



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**CIVIL APPEAL NO.04 OF 2020**

**GEOFFREY OMBACHI OMONDI.....APPELLANT/RESPONDENT**

**VERSUS**

**JOHN KANGU ANZOFU.....RESPONDENT/APPLICANT**

**RULING**

1. Before me is the notice of motion dated 1<sup>st</sup> March 2021 brought under Order 42 Rule 35(1) and (2) of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act. It was filed by the respondent/applicant seeking the following orders:

- a. That the Honourable Court does in exercise of its inherent jurisdiction set aside the stay of execution issued on 29<sup>th</sup> May 2020 and dismiss the appeal herein for want of prosecution.*
- b. That this Honourable court be pleased to order the release to the firm of M/s Wanyonyi & Muhia Advocates half of the decretal sum plus party and party costs of Kshs. 632,000/= deposited by the appellant/judgment debtor in a joint account together with all the accrued interest to date.*
- c. That this Honourable court be pleased to order the appellant/judgment debtor to pay the respondent all outstanding balance of the decretal sum, costs of the suit and accrued interest from the time of filing suit until payment in full.*
- d. That the appellant to pay costs of this application.*

2. The application is premised on the following grounds:

- i. That the appellant herein filed a Memorandum of Appeal dated 7<sup>th</sup> January 2020 against the judgment of the Honourable Magistrate D.O Mbeja (Mr) delivered on 13<sup>th</sup> December, 2019 in CMCC 6152 of 2018.*
- ii. That the appellant then proceeded to apply for stay of execution which stay was granted on condition that half of the decretal sum be paid to the plaintiff and that the defendant deposits the remaining balance of the decretal sum plus costs in a joint interest earning account.*
- iii. That half the decretal sum plus party and party costs of Kshs. 632,000/= was deposited in an interest earning account vide a cheque dated 10<sup>th</sup> September 2020.*
- iv. That it is now over a year and the appellant has not taken any steps to set the Appeal down for hearing since January 2020.*
- v. That the continued delay in the prosecution of the suit is a clear abuse of the court process and aimed at delaying the respondent from enjoying the fruits of his judgment.*

3. The application is supported by two affidavits sworn by **Ms. Salome Beacco** counsel for the respondent/applicant, on different dates. In the supporting affidavit sworn on the date of the application, she averred that the failure to prosecute the appeal has greatly prejudiced the plaintiff/respondent as he cannot enjoy the fruits of the judgment. (Annexed and marked exhibit "SB 1" is a copy of the Memorandum of Appeal)

4. That it would be just that the stay of execution pending appeal issued on 29<sup>th</sup> May 2020 be set aside. It is therefore in the interest of justice that the prayers sought be granted and all the funds plus interests accrued to date be released forthwith to the plaintiff/respondent.

5. In her supplementary affidavit sworn on 12<sup>th</sup> April 2021 Ms. Salome Beacco, averred that the appellant/respondent alleges the delay had been caused by shutting down of courts due to the Covid-19 pandemic and the huge backlog of requests for proceedings, yet courts resumed normal operations in June 2020 and have been in operation ever since.

6. She avers that the respondent/appellant had by a letter requested for typed proceedings in January way before the covid pandemic hit the country in March. She depones that they have never written any other letter to the court registry or follow up on the same.

7. She depones that it is the duty of the appellant to cause the appeal to be listed for directions before a judge after serving the memorandum of appeal and serving the record of appeal. She further avers that there has been inordinate and inexcusable delay in setting down the appeal for hearing which amounts to abuse of the court process.

8. A replying affidavit sworn by **Mr. John K. Njuguna** counsel for the respondent/appellant on 5<sup>th</sup> March 2021 was filed in opposition to the application. He averred that the appellant had applied for typed proceedings and judgment which the trial court was yet to finalize, which is not their fault.

9. He avers that the delay of the issuance of the proceedings has been caused by the following factors that are beyond their control i.e. the Covid 19 pandemic which led to the shutting of the courts, no physical court attendance, closure for fumigation of the courts which hampers typing of proceedings and the huge backlog of requests for proceedings at the typing pool.

10. He further avers that this application is premature as the High court is yet to admit the appeal or give directions as required by Order 42 Rule 35 of the Civil Procedure Rules. It is therefore not their fault and there has been no inordinate delay in prosecuting the appeal. He believes that the respondent's application is without merit and should be dismissed.

11. In a further affidavit sworn on 16<sup>th</sup> April 2021 the respondent/appellant, annexed "JNK2" copies of the consent letter executed by the respondent dated 20/08/2020, the ruling of the trial court granting stay of execution dated 29/05/2020 and the judgment of the trial court dated 13/12/2019.

12. Directions were given for the application to be disposed of by way of written submissions, which was complied with by both parties.

13. Learned counsel for the applicants –Ms. Beacco submitted that this court has inherent jurisdiction to dismiss this appeal for want of prosecution under Order 42 Rule 35(2) of the Civil Procedure Rules. She submits that the reasons advanced by the appellant for the delay are not convincing, as he has a duty to prosecute this appeal to its final conclusion.

