



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**ELC APPEAL NO. 3 OF 2019**

**KIWACOM ENTERPRISES LIMITED.....1<sup>ST</sup> APPELLANT/RESPONDENT**

**JACINTA WACHU KIMANDI.....2<sup>ND</sup> APPELLANT/RESPONDENT**

**DICKSON KIMANDI MWAIRABUA.....3<sup>RD</sup> APPELLANT/RESPONDENT**

**VERSUS**

**CO-OPERATIVE BANK OF KENYA LIMITED.....RESPONDENT/APPLICANT**

**RULING**

**INTRODUCTION**

1. This ruling is a determination of the application dated 6/11/2020 and filed on 10/11/2020. The Application is brought under section 1A and 1B of the Civil Procedure Act and Order 42 Rule 35 of the Civil Procedure Rules. It is a Notice of Motion.

**APPLICATION**

2. The applicant is the **CO-OPERATIVE BANK OF KENYA LIMITED**, which is the Respondent in the appeal, while the respondents are **KIWACOM ENTERPRISES LIMITED, JACINTA WACHU KIMANDI AND DICKSON KIMANDI MWAIRABUA**, the appellants in this appeal. For the purposes of this application, the respondent in the appeal is simply the applicant, while the appellants will throughout be referred to as the respondents.

3. The motion came with two prayers, which are as follows:

i) ***THAT*** this appeal be dismissed for want of prosecution.

ii) ***THAT*** the costs of this application and Appeal be awarded to the Respondent/Applicant.

4. The application is anchored on grounds inter alia, that the appeal was initiated by way of a memorandum of appeal dated 12<sup>th</sup> February, 2019. The record of appeal was filed on 25<sup>th</sup> March 2019 and served upon the applicant. That however, since March 2019 the respondents have failed, refused and/ or neglected to fix the appeal for hearing or take any other steps to ensure progress of the matter. The applicant decried that it has been almost one and a half years since the appeal was lodged and failure to fix it indicates dis-interest on the part of the respondents.

5. According to the applicant filing an appeal and failing to prosecute it amounts to an abuse of the court process and the appeal is said to be liable for striking out for want of prosecution. Filed with the application is a supporting affidavit dated 6<sup>th</sup> November 2020 and sworn by C.K Kiplagat the advocate on record, which reiterates the averments in the application in support of the case.

**RESPONSE**

6. The application is opposed via a replying affidavit filed on 25<sup>th</sup> January 2021 and sworn by Mr. Gitonga Muthee advocate on record for the respondents. The said advocate denied that there were no steps taken in prosecuting the application. He deposed that the matter had been mentioned before the Deputy Registrar on 17.06.2019 for directions on its disposal.

7. He further deposed, that he later lost instructions from his client (Jacinta) who had travelled to the United States which factor inhibited filing of submissions. He pleaded that the client was to return to the country before the end of year 2019 but had been unable to travel back due to the stringent travel measures imposed by the United States due to Covid 19 pandemic. He affirmed that he had since regained instructions and proceeded to file the submissions in relation to the appeal. According to him, it is in the wider interests of justice that the court disallows the application and allow the appeal to proceed to the end as the applicant will not suffer any prejudice if the application is disallowed.

## **SUBMISSIONS**

8. The application was canvassed by way of written submissions. The applicant's submissions were filed on 13.10.2021. The applicant reiterated the contents of the application and restated that the respondents had failed to comply with the conditions required after filing the appeal, thus the appeal ought to be dismissed.

9. Reference was made to the provisions of Order 42 Rule 35(1) and (2) of the Civil Procedure Rules 2010 and reliance was made on the case of **Kenya Nuts Company Limited –vs- Justine Musyoka Nkabi (2018) eKLR** where the court dismissed an appeal for want of prosecution on grounds that respondent had been guilty of lack of interest in prosecuting the matter and the reasons for delay cited were not excusable.

10. It was further submitted that failure by the respondents to swear the affidavit and instead have their advocate swear it, was an indication of disinterest in prosecution of the appeal. According to the applicant the respondents herein went into slumber after filing the appeal and were only woken up by the instant application, thus the delay is inexcusable. Reliance in that respect was made on the case of **Peter Kipkurui Chemoiwo –vs- Richard Chepsergon (2021) eKLR**. The applicant further submitted that the said delay was in violation of the overriding objectives of the court as provided for under sections 1A and 1B of the Civil Procedure Act and further a violation of Article 159(2) of the Constitution of Kenya 2010 as according to the applicant they had been denied justice because of the inordinate delay. With that, the applicant urged the court to find merit in the present application and proceed to dismiss the appeal for want of prosecution and its costs.

11. The respondents on their part filed their submissions on 21<sup>st</sup> February 2021. They gave a brief background of the suit and further relied on the averments in their replying affidavit. They submitted that the delay by them in prosecuting the appeal was beyond their control. They urged the court to indulge them as they are desirous of prosecuting the appeal.

12. They relied on Article 50 of the Constitution on the principle of fair hearing and the court was urged to strike a balance between upholding right to fair trial and the need to enforce statutory provisions on timelines.

13. The respondents submitted that courts should be slow to dismiss a suit for want of prosecution if satisfied that the suit can proceed without further delay and relied on the case of **Naftali Opondo Onyango Vs National Bank of Kenya Ltd [2005]** in support of this. The respondents further laid out a criteria for considering an application for dismissal of an appeal and urged the court to consider the reasons given.

14. Further reliance was made on the cases of **John Mwangi Muhia & 2 others Vs Director of Public Prosecution & 5 others [2019] eKLR** and **Argan Wekesa Okumu Vs Dima College Limited & 2 Others [2015] eKLR** which cited the court of Appeal decision in **Ivita Vs Kyumbu [1984]** where the court stated that the test to be applied in dismissal of a suit for want of prosecution was whether the delay is prolonged and inexcusable and if it is, whether justice can be done despite the delay.

15. It was further contended that the respondents would suffer great prejudice if the appeal is dismissed as it will deny them the right to be heard; dislodge them from the seat of justice and would result in grave injustice and immense hardship on their part.

16. It was further argued that the application is misconceived as the applicant had the option to set the appeal down for hearing. The respondents contended that they had now filed submissions to the appeal and the applicant should now file its submissions in order for the court to issue a judgment date in the matter. The court was urged to consider the ends of justice and dismiss the application with costs.

## **ANALYSIS AND DETERMINATION**

17. I have considered the application as filed, the replying affidavit in response to the same, the rival submissions, and the court record in general. In my view, the sole issue for determination is whether the application should be allowed as prayed. In other words, whether the appeal pending before this court should be dismissed for want of prosecution.

18. Dismissal of appeal is provided for under Order 42 Rule 35 of the Civil Procedure Rules, which is the provision under which the instant application is brought. Order 42 Rule 35 (1) of the Civil Procedure Rules stipulates as follows:-

*“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”.*

Order 42 Rule 35 (2) of the Civil Procedure Rules stipulates as follows:-

*“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”*

19. It is not disputed that the appeal herein has been pending since 2019 as the matter was last in court on 17.06.2019 before the Deputy Registrar for directions when it was ordered that the same be canvassed by way of written submissions. From June 2019 to November 2020 is indeed one year and five months. As such, and from the provisions of Order 42 Rule 35 (1 and 2), the said appeal appears ripe for dismissal.

20. However, even though the appeal has met the provisions under order 42 rule 35 (1) of the Civil Procedure Rules, the court has to consider whether the delay is prolonged and inexcusable, and if it is, whether the delay could be excused and justice can be done despite the delay. (**Ivita -v- Kyumba [1984] KLR 441**).

21. In the case of **Eastern Province Kenya Ltd -vs- Rongai Workshop & Transporters Ltd & Another [2014] eKLR** the Court held that:-

*“The test to be applied in application for dismissal for want of prosecution is whether the delay is prolonged and inexcusable, and if it is whether justice can still be done despite the delay. Thus, even the delay is prolonged, if the court is satisfied with the plaintiff’s excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of the discretion of the court.”*

22. Further in the case of **Pyramid Hauliers Co. Limited v James Omingo Nyaaga & 3 others [2017] eKLR Justice R. Nyakundi** while discussing the relevance of the decision in the above cited case stated:

*“The rationale of this decision is the supremacy of the courts to exercise discretion not to deprive a party of a right to access court to pursue his claim which by reason of delay would not see the light of the day. This principle recognizes that the fundamental rights and obligation of court of law is to do substantive justice between the parties”.*

23. On whether the delay was inordinate and inexcusable, as I have already pointed out, the delay alluded to is for 1 year and 5 months which is indeed prolonged. The respondents have blamed it all on the incidence of corona virus pandemic and the attendant disruptions that came with measures intended to contain it. I agree with the respondents that there were such disruptions which affected the way of life in general, including litigation and court operations.

24. The application on its’ part did not seek leave to file a further affidavit to challenge these averments nor did it submit on this issue. It’s position is that the delay was inordinate. I think the applicant needed to show well that justice can not be done in the circumstances or that the delay is inexcusable. To me, the respondents explained themselves reasonably well.

25. Given what has been availed by the respondents, the possibility that there was travel outside the country is real. The possibility also that travelling back could not take place as scheduled is also real.

26. On whether justice can be done despite the delay. I note that the appellants had indeed proceeded with haste to set down the appeal for hearing after the record of appeal was filed. The directions had been taken as to the mode of disposal of the appeal but the respondents had failed to file submissions to enable judgment in the matter be rendered. The respondents have now filed their submissions in support of the appeal and what is remaining is for the applicant herein to file its written submissions.

27. In the circumstances of the instant case, and noting the stage at which the appeal has reached, it is my view that justice can still be done to the parties herein and the said justice can only be done by allowing the appeal to proceed to hearing and determination. The application in the lower court sought injunction orders to stop sale of land by way of public auction. The application was dismissed and the appeal made is out of the respondent’s dissatisfaction with the orders of the trial court. They have come to this court for further consideration of the matter. I agree with the respondents that in the event the appeal is dismissed at this stage they will suffer prejudice and injustice. The right to be heard should not be taken lightly.

28. The level of injustice to be suffered by the respondents in the circumstances will be greater than that likely to be suffered by the applicant.

29. The court therefore finds no merit in the application and the same is hereby dismissed. The applicant is granted 30 days to respond to the respondents submissions. Costs are to be in the cause.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this **30<sup>TH</sup> DAY** of **NOVEMBER 2021**.

In the presence of Muthee for the appellants and Munene Wambugu & Kiplagat Advocates for the Respondent.

Court Assistant: Leadys

**A.K. KANIARU**

**JUDGE**

**30.11.2021**