



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL APPEAL NO. 61 OF 2016**

**ELDORET EXPRESS CO. LTD..... 1<sup>ST</sup> APPELLANT**

**PHILIP CHANZU.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**ANGELA NYABOKE TINEGA.....RESPONDENT**

**RULING**

1. This is a ruling on **Notice of Motion** dated **24<sup>th</sup> January, 2020** seeking the following orders: -

**i. That this appeal be dismissed for want of prosecution.**

**ii. That costs be in the cause.**

2. Grounds on the face of the application are that the appeal was lodged more than two years ago and since then the Appellant has never taken any step to prosecute.

3. The application is supported by affidavit sworn by **Angela Nyaboke Tinega** filed on 5<sup>th</sup> February, 2020. She averred that the Respondent lodged this appeal on 27<sup>th</sup> May, 2007 and that it has now been more than 2 years since this matter was filed and no step has been taken to have it determined. That despite their efforts urging the Appellants to prosecute the appeal, no response has been received.

4. She further averred that her advocate wrote a letter dated 6<sup>th</sup> July, 2017 requesting the Appellant to serve Respondent's Advocates with record of appeal but they failed to do so and the Appellant's failure to take any steps to proceed with the appeal show lack of interest in this appeal and it is only fair and just to have the same dismissed with costs to the Respondent.

5. In response, the Respondent filed a replying affidavit on 22<sup>nd</sup> April, 2021 sworn by **Kelvin Ngure**. He averred that he instituted this Appeal on 27 April, 2017 through Memorandum of Appeal dated 24<sup>th</sup> May 2016 against the whole judgment by **Honorable Maranga**, Principal Magistrate at **Nakuru in CMCC No. 1123 of 2010**.

6. He further averred that the Appellants wrote to the Executive Officer of the trial court asking for the certified copies of the decree, judgment and typed proceedings to enable them file Records of Appeal but despite numerous follow ups, the proceedings were not availed on ground that the lower court file was missing in the court registry.

7. The Respondent submitted that due to Covid-19 pandemic which led to downscaling of court activities, they were unable to access the court premises in order to obtain certified court proceedings to enable them file the record of appeal and resulted in delay in prosecuting this suit.

8. He further averred that they had been advised by their advocates on record that the entire application had been brought under the wrong provisions of the law, as **Order 17 rule 2** does not provide for dismissal of appeals for want of prosecution and the same should be dismissed/struck out for being incompetent.

9. He further averred that the present appeal can only be dismissed for want of prosecution under **Order 42 Rule 35 (2)** of the **Civil Procedure Rule** if directions had been given as provided under **Section 79B**. That the Appeal is yet to be admitted in accordance with **Section 79B of the Civil Procedure Act** and without being admitted as such, no step can be undertaken in the appeal.

10. That since **Order 42 Rule 35(2)** is couched in mandatory terms, a party filing an application like the present one is considered to be usurping the duties of the Deputy Registrar. That further the said provisions cannot be complied with unless and until they obtain the typed

and certified copies of the proceedings, Judgment and/or Decree.

11. The Respondent averred that in the event that application is allowed, they will be prevented from ventilating their grievances and will heavily suffer prejudice and hardship despite having a viable and arguable appeal with high chances of success.

12. Parties herein agreed to canvas the application by way of written submissions by both parties.

### **RESPONDENT'S/APPLICANT'S SUBMISSIONS**

13. The Respondent/Applicant submitted that service upon the Appellants/Respondents of the subject application was done on 21<sup>st</sup> February, 2020 but they responded on 7<sup>th</sup> December, 2020 by filing a replying affidavit and submitted that other than the request for proceedings, the Appellants/ Respondents had not done any follow up to expedite prosecution of their appeal and five (5) years had lapsed without appeal being prosecuted.

14. The Respondent submitted that the Appellants has lost interest in their appeal and its pendency was causing her immense mental anguish and the appeal should not be left pending forever to her detriment and urged the court to allow the application with costs.

### **APPELLANTS/RESPONDENTS' SUBMISSIONS**

15. The Appellants/Respondents submitted that the court had not yet considered this appeal summarily with a view to admitting the same or summarily rejecting the same. That the lower court file from Makindu had also not been availed to this court to facilitate the admission process and cited the case of **Jurgen Paul Flach Vs Jane Akoth Flach, Nakuru Civil Appeal No.119 of 2012** where the court rightly stated that where directions had not been issued dismissal of an appeal for want of prosecution cannot be granted.

