REPUBLIC OF KENYA

IN THE ENVIRONMENT& LAND COURT AT ELDORET

ELC APPEAL NO. 5 OF 2013

HENRY KHEJERI ..... APPELLANT/RESPONDENT

VERSUS

ELDOCHEM LIMITED.....RESPONDENT/APPLICANT

RULING

[NOTICE OF MOTION DATED 5TH MARCH, 2021]

1. The Applicant herein approached this Court by way of a Notice of Motion dated 5th March, 2021 seeking the following orders: -

   (a) **THAT** the Memorandum of Appeal dated 31st October, 2006 be struck out.

   (b) **THAT** the order of stay of execution granted on 15th March, 2010 herein be discharged and/or set aside.

   (c) **THAT** the balance of the decretal amount of Kenya Shillings four hundred and forty-seven thousand, one hundred and forty-six and ninety cents (Kshs.447,146.90/=) together with interest held in ABC Bank – Eldoret Branch Account number xxxxxxx in the names of **Hilary Kiplagat Chemitei** and **Wilson Kiplagat Kalya** be released to M/s Kalya & Company Advocates.

   (d) **THAT** costs be awarded at a higher scale.

2. The application is based on the ten grounds on the face of the motion marked **(1)** to **(10)**, among them being that, despite the Memorandum of Appeal being filed on 31st October 2006, and last being in court on 16th March 2010, the Appellant has not made any efforts towards prosecuting it; That the failure to prosecute the appeal amounted to a denial of the fruits of the judgment to the Applicant for over 10 years and 11 months; That the Applicant had consented to the stay of execution of the judgment and consequential orders of this court in good faith, but the continued failure by the Appellant to prosecute the appeal is inordinate, inexcusable, an abuse of the good faith and prejudicial to it.

3. The application is supported by the affidavit of **Pohland Kigen**, the manager of the Applicant, sworn on the 5th March, 2021. It is its case that it obtained judgment against the Appellant on 19th August, 1998 in ***Eldoret CMCC No. 98 of 1998 – Eldochem Limited vs Henry Khejeri T/A Sereni Chemists*** for a decretal sum of Kshs.228,153.23/=, but the Appellant in turn appealed the decision on 31st October, 2006 by filing a Memorandum of Appeal. That the Appellant further filed an application on 3rd November 2006, seeking for stay of the execution of the judgment of 19th August, 1998. That on the 16th March 2010, the parties filed a consent in respect of the application for stay of execution that among others required the Appellant to deposit the decretal sum of Kshs.261,723.00/= plus interests in a joint interest earning account in the name of both parties' counsel, and as at 11th February, 2021 the total amounted to Kshs.447,146.90/=. That since the 16th March 2010, the Appellant has never made any attempt to file and serve a record of appeal, or to obtain typed proceedings which should be construed as a lack of interest in prosecuting the appeal. That the Applicant sent a letter to the Appellant on the 19th October, 2010 requesting for the record of appeal but this has never been served or a response to the letter tendered to date. That on their part, the deponent avers that the Applicant made effort to get the appeal prosecuted, by writing a letter to the Deputy Registrar of the Court on 5th September, 2011 requesting the file be placed before a judge for dismissal though this effort was futile.

4. That despite the application being served as confirmed vide the affidavit of service sworn by J. K. Chesoo on the 15th March 2021, and filed in court on the 7th April 2021, no response in opposition has to date been filed.

5. That pursuant to the directions issued by the court on the 20th May 2021, the learned counsel for the Applicant filed the written submissions dated 15th October, 2021 in support of its application.

6. The following are the issues for the court's determinations;

(a) Whether the Applicant has established a reasonable case for the orders sought to be granted.

(b) Who pays the costs of the application?

7. That I have carefully considered the grounds on the motion, the affidavit evidence, the submissions filed, the superior courts decisions cited thereon, and come to the following findings;

(a) That from the heading on the Memorandum of Appeal, the grounds thereon, and the other annexures to the application, it is evident that an interlocutory judgement had been entered against the Appellant in the lower court matter on the 19th August, 1998. The court was subsequently moved and vide its ruling of 26th October, 2010 the draft defence filed was disallowed and judgement entered against the Appellant. That it is the appeal filed against this ruling that the Applicant seeks to be struck out, and the funds deposited under the consent order to be released to it as the Appellant has inordinately delayed in prosecuting it.

