



REPUBLIC OF KENYA



KENYA LAW
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**Ochieng & another v Gachanja (Civil Appeal 758 of 2019)
[2023] KEHC 21559 (KLR) (Civ) (11 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21559 (KLR)

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

CIVIL

CIVIL APPEAL 758 OF 2019

DO CHEPKWONY, J

JULY 11, 2023

BETWEEN

IBRAHIM OTIENO OCHIENG 1ST APPELLANT

GALAXY PHARMACEUTICALS LIMITED 2ND APPELLANT

AND

PHILIP CHEGE GACHANJA RESPONDENT

RULING

1. The Appellants filed this appeal vide a Memorandum of Appeal dated 20th December, 2019, challenging the Judgment of the trial Court in CMCC No. 8092 of 2018 delivered on 29th November, 2019.
2. On 18th August, 2022 the Deputy Registrar of this court issued a Notice to Show Cause why the case should not be dismissed for want of prosecution. The said notice was served upon both advocates on record on 19th August, 2022 and there is an Affidavit of Service on record.
3. The Notice to Show Cause came up for hearing on 7th October, 2022 and Counsel for the appellants filed an affidavit in response to the Notice to Show Cause sworn by Philip Malanga dated 8th October, 2022. In the affidavit, he deposes that he is the Counsel seized with the conduct of the matter on behalf of the Appellants. He states that this appeal was instituted on 20th December, 2019 against the Judgment and decree in Milimani CMCC No.8092 of 2018. Subsequently, an interlocutory application was instituted seeking stay of execution pending appeal.
4. According to the Appellants' efforts to prosecute the application were thwarted by the non-responsiveness of the lower court registry which persistently indicated that the lower court file was missing. The said missing lower court file had the negative effect of making it impossible for them



to obtain a certified copy of proceedings and Judgment so as to prepare the Record of Appeal. The Appellants contend that it is clear that they have all along been desirous of prosecuting this appeal and should be given opportunity to do so.

5. It is deposed that it is also clear that the stalling of this matter has been due to circumstances beyond the control of the appellants such as:-
 - a. That this matter was scheduled for hearing of an interlocutory application on 30th September, 2021 which was adjourned to 2nd November, 2021 and again to 7th December, 2021 since parties were trying to reach an agreement on the said application.
 - b. That on 7th December, 2021, the Judge handling the matter was on leave and matters listed before him were taken out and this matter was fixed for 9th February, 2022.
 - c. That on 9th February 2022, a Notice was published that the Judge handling this matter was still on leave.
 - d. That in those circumstances it was clear that the Appellants would ordinarily wait for information on how the court intended to deal with the matters.
6. The Appellants contend that they were surprised to be invited to show cause why the suit should not be dismissed pursuant to order 17 rule 2 of the *Civil Procedure Rules*, 2010. That proceeding to dismiss this appeal pursuant to the Notice to Show Cause would clearly be in contravention of Order 17 Rule 2 of the *Civil Procedure Rules* since it is clear that this appeal has had steps taken which takes it away from the application of that rule. He asked the court to allow the Appellants to prosecute this appeal.

Analysis and Determination

7. This Court has considered the Appellants' affidavit in response to the Notice to Show Cause and finds the sole issue for determination being whether the Appellants' appeal should be dismissed for want of prosecution.
8. The Notice to Show Cause why the case should not be dismissed for want of prosecution was brought pursuant to the provisions of Order 42 Rule 35 (2) of the *Civil Procedure Rules*, 2010. It stipulates that:-
 - a. 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.
 - b. 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. (Emphasis mine).
9. It is in line with the provisions of Order 42 Rule 35 (2) above that the Deputy Registrar proceeded to list down this appeal for Notice to Show Cause why the appeal should not be dismissed for want of prosecution. The appellants filed an affidavit dated 8th October, 2022 in response to the Notice to Show Cause why the case should not be dismissed for want of prosecution.
10. The principles governing dismissal of an appeal suit for want of prosecution were enumerated in the case of *Mwangi S. Kimenyi v Attorney General & Another* (2014) eKLR, where the Court held that:-

“When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the act straight



away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all parties- the Plaintiff, the Defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues;

- a. Whether the delay has been intentional and contumelious;
- b. Whether the delay or the conduct of the Plaintiff amounts to an abuse of the court;
- c. Whether the delay is inordinate and inexcusable;
- d. Whether delay is one that gives rise to a substantial risk to a fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and,
- e. What prejudice will the dismissal cause to the Plaintiff? By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.”

11. I have perused the instant appeal and noted that the Memorandum of Appeal was filed on 20th December, 2019. And the time the Notice to Show Cause was issued on 18th August, 2022, the requirements of Order 42 Rule 35 had not been met to warrant the dismissal of the appeal.

12. This is contrary to the provisions of Order 17 Rule 2 of the [Civil Procedure Rules, 2010](#) which provides that;

“In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.”

13. The provisions of Order 17 Rule 2 deals with in action by a party to take any steps on the matter. The last action on the file was on 2nd November, 2021 prior to issuance of the Notice to Show Cause on 18th August, 2022. The notice indicates that the case was last in court on 7th February, 2021 which is contrary to the position on the court record. This is not the provision upon which the Notice to Show Cause was issued by the Deputy Registrar.

14. The record also shows that no directions had been issued regarding the hearing of this appeal. From the provisions, it seems to this Court that taking of directions is a prerequisite before an appeal can be listed down for dismissal. This was the position taken by the court in the case of [Njai Stephen v Christine Khatiala Andika](#) [2019] eKLR, where the Court held that;

“This court took the view that an appeal cannot be dismissed before directions had been given. As there was no indication that directions had been given herein, the Appeal herein could not be dismissed under Order 42 Rule 35 (1) of the [Civil Procedure Rule](#).”

15. It has severally been held that dismissal of suits is a draconian mechanism which should be exercised with caution as it tends to drive away litigants from the seat of justice. In the case of [John Nabashon Mwangi v Kenya Finance Bank Limited \(in Liquidation\)](#) (2015) eKLR, the Court held that;

“Courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such



acts are comparable only to the proverbial ‘Sword of the Damocles’ which should only draw blood where it is absolutely necessary.”

16. On the same breath, Article 50 (1) of the [Constitution of Kenya](#) provides for the right of a fair hearing. It states as follows;

“Every person has the right to have any dispute that can be resolved by application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

17. Although, the Appellants have not satisfactorily explained the reason for not complying with the provisions of Order 42 Rule 35 (2) of the [Civil Procedure Rules](#) by not taking directions regarding the hearing of this appeal, this Court proceeds to exercise its discretion in their favour and give them the last opportunity to prosecute this appeal.
18. Having said so, it is this Court’s finding that it was premature to list this appeal for Notice to Show Cause why it should not be dismissed even before directions regarding the hearing of the appeal were issued.
19. For the aforesaid reasons, I proceed to make the following orders;-
- a. The orders dismissing the appeal be and hereby set aside.
 - b. The Record of Appeal be filed and this appeal be listed down for hearing within 45 days from the date of this ruling.
 - c. The matter shall be mentioned before the Deputy Registrar of the Division to confirm compliance and for purposes of taking directions on 2nd October, 2023.
 - d. Failure to comply with the direction in (a) above, this appeal shall stand dismissed.
 - e. Costs to await the outcome of the appeal.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 11TH DAY OF JULY, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Wambugu Kariuki counsel for the Respondent

No appearance for the Appellant

Court Assistant - Martin