16. The Respondent further submitted that **Section 79B** of the Act is worded in mandatory terms meaning it is a step which must be undertaken by the court before the chain of events is triggered under **Order 42 Rules 12 – 35**; and cited the case of **UAP Insurance Company Limited vs. Washington Gatura Kimani [2016] eKLR** where **Njuguna J.** in agreeing with decision in **Kirinyaga General Machine vs. Hezekiel Mureithi Ireri [2007] eKLR** opined that **Order 35(1)** provides for a situation where three (3) months after issuance of directions under **Order 42 Rule 13** and no steps have been taken by the Appellant to fix the appeal for hearing, the Respondent can either fix the appeal for hearing or apply by summons for it to be dismissed and directions ought to have been given as provided under **Rule 79B** before the Respondent can move the court either to set the appeal down for hearing or to apply for dismissal for want of prosecution,

17. The Applicant/Respondent has not demonstrated what prejudice she is likely to suffer in the event that the Appellant is given more time to prosecute the appeal and stated that in the event this application is allowed as prayed, the Appellant stand to lose their constitutional right to appeal and to have their case heard and determined on its merits or if the same dismissed for want of prosecution.

18. The Appellants/Respondents submitted that they had not been indolent in prosecuting the appeal and that this court should therefore exercise its discretion and grant them more time to prepare, file their record of appeal and have the same disposed of on its merits; and if there is any delay, the same was not so inordinate as to warrant the appeal to be struck out entirely and it can be compensated by an award of costs.

### **ANALYSIS AND DETERMINATION**

19. I have considered averments and submissions herein and wish to consider whether the applicant has demonstrated that this appeal should be dismissed for want of prosecution. **Order 42 Rule 35(1)** of the **Civil Procedure Rules** provide as follows: -

**“Unless within three months, after granting 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.”**

20. Memorandum of appeal is dated 27<sup>th</sup> May, 2016. From the averments, besides request for proceedings, the Appellants/ Respondents had not done any follow up to expedite prosecution of their appeal and at time of filing this application, five (5) years had lapsed.

21. Even though the Respondent blames the court for failing to supply proceedings to enable him take steps in the appeal, I note that response to application for dismissal was filed on 22<sup>nd</sup> April 2021 and not 7<sup>th</sup> December as stated in the averments. That is a period of over a year taken to respond to the application for dismissal. No explanation has been given for the prolonged delay.

22. The Appellant's argument is that this application is premature as directions have not been given. The appellant has however failed to explain what steps he has taken to move the court to have the appeal admitted. In my view the appeal could not have been admitted before record of appeal had been prepared and filed. Apart from a letter requesting proceedings dated 30<sup>th</sup> September 2016, no other steps have been shown to move the appeal forward. The Deputy Registrar cannot admit appeal before record of appeal is filed.

23. The issue on delay has been well captured in the case of **Ikta v Kyumbu [1984] KLR 441** by laying down the test to be applied as follows: -

**“The test to be applied in application for dismissal for want of prosecution is whether the delay is prolonged and inexcusable, and if it is whether justice can still be done despite the delay.**

**Thus, even the delay is prolonged, if the court is satisfied with the plaintiff’s excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of the discretion of the court.”**

24. In my view the Appellant should not use compliance **section 79B** in situation where it is clear there is no effort to progress the appeal is shown by the Appellant. The Appellant should not hide in that technicality in a situation where it is clear no action has been taken by the Appellant for a long period. This appeal has been pending for about 5 years now and response to this application was filed after 10 months. The Appellant should not be allowed to hide under **Section 79B** of the **Civil Procedure Act**. I see merit in this application and do proceed to dismiss this appeal for want of prosecution.

25. **FINAL ORDERS**

- 1) **This appeal is hereby dismissed for want of prosecution**
- 2) **Costs of the appeal to the Respondent.**

Ruling dated, signed and delivered via zoom at Nakuru This **15<sup>th</sup> day of July, 2021**

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**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Schola/Jeniffer - Court Assistant

Mr. Thairu holding brief for Kabute for Appellant

Ms. Nyasetia holding brief Mr. Omboga for Respondent