



REPUBLIC OF KENYA



KENYA LAW

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**Cool Joint Electronics Ltd v B.S. Mohindra & Co. (K) Ltd (Civil Appeal
279 of 2019) [2023] KEHC 18843 (KLR) (Civ) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18843 (KLR)

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

CIVIL

CIVIL APPEAL 279 OF 2019

CW MEOLI, J

JUNE 15, 2023

BETWEEN

COOL JOINT ELECTRONICS LTD APPELLANT

AND

B.S. MOHINDRA & CO. (K) LTD RESPONDENT

RULING

1. The Chamber Summons dated April 4, 2022 (hereafter the application) brought by B.S. Mohindra & Co. (K) Ltd (hereafter the Respondent) primarily seeks the dismissal for want of prosecution, of the appeal filed on May 24, 2019 by Cool Joint Electronics Ltd (hereafter the Appellant) against the decision delivered on 23rd May 2019 in Milimani CMCC 3230 of 2006. It is expressed to be brought under order 42, rule 13(1) of the Civil Procedure Rules, and sections 1A, 1B and 3A of the Civil Procedure Act. The main grounds raised in support of the application are that since lodging the memorandum of appeal, the Appellant has not taken any active steps in prosecuting its appeal, thereby demonstrating its lack of interest in the matter.
2. The application is further supported by the affidavit sworn by Viresh Mohindra, the Managing Director of the Respondent, who averred that judgment was delivered in favour of the Respondent and against the Appellant by the trial court in the sum of Kshs. 1,090,849.10 and that being aggrieved by the said judgment, the Appellant lodged an appeal and was granted a conditional order of a stay of execution of the resulting decree, which condition it did not fully comply with, prompting the Respondent to commence the execution process.
3. The deponent further averred that a second application seeking to stay execution of the decree by the Appellant was dismissed by the lower court vide the ruling delivered on 23rd May 2019 and which ruling the Appellant sought to challenge through the present appeal, also accompanied by a separate



application seeking stay of execution. It was reiterated that since filing the present appeal on 24th May, 2019 the Appellant had not taken any reasonable steps to set the appeal down for hearing and that the present appeal, together with an appeal previously filed by the Appellant (namely Nairobi HCCA No. 670 of 2017) were last in court on 3rd March, 2021 wherein the court directed that the appeal be set down for hearing in order for the issue of consolidation of the two appeals to be considered and determined.

4. The Appellant in opposition to the application filed a replying affidavit through its General Manager, Shaban Jumah asserting that the application is premature and incompetent in view of the fact that the appeal has not yet been set down for hearing and that the delay in prosecuting the appeal is primarily as a result of the various applications which have been filed both in the present appeal and in Nairobi HCCA No. 670 of 2017 coupled with the impact of the Covid-19 pandemic. He also asserted that the application is incurably defective on the basis that the supporting affidavit was not sworn under seal of the Respondent Company and therefore ought to be expunged from the record.
5. The deponent further stated that the delay in the matter was occasioned by the difficulties faced by the Appellant in having the Respondent acknowledge receipt of the sum of Kshs.1,038,363/- and which led to the lodging of a complaint with the Advocates Complaints Commission by the Appellant against the Respondent's advocate. The deponent maintained that the Appellant remains keen on prosecuting the appeal and prayed that the application be dismissed with costs.
6. The application was canvassed through written submissions. Relying on the provisions of order 42, rules 13 and 35 of the *Civil Procedure Rules*, the Respondent through its counsel argued that directions had been given in the appeal but that the Appellant did not comply by setting the appeal down for hearing resulting in inordinate and inexcusable delay in the prosecution of the appeal. To reinforce these arguments, the Respondent cited the decisions in *Peter Kipkurui Chemoiwo v Richard Chepsergon* [2021] eKLR and *Njeru v Kinanda* (Civil Appeal 136 of 2017) [2022] KECA 946 (KLR) while urging the court to invoke its inherent discretion under Section 3A of the *Civil Procedure Act* to dismiss the appeal for want of prosecution.
7. On the part of the Appellant, it was submitted that the delay in prosecuting the appeal is excusable and unintentional. It was also reiterated that the application is premature and ought to be dismissed since directions have not been taken on the hearing of the appeal. To reinforce its sentiments here, the Appellant has cited several decisions including *National Bank of Kenya v Alfred Owino Bala* [2017] eKLR and *Kirinyaga General Machinery v Hezekiel Muriithi Ireri* [2007] eKLR. For these reasons, the court was urged to dismiss the application with costs.
8. The court has considered the rival material presented and canvassed in respect to the application. Before the court considers the merits of the application, it deems it necessary to first address the preliminary issue which was raised by the Appellant concerning the competency of the application and premised on the ground that the supporting affidavit does not bear the official stamp of the Respondent. While the Appellant did not raise any counter arguments thereon, the court has not come across any legal provision which makes it mandatory for a supporting affidavit sworn on behalf of a company to bear its official stamp.
9. In any event, the supporting affidavit was ex facie duly sworn by the Respondent's Managing Director before the Commissioner for Oaths and bears the requisite Commissioner's stamp and signature. In view of the foregoing, the Appellant's argument on the matter is without merit.



