



Cool Joint Electronics Ltd v BS Mohindra & Co (K) Ltd (Civil Appeal 670 of 2017) [2023] KEHC 19229 (KLR) (Civ) (15 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19229 (KLR)

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

CIVIL

CIVIL APPEAL 670 OF 2017

CW MEOLI, J

JUNE 15, 2023

BETWEEN

COOL JOINT ELECTRONICS LTD APPELLANT

AND

BS MOHINDRA & CO (K) LTD RESPONDENT

RULING

1. The Chamber Summons dated 4th April 2022 (hereafter the application) was brought by B.S. Mohindra & Co. (K) Ltd (hereafter the Respondent) seeking the dismissal, for want of prosecution of the appeal filed herein on 4th December 2017 by Cool Joint Electronics Ltd (hereafter the Appellant) in respect of the judgment delivered on 8th November 2017 in Milimani CMCC 3230 of 2006.
2. The application is expressed to be brought under Order 42, rule 35(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 even after directions were given on the hearing of the appeal, thereby demonstrating its lack of interest in the matter.
3. The application is further supported by the affidavit sworn by Viresh Mohindra, the Managing Director of the Respondent, who swore 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 the present appeal and was granted a conditional order of a stay of execution of the resulting decree, and which condition it did not fully comply with instead filing numerous applications.
4. That on 3rd March 2021 the High Court gave directions for the hearing of the appeal, but the Appellant has not taken any active steps in setting down the appeal for hearing, together with an appeal later



filed by the Appellant (namely Nairobi HCCA No. 279 of 2019). It was reiterated that the issue of consolidation of the two appeals which had been raised by way of an application filed by the Appellant is yet to be determined with finality.

5. It is apparent from the record that the Appellant did not avail a response and/or written submissions in respect to the application in the present appeal for the court's consideration, despite opportunity granted them to do so. Moreover, no response or submissions can be traced on the online court filing system (CTS). It remains unclear whether the Appellant intended to rely on its response and submissions filed in respect to a related application filed by the Respondent in Nairobi HCCA No. 279 of 2019 also due for ruling.
6. Suffice it to say that the Respondent on its part filed written submissions on the application. Relying on the provisions of Order 42, Rules 13 and 35 of the Civil Procedure Rules, the Respondent through its counsel reiterated the Respondent's affidavit material and asserted that there has been inordinate and inexcusable delay in the prosecution of the appeal. To reinforce these arguments, the Respondent cited the decision in *Peter Kipkurui Chemoiwo v Richard Chepsergon* [2021] eKLR and *Njeru v Kinanda* (Civil Appeal 136 of 2017) [2022] KECA 946 (KLR) in urging the court to invoke its inherent discretion under Section 3A of the *Civil Procedure Act* and dismiss the appeal for want of prosecution.
7. The court has considered the material presented and canvassed in respect to the application. Order 42, Rule 35 of the *Civil Procedure Rules, 2010* sets out the circumstances and manner of dismissal of an appeal 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. From a reading of the foregoing provision, it is clear that Rule 35(1) of Order 42 *Civil Procedure Rules* is the only express provision which permits a Respondent to seek the dismissal of an appeal for want of prosecution. This can only take place once directions have been given under Rule 13. Upon its perusal of the proceedings, the court notes that when the matter came up in court on 3rd March 2021 the purpose was for the hearing of the application dated 14th January 2021 filed by the Appellant and seeking the recusal of the late Thurania Jaden J.
9. Subsequently, upon the agreement by the parties, the late Judge directed that the aforesaid application as well as the application dated 30th December 2019 brought by the Respondent and seeking the dismissal of the appeal for want of prosecution, be marked as withdrawn and that the appeal be heard by any other judge in the Civil Division.
10. In my reading of the said orders/directions, no formal directions pursuant to Order 42 Rule 13 were given. Moreover, it is apparent from the record that the Appellant is yet to file the record of appeal in perfecting the appeal for taking of directions. It therefore follows that the provisions of Order 42, Rule 35(1) (*supra*) do not neatly apply in this instance. Moreover, the Deputy Registrar has not listed the appeal before a judge for dismissal pursuant to the provisions of Order 42, Rule 35(2) (*supra*); the Respondent has moved the Court.



11. That said, it was held in *Haron E. Ongechi Nyaberi v British American Insurance* that the duty of moving the court in terms of Order 42 Rule 11 & 13 lies with the Appellant. The Court is of the view that where an appellant is indolent and has failed to take steps in perfecting his appeal, the Respondent is not left without recourse notwithstanding the absence of an express empowering provision; a respondent may prod the Deputy Registrar to move under 42 rule 35(2) of the *Civil Procedure Rules* or invoke the inherent jurisdiction of the Court under Section 3A of the *Civil Procedure Act* to give meaning to the overriding objective principle. An indolent appellant confronted with such an application cannot be allowed to use the provisions of Order 42 Rule 35 (1) as both a sword and a shield.
12. Except for the self-evident myriad applications herein, no explanation for the delay in this appeal has been proffered by the Appellant, at least for the failure to file the record of appeal. Almost six years since the filing of the appeal, the record of appeal is yet to be filed. Litigation must come to an end. The delay in this case is inordinate and unjustified and in violation of the overriding objective.
13. In *Osho 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. In view of all the foregoing, the court declines the Respondent’s motion but will direct as follows:
 - a. The Appellant shall file and serve the record of appeal within 21 days of today’s date.
 - b. The Appellant shall fully prosecute the appeal within 4 (four) months of today’s date.
 - c. In default of any of the above conditions, the appeal shall stand dismissed for want of prosecution, with costs to the Respondent.
 - d. The costs of the chamber summons dated 4th April 2022 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