(b) That the Court of Appeal in ***Cecilia Wanja Waweru –V- Jackson Wainaina Muiruri & Another (2014), eKLR*** expounding on the concept of inordinate delay stated as follows: -

> ***"There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case. We are of the considered view that the learned judge in considering the application, should have looked at the appellant's conduct from the time the appeal was field up to the date the application for reinstatement was filed…***
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> ***We have to ask ourselves whether the failure by the appellant to prosecute the appeal in the High Court and/or the delay in filling the application for reinstatement constitute an excusable mistake or was it meant to deliberately delay the cause of justice... Why didn't she set the appeal down for hearing for almost 14 years? The reasonable explanation would be that the appellant had been indolent and had slept on her rights. She was only awakened from her slumber by the dismissal of the appeal."***

The issue was also been subject of consideration in the case of ***Paul Muthini Kimongo v Flex Pac International Limited [2019] eKLR*** wherein the court cited with approval the decision in ***Ivita Vs. Kyumbu (1984) KLR 441***, where Chesoni J, as he then, was held that;

> ***"The test is whether the delay is prolonged and inexcusable, and if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and the defendant, so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents and, or witnesses may be wanting and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however, satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time".***

That further, in the case of ***Mwangi S. Kimenyi Vs. Attorney General & Another (2014) eKLR,*** the court held that;

> ***"There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case, the explanation given for the delay; and so on and so forth nevertheless, inordinate delay should not be difficult to ascertain once it occurs, the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable....."***

That from the foregoing, the question of what amounts to an inordinate delay is a question of the facts and circumstances of the case at hand. The measure is whether the party whose delay is complained of, can justify that the delay was excusable and not aimed at frustrating the ends of justice. The prejudice occasioned by the delay on the party complaining should also be taken into account.

(c) That in the instant suit, the relevant facts and circumstances are as follows: that the Applicant herein obtained an interlocutory judgment against the Appellant for want of filing a defence in 1998; that the Appellant waited for about eight **(8)** years till 2006 to file a stay application and a draft defence; that when the matter came up in court four **(4)** years later in 2010, the Applicant consented to a stay being in place but in turn, that the Applicant deposits the decretal sum as security in an account jointly held by the Parties' counsel, and from March, 2010 to the writing of this ruling, a period of about eleven **(11)** years, eight **(8)** months, has lapsed. That cumulatively, the prosecution of the appeal of the decision of 19th August, 1998 has taken about twenty three **(23)** years and three months to commence. That period of time clearly amounts to an inordinate delay unless compelling and excusable explanations are presented.

(d) That the next question is whether the delay is excusable. The responsibility or obligation to explain the delay lay squarely with the Appellant who chose not to file a response to the application, though served. Had a response been filed, the reasons proffered for delay would have been considered by the court. That as no reasons have been presented to rebut the Applicant's contention on the issue, I find that the delay in prosecuting the appeal is not only inordinate, but inexcusable in view of **Article 159(2)(b) of the Constitution** that requires that in the exercise of judicial authority, justice shall not be delayed. This constitutional obligation finds

expression in **Sections 1A and 1B of the Civil Procedure Act, Chapter 21 of the Laws of Kenya**, that among others provides for expeditious resolution of disputes and timely disposal of proceedings respectively, and **section 19(1) of the Environment and Land Court Act No.19 of 2021** that obligates the court to act **"expeditiously"** in any proceedings to which the Act applies. The foregoing provisions of the Constitution and statutes shows clearly that the timely disposal of judicial proceedings is a key pillar of today's civil law litigation in our courts, and I find that the Appellant is in breach of this principal.

(e) That **Order 42 Rule 13(1) of the Civil Procedure Rules** provides a mandatory obligation on an appellant to, within 21 days of filing a memorandum of appeal, cause it to be listed for the giving of directions by a judge in chambers. It was the Appellant's duty to take the necessary steps to prosecute this appeal, but he has abdicated this duty for about 23 years. That in the circumstances, this Court finds that the Applicant has shown that the Appellant is guilty of inordinate and inexcusable delay in prosecuting the appeal. The Applicant being the decree holder in the lower court matter, and having been found successful in its application, is entitled to costs of this application and the appeal in terms of **section 27 of the Civil Procedure Act**.

8. That having found merit in the Applicant's notice of motion dated the 5th March 2021, the same is allowed and the following orders issued;

(a) That the Memorandum of Appeal dated the 31st October, 2006 is hereby struck out, and the stay of execution order of 16th March, 2010 is vacated forthwith.

(b) The Applicant, being the decree holder, is entitled to the fruits of its judgment. That accordingly, the decretal sum and all accrued interest held in ABC Bank – Eldoret Branch, Account number xxxxxx in the names of Hilary Kiplagat Chemitei and Wilson Kiplagat Kalya should be released to Applicant, through its counsel on record M/s Kalya & Company Advocates.

(c) The costs are awarded to the Applicant.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 8TH DAY OF DECEMBER, 2021.

S. M. KIBUNJA

ENVIRONMENT AND LAND COURT JUDGE

IN THE PRESENCE OF;

APPELLANT/RESPONDENT: ABSENT

RESPONDENT/APPLICANT: ABSENT

COUNSEL: M/S KIPKESEI FOR APPLICANT

COURT ASSISTANT: ONIALA