14. She relied on the decision by Justice D.A Onyancha in **Protein & Fruits Processors Limited & Another vs Diamond Trust Bank Kenya Limited (2015) eKLR** for dismissal of an appeal for want of prosecution. He invoked **Section 3A of the Civil Procedure Act and Article 159(2)(b)** of the Constitution in order to meet the ends of justice and prevent abuse of the court process where the appellant had not taken any steps in prosecution of an Appeal three years after filing a memorandum of appeal.

15. She further submitted that it is the duty of the appellant to cause the appeal to be listed for directions before a judge after serving the memorandum of appeal and serving the record of appeal. She argued that the court could only have given directions after the filing of the record of appeal, which the appellant has never done.

16. She relied on decision by Githua J in Juma **Hamilton v Martin Kithuvi (2019) eKLR** where the Judge held that even where directions have not been given, the court can dismiss an appeal which amounts to abuse of the court process. She stated as follows: -

*"I hold a contrary opinion. My view on the matter is similar to the one expressed by Onyancha J in **Protein & Fruits Processors Limited & Another v Diamond Trust Bank Kenya Limited, (2015) eKLR** in which he stated that this court can in appropriate cases exercise its discretion and inherent power to dismiss any appeal which amounts to an abuse of the court process where the ends of justice so require."*

17. She further relied on the case of **Malonza Maiko v James Kisilu Mangeli (2017) eKLR** where Angote J in holding that a court can dismiss an appeal where directions have not been issued stated as follows:

*"Indeed, Order 42 Rule 35(2) of the Civil Procedure Rules allows the court on its own motion to dismiss a memorandum of appeal if it is not set down for hearing within one (1) year. If the court can dismiss a memorandum of appeal that has not been set down for hearing within one (1) year, it follows that a party can apply for the dismissal of a memorandum of appeal that has not been set down for directions or hearing within one (1) year."*

18. She further submitted that the court still has power to dismiss an appeal where directions have not been issued and where the appellant has been indolent in setting down the appeal for directions. She relied on **Section 3A Civil Procedure Act** provides:

*"Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."*

19. In rebuttal, Mr. Njuguna for the appellant/respondent submitted that they believe that the power to review an order can only be exercised by the trial court on Review under Order 45 of the Civil Procedure Rules 2010 and on Appeal under Order 42 of the Civil Procedure Rules. Counsel contends that this application does not qualify for review under Order 45 of the Civil Procedure Rules as it was not filed in the trial court.

20. Counsel submitted that the Registrar on most occasions has informed parties that a matter will only be listed for directions when the lower court file has been availed and the record of appeal has been filed. Further this procedure has been adopted by the Civil Appeal registry at Milimani Law Courts.

21. He relied on the case of **Njai Stephen v Christine Khatiala Andika (2019)** which held thus:

*“Notably, the procedure for rejection and/or admission of appeal and giving of directions is very well set out in the Civil Procedure Rules. However, this procedure does not seem to be strictly followed and differs from one court to another. In the Civil Division Milimani Law Courts, the Registrar issues the notice for admission and directions of appeal after the High Court receives the file and lower court proceedings. The appellant does not seem to have any role in fixing the appeal for directions as contemplated under Order 42 Rule 11 of Civil Procedure Rules and Order 42 Rule 13 (1) of the Civil Procedure Rules. It is important to point out that under Order 42 Rule 13 (4) of the Civil Procedure Rules, the judge shall not allow a matter to proceed for hearing unless the record of Appeal is duly filed.”*

22. He further relied on the case of **Juma Hamilton vs Martin Mutua Kithuvi (2019) eKLR** in which Justice Githua declined to strike out the Appeal and stated as follows: -

*“Even if the respondent had filed his record of appeal, the appeal would still not have been admitted and no step would have been taken towards its prosecution since the original record of the lower court is yet to be forwarded to this court. It is worth noting that the responsibility of calling for the original record of the lower court rests on the court’s Deputy Registrar and not on the appellant.”*

23. Counsel submitted that the first option on the dismissal of suits is **Order 42 Rule 11 of the Civil Procedure Rules** which is read together with Rules 12 and 13 and in particular Order 42 Rule 13(4) states as follows: -

*“Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are court record”*

*i. The Memorandum of Appeal*

*ii. The Pleadings*

*iii. The notes of the trial magistrate made at the hearing;*

*iv. The transcript of any official shorthand, typists notes, electronic recordings or palantypists notes made at the hearing.*

*v. All affidavits, maps and other documents whatsoever put in evidence before the magistrate.*

*vi. The judgments order or decree appealed from and where appropriate the order giving leave to appeal.*

24. Counsel further gave the second option as provided under **Order 42 rule 35 (2) of the Civil Procedure Rules** states that;

*“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.”*

25. On the grant of stay of execution, Counsel contends that it protects the interests of both parties, ensures that the respondent has partial access to the fruits of judgment and the respondent has a right to a fair trial by way of appeal under Article 50 of the Constitution which is protected.