10. Turning to the merits of the application, dismissal of appeals for want of prosecution is provided for under order 42, rule 35 of the [Civil Procedure Rules](#) which states:

- “(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”.

11. Evidently rule 35(1) above is the only express provision which permits a Respondent to seek the dismissal of an appeal for want of prosecution. This step can only be taken once directions have been given under order 42 rule 13 of the [Civil Procedure Rules](#). In the present instance directions are yet to be given in respect to the appeal and consequently, the appeal is yet to be set down for hearing. It therefore follows that the court cannot be moved under the provisions of Order 42 Rule 35(1) (supra).

12. The record reveals that the Deputy Registrar has not listed the appeal before a judge for dismissal pursuant to the provisions of order 42, rule 35(2) (supra). However, it was held in [Haron E. Ongechi Nyaberi vs British American Insurance Co Ltd](#) HCCA No 110 of 2001 that the duty of moving the court in terms of order 42 rule 11 & 13 lies with the Appellant. Suffice it to state that in the court’s view, the respondent aggrieved by inaction by the appellant is not left without recourse; such respondent may prod the Deputy Registrar to move under 42 rule 35(2) of the [Civil Procedure Rules](#). And faced with an indolent appellant, the respondent can equally invoke the Court’s inherent jurisdiction reserved by section 3A of the [Civil Procedure Act](#). In which event, such appellant cannot take refuge, as the Appellant herein has attempted to do, in the absence of an express provision in Order 42 empowering the respondent to move the court to dismiss the delayed appeal in which no directions have been given.

13. An appellant who shows scant regard for the overriding objective in section 1 of the [Civil Procedure Act](#) through delay and indolence cannot hope to deflect a dismissal motion in such circumstances by using the provisions of order 42 rule 35 of the Civil Procedure Rules both as a sword and shield. As held in [Osbo Chemicals Ltd v Tabitha Wanjiru Mwaniki](#) (2018) eKLR the court bears the duty imposed by section 1B 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.



14. The record herein shows that after filing the memorandum of appeal on 24th May 2019, the parties were engaged in the application dated 30th May 2019 by the Appellant seeking to stay execution, and which application was eventually withdrawn. Admittedly, there are two concurrent subsisting appeals between the parties; the present appeal and the above-cited Nairobi HCCA No. 670 of 2017. The two appeals are yet to be consolidated. The record of appeal in the present appeal was filed sometime on or about the 9th of July 2020.
15. The Appellant has not demonstrated efforts made to progress this appeal since filing the record of appeal for almost two years prior to the filing of the present application. The appeal relates to a decision made in 2019 and is almost four years old at the date of this ruling. While declining to dismiss the appeal as sought in the application dated 4th April 2022, the Court directs the Appellant to fully prosecute the appeal within four (4) months of today's date failing which it will stand dismissed with costs to the Respondent, for want of prosecution. The costs of the application are awarded to the Respondent in any event.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 15TH DAY OF JUNE 2023.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: Mr. Kagunza

For the Respondent: Mr. Amuhale

C/A: Carol

