' The delay of justice is a denial of justice all through the years men have protested at the law's delay and counted it as a grievous wrong, hard to bear. To put right this wrong, we will in this court do all in our power to enforce expedition; and if need be, we will strike out actions



when there has been excessive delay. This is a stern measure; but it is within the inherent jurisdiction of the court, and the rules of court expressly permit it.'

9. And, in *Fitzpatrick vs Batger & Co Ltd [1967] 2 All ER 657*, it was held that:

' It is the duty of the plaintiff's advisers to get on with the case. Public policy demands that the business of the courts should be conducted with expedition. The delay [of two years] is far beyond anything we can excuse. It is impossible to have a fair trial after so long a time.'

10. [10] The foregoing notwithstanding, it is also well settled that, even where delay is unexplained, the Court still retains the residual discretion to determine whether justice can still be done despite the delay. In *Ivita v Kyumbu (supra)* for instance, it was held that:

' 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 Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no 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. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if 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.'

11. Thus, bearing in mind the aforesaid principles, I have looked at Order 42 Rule 35 of the Civil Procedure Rules, one of the provisions pursuant to which the application has been brought. It provides that:

- (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'.

12. In this case, directions are yet to be given for purposes of Rule 11 of Order 42. Consequently, the Deputy Registrar is yet to issue a notice to the appellant pursuant to Order 42 Rule 12 of the Civil Procedure Rules. The implication is clear; namely, that the delay appears to have been occasioned by the Court and not the appellant. Of course, the appellant has the responsibility of making a follow up to ensure prompt admission of the appeal. Thus, in *China Road & Bridge Corporation v John Kimenye Muteti [2019] eKLR*, Hon Odunga, J took the view, with which I entirely agree, that nothing bars the Court from dismissing an appeal even where no directions have been given, if such a step is warranted in the interests of justice.

13. I have nevertheless given consideration to the reasons given for delay; one being the impact of the global COVID-19 pandemic and the other being the assertion by the appellant that the parties have been engaged in negotiations. Those are valid excuses and therefore I am prepared, in the interest of justice, to give the appellant an opportunity to prosecute its appeal for a determination on the merits.



14. In the premises, the application dated April 6, 2022 is hereby dismissed with an order that the costs thereof be in the cause. It is further ordered that:

(a) The Deputy Registrar do call for and avail the record of the lower court within 14 days from the date hereof to enable directions for purposes of Order 42 Rule 11 of the Civil Procedure Rules;

(b) The Record of Appeal be prepared and served within 30 days from the date hereof.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 11TH DAY OF MAY 2023

OLGA SEWE

JUDGE