26. He further submitted that the outstanding amount is being held as security for the appeal and releasing it will render the appeal nugatory. That in the event the appeal is dismissed at this stage the appellant will suffer prejudice and on the other hand the injury caused by the delay on part of the appellant is compensatable by way of payment of costs.

27. He urges the court to be persuaded by the words of Lady Justice Kamau who held **Njai Stephen v Christine Andika (2019) eKLR** as follows:

*“It therefore follows that every person ought not to be shut out from accessing court or having his day in court. Indeed, the right of a party to enjoy the fruits of his judgment must be weighed against the right of a party to access court to have his dispute heard and determined by a court or tribunal of competent jurisdiction.”*

### **Analysis and Determination**

28. Upon considering the notice of motion, affidavits, annexures, authorities and the submissions by the counsel, I find this application to be

raising the following issues for determination by this Court;

a. *Whether setting aside the order staying execution and dismissal of the appeal will prejudice the appellant.*

b. *Whether the appellant has offered a reasonable explanation for the delay.*

29. The applicant relied on **Order 42 Rule 35(2) of the Civil Procedure Rules** which he says allows the court on its own motion to dismiss a memorandum of appeal if it is not set down for hearing within one (1) year.

**Order 42 rule 35 (2) of the Civil Procedure Rules** states that;

*“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.”*

30. The respondent/applicant wants the appeal to be dismissed for want of prosecution, because it has been one year since the filing of the appeal. He argues that he is being denied the right to enjoy the fruits of the judgment.

31. In assessing any prejudice caused to the respondent/applicant by the delay, the court should also assess the likely prejudice the dismissal of the appeal will cause the appellant/respondent. See **Allen vs Alfred Mcalpire & Sons (1968) IALLER 543, Agip Kenya Ltd vs Highlands Tyres Ltd (2001) KLR 630 & Birket vs James (1978) A.C 297.**

32. It is clear that the prejudice to the appellant/respondent may only be ascertained by looking at the following among others: the nature of the case e.g. public litigation or representative suit; importance of the claim or subject matter, legal capacity of parties, rights of the parties in the suit etc.

33. On the other hand the appellant/respondent finds it to be unfair if he is not allowed to proceed with the appeal since his rights will have been infringed. He further gave various reasons for this delay, one being the Covid 19 pandemic, the delay of getting the typed proceedings from the trial court and closure of courts for purposes of fumigation.

34. On whether there has been inordinate delay on the part of the appellant/respondent in prosecuting the case, the record speaks for itself. Is the delay justifiable, considering the fact that this appeal is for 2020? The fact that the appellant/respondent has continued to follow up on the typed proceedings and judgment shows his interest in the matter. It is also not lost to this court’s mind that the Covid 19 pandemic has had a negative impact on a number of services in Milimani Law Courts.

35. The court in **Ivita Vs Kyumba (1984) KLR 441** stated thus: -

*“The test applied by courts in the application for dismissal of a want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus even if the delay is prolonged, if the court is satisfied with the plaintiff’s excuse for 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”*

36. I am further guided by the case of **Utalii Transport Company Limited & 3 others vs Nic Bank & another (2014) eKLR** where the court stated that:

*“...whereas there is no precise measure of what amounts to inordinate delay, and whereas what amounts to inordinate delay will differ from case to case; the nature of the case...caution is advised for courts not to take the word inordinate in its ordinary meaning....”*

37. The appellant/respondent was granted the stay of execution on condition that he pays half the decretal sum. He paid Kshs. 632,000/= plus costs which is earning interest pending the hearing and determination of the appeal. The respondent/applicant has acknowledged that vide a letter dated 14<sup>th</sup> September 2020.

38. The respondent wants to be paid the full amount due to the delay. In my opinion the depositing in an interest earning account half of the decretal sum by the appellant is a commitment that he will pay the full amount if the appeal goes either way. Further, it is a form of security so as to make the respondent/applicant feel safe that they will not be prejudiced in any way.

39. I further rely on cases of **Amal Hauliers Limited Vs Abdulnasir Abukar Hassan {2017} eKLR** and **Butt V Rent Restriction Tribunal (1982) KLR 417**. In the latter case the court of Appeal gave the following guidelines on the issue;

i. *The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.*

ii. *The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.*

iii. *A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.*

*iv. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.*

*v. The court in exercising its power under Order 42 rule 6(2)b of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”*

40. The willingness by the appellant/respondent to pay half the decretal sum deposited in a joint interest account for a conditional order of stay of execution protects both parties as one has partial fruits of his judgment and the other has a right to a fair trial by way of appeal under Article 50 of the Constitution. I also wish to confirm to both parties that this court received the original record plus typed proceedings from the lower court on 9<sup>th</sup> June, 2021. Steps should now be taken for purposes of admission of the appeal and directions being taken.

41. In the final analysis I find that the application dated 14<sup>th</sup> March 2021 lacks merit and is dismissed with costs.

**DELIVERED ONLINE, SIGNED AND DATED THIS 6<sup>TH</sup> DAY OF JULY 2021 AT MILIMANI, NAIROBI BY:**

**H. I. ONG’UDI**

**JUDGE**