



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CIVIL APPEAL NO. 10 OF 2019

(CORAM: F.M. GIKONYO J.)

(Being an appeal from the judgment of Hon W. Juma (C.M))

Delivered on 28th March 2019 in Narok CMCC No. 222 of 2014)

THUGE CAROLINE.....1ST APPELLANT/RESPONDENT

FRANCIS NGANGA.....2ND APPELLANT/RESPONDENT

SAMUEL NDANI KAMAU.....3RD APPELLANT/RESPONDENT

VERSUS

KIMANI NGANGA KAGO.....RESPONDENT/APPLICANT

RULING

Dismissal for want of prosecution

1. Before me is a Notice of Motion dated 3rd September 2020 brought under Orders 17 Rule 2(3), 51 Rule 1 of the Civil Procedure Rules 2010 and Section 3 A of the Civil Procedure Act and all other enabling provisions of the law. The application is seeking the following orders:

i