



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**CIVIL APPEAL NO.444 OF 2019**

**JULIUS MAINA MWANGI.....1<sup>ST</sup> APPELLANT/ RESPONDENT**

**BOARD OF GOVERNORS**

**NEWLIGHT JUNIOR.....2<sup>ND</sup> APPELLANT/ RESPONDENT**

**VERSUS**

**MARY WANJIKU MUKAMI.....1<sup>ST</sup> RESPONDENT/APPLICANT**

**MUTAI JIMSON LONGIRO.....2<sup>ND</sup> RESPONDENT**

**ALEX MUNGAI.....3<sup>RD</sup> RESPONDENT**

**FRANCIS MWANGI.....4<sup>TH</sup> RESPONDENT**

**STANLEY NGARUIYA MBURU.....5<sup>TH</sup> RESPONDENT**

**RULING**

**1.** The application for consideration is the 1<sup>st</sup> respondent's notice of motion dated 29<sup>th</sup> March 2019, brought under **Order 42 rule 35 (1&2)** of the **Civil Procedure Rules, Section 3A of the Act, Cap 21 Laws of Kenya** and all other enabling provisions of the law. The application seeks the following orders:

*a) That the appellants' appeal and/or memorandum of appeal filed herein be dismissed with costs for want of prosecution.*

*b) That costs of this application be borne by the appellants.*

It is supported by the grounds on its face which could be summarized as follows:

*a) That the appellants have taken no steps to set down the appeal for hearing since 2<sup>nd</sup> August 2019, a period of over one (1) year.*

*b) That the delay by the appellants to take steps to set a hearing date is inordinate, unreasonable in the circumstances.*

*c) That it is in the interest of justice that litigation must come to an end.*

**2.** The application is supported by an affidavit by the applicant's counsel Mr. Gachoka Mwangi sworn on 3<sup>rd</sup> February 2021. He deponed that the appellant has stalled the matter for one and half years that is from 2<sup>nd</sup> August 2019 when the memorandum of appeal was filed.

**3.** He avers that the appellants/respondents are no longer interested in prosecuting the appeal which has caused the respondent great prejudice having to wait for the determination of the matter indefinitely. He further avers that the unnecessary delay by the appellant is denying the 1<sup>st</sup> respondent her lawful right to reap fruits of judgment.

**4.** In opposition to the application, the appellants/respondents' counsel Mr. Dave Khamala swore a replying affidavit on 2<sup>nd</sup> June 2021. He

deposed that the delay in filing the record of appeal had been occasioned by a delay from the lower court in preparing the typed and certified proceedings and Judgement.

5. He avers that they had been advised to pay a sum of Kshs. 3,480/= on 25<sup>th</sup> March 2021 for the typed proceedings and check on them after two weeks but the same had not been finalized. He further avers that his constant follow ups to the registry bore no fruits as the staff were overburdened and the proceedings were in a draft copy awaiting proof reading.

6. He contends that the delay in prosecuting the appeal is not on the appellants but the lower court for failing to supply the typed proceedings. He further avers that in the interest of justice the application should be dismissed and the lower court to be compelled to hasten the finalization of the typing and certifying the proceedings to enable determination of the appeal to its logical conclusion.

7. The 1<sup>st</sup> respondent/applicant through his advocate Mr. Gachoka Mwangi submitted that the appeal arises from a lower court matter filed on 2/2/2012 which proceeded by way of formal proof and judgment was delivered. After the judgment the defendants who are now the appellants made an application to set it aside which was allowed and a interparte judgment after hearing both sides was delivered on 2/7/2019.

8. Counsel submitted that even after the 2<sup>nd</sup> judgment for a modest sum was delivered the appellants still went ahead and moved the court by way of an appeal which was filed on 2/8/2019 and went into limbo. For two years nothing has been done to have the appeal finalized. He further submitted that it has taken nine years without the matter being determined yet the applicant has been taking steps in the matter and as such the application is not merited.

### **Analysis and Determination**

9. Upon considering the notice of motion, both affidavits, annexures, authorities and the oral submissions by the counsel, I find this application to be raising the following issues for determination by this Court;

a) *Whether the dismissal of the appeal will give rise to substantial risk to fair trial or cause serious prejudice to the appellants/respondents.*

b) *Whether the appellants/respondents have offered a reasonable explanation for the delay in prosecuting the appeal.*

10. In assessing any prejudice caused to the 1<sup>st</sup> respondent/applicant by the delay, the court should also assess the likely prejudice the dismissal of the appeal will cause the appellants/respondent. Factors to be considered would include: the nature the case, importance of the claim or subject matter, legal capacity of parties, and their rights. See **Allen Vs Alfred Melphine & sons {1968} 1 all ER 543; Agip Kenya Ltd Vs Highlands Tyres Ltd {2001} KLR 630; Birket Vs James {1978} A.C 207.**

11. Counsel for the appellant/respondent has submitted that the delay was occasioned by the fact that the lower court registry had not supplied them with the typed proceedings as they had requested. This is after so many visits to the registry and even paying a sum of Kshs.3480/= for the proceedings but the same had not been finalized.

12. On the other hand the 1<sup>st</sup> respondent/applicant is of the view that the appellants are not serious with the appeal because it has been two (2) years since the filing of the same which has not proceeded thus denying the applicant his fruits of the judgment.

13. On whether there has been inordinate delay on the part of the respondent/appellant in prosecuting the case, the record speaks for itself. Is the delay justifiable? Considering the fact that this is an old matter of 2012 in itself confirms undue delay. The fact that the appellants/respondents have continued to follow with the lower court registry over the typed proceedings shows their interest in the matter. The court in **Ivita –VS- Kyumba (1984) KLR 441** stated thus: -

*“The test applied by courts in the application for dismissal of a suit for 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 ....”*

14. In the case of **Utalii Transport Company Limited & 3 Others vs NIC Bank & Another (2014) eKLR** the court held;

*“.. 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 depending on the circumstances of each case; the subject matter of the case; the nature of the case ... caution is advised for courts not to take the word inordinate in its ordinary meaning ...”*

15. It is true that the forwarding of the file from the lower court has taken too long a process for which the appellants are not to blame. I however, wish to confirm that the original record and typed proceedings from the lower court have been received by this court. I therefore in the interest of Justice find it just to give the appellants an opportunity to process their appeal with no further delays.

16. I therefore disallow the application dated 29<sup>th</sup> March 2021.

i) I direct that the Appeal be processed immediately for purposes of admission and hearing

ii) Costs in cause

**DELIVERED ONLINE, SIGNED AND DATED THIS 7<sup>TH</sup> DAY OF JULY, 2021.**

**H. I. ONG'UDI**

**JUDGE**