



**Kubri Roads Works Limited v Kariuki & another (Civil Appeal
112 of 2020) [2023] KEHC 23566 (KLR) (19 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 23566 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 112 OF 2020
DO CHEPKWONY, J
SEPTEMBER 19, 2023**

BETWEEN

KUBRI ROADS WORKS LIMITED APPELLANT

AND

MAHAT SUBDOW HASSAN 1ST RESPONDENT

PAUL NGIGE KARIUKI 2ND RESPONDENT

RULING

1. The court issued a Notice to Show Cause why the Appeal should not be dismissed for want of prosecution dated 16th June, 2023. Upon being served with the said Notice to Show Cause, the Appellant filed Replying Affidavit sworn on 22nd June, 2023 by Abdiwahab Mohammed Ali as a Director of the Appellant.
2. According to the Appellant, it lodged the present appeal upon being dissatisfied with the Judgment and Decree in Thika CMCC No.332 of 2016. It states that on 20th April, 2021 the court directed the Appellant to serve the 2nd Respondent with the pleadings and the application dated 18th July, 2022 failure to which the Appellant would be required to show cause as to why the appeal should not be dismissed for want of prosecution.
3. The Appellant states that on 16th March, 2022, it was granted leave to serve the 2nd Respondent by way of substituted service under Order 5 Rule 17 of the Civil Procedure Rules as it was unable to track him down.
4. It is the Appellant's contention that later, it was able to track the 2nd Respondent and it served him with the Memorandum of Appeal as well as a Hearing Notice dated 24th June, 2022 and he filed an Affidavit of Service sworn on 8th July, 2022.



5. The Appellant holds that it has been trying to acquire typed proceedings for the subordinate court so that it can file a Record of Appeal in vain despite several reminders vide letters dated 25th August, 2020 and 21st June, 2023.
6. The Appellant explains that the delay in filing the Record of Appeal was occasioned by the delay in getting the typed proceedings and urges that the court considers the Replying Affidavit as sufficient response to the Notice to Show Cause issued on 16th June, 2023.

Analysis and determination.

7. For determination herein is whether this appeal should be dismissed for want of prosecution. The Notice to Show Cause was issued pursuant to Order 42 Rule 35 of the Civil Procedure Rules which 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”.
8. The principles for applications for dismissal for want of prosecution were discussed in the case of *Argan Wekesa Okumu vs Dima College Limited & 2 Others* [2015] eKLR, where the Court stated as follows:-

“The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay. As such the 3rd Defendant in this case must meet the burden of proof in seeking the dismissal of the Plaintiff’s case for want of prosecution see the case of *Ivita –vs- Kyumbu* (1984) KLR 441. Further to this, the decision of whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same.”
9. It is trite law that a party who brings a matter to court should see to it that it is prosecuted and determined within reasonable period so that matters do not drag for too long thus causing unnecessary backlog.
10. In this case, on 18th September, 2020, the Appellant lodged an appeal against the Judgment and decree of 20th August, 2020. Thereafter the Appellant filed a Notice of Motion application dated 24th September, 2020 seeking stay of execution pending the hearing and determination of the said application. The court then granted an order of stay of execution on condition that the Applicant deposits a sum of Kshs.500,000/= into court within 21 days from the 29th September, 2020. The court also directed that the application be assigned a hearing date at the registry. The application was then fixed for hearing on several occasions being 15th February, 2021, 20th April, 2021, 12th June, 2021 and 15th November, 2021. On 16th March, 2022, the court was informed that the Applicant had been unable to trace the 2nd Respondent so as to serve the application upon him. They sought leave to serve the 2nd Respondent by Substituted Service but the court directed that they file a formal application in



- that regard specifying the mode to be used in the said service by 18th July 2022, failure to which the Appellant would have to Show Cause Why the appeal should not be dismissed for want of prosecution.
11. On 18th July, 2022, the Appellant's Counsel Mr. Naswa while holding brief for Mr. Mosi informed the court that the 2nd Respondent had been served and the court fixed the Notice of Motion application dated 24th September, 2020 for hearing on 18th October, 2022. However, on the said date, the parties did not appear and the court directed that a Notice to Show Cause to issue as per the directions issued on 16th March, 2021. The matter was fixed for hearing on 14th February, 2023.
 12. On 14th February, 2023 when the matter came up, the court was not sitting as the Judge was away. The matter was adjourned to 19th April, 2023 and since the trial Judge was still on leave, the matter was fixed for mention for 15th June, 2023. On this day, the 1st Respondent's counsel on his part stated that the appeal had taken too long to be prosecuted and it should be dismissed for want of prosecution.
 13. The court has considered the Replying Affidavit and the sentiments of the Counsel for the 1st Respondent, that the Appeal has taken too long to be prosecuted. The Appellant has attached letters dated 25th August, 2020 and then another dated 21st June, 2023. It is evident from the letters that since 2020, the Appellant did not follow up on the proceedings until 21st June, 2023 when it was served with the Notice to Show Cause.
 14. In this case, it is evident that the Appellant lodged this appeal in 2020. The Appellant has attached a letter dated 25th August, 2020 requesting for proceedings and did not issue any other letter until 21st June, 2023 when they were awoken from their slumber by a Notice to Show Cause. Therefore, it cannot be said that he was actively pursuing the typing of proceedings. Further, the directions of the court on 16th March, 2022 were clear that if by 18th July, 2022, the Appellant will not have taken any action then it would be required to show cause why the Appeal should not be dismissed.
 15. The court also notes that on 18th July, 2022, the parties were given a hearing date by the Deputy Registrar which was fixed for 18th October, 2022, on which date none of the parties were in attendance, and Notice to Show Cause issued. From the proceedings herein, it is clear that there was laxity on the part of the Appellant in following up on the issue of proceedings to have the appeal prosecuted and the reasons advanced by it are not sufficient to warrant the court's discretion, more-so in this instant where it is expected to balance the rights of the parties. It has been three years since the appeal was lodged and parties must be reminded of the maxim that 'Equity does not aid the indolent'.
 16. In the end, the appeal dated 18th September, 2020 is hereby dismissed for want of prosecution as per the provisions of order 42 rule 35 of the Civil Procedure Rules. And subsequently any stay orders in force are hereby lifted.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 19TH DAY OF SEPTEMBER, 2023.

D.O CHEPKWONY

JUDGE

In the presence of:

M/S Njeri holding brief for Mr. Mose for Appellant

No appearance for the Respondents

Court Assistant – Martin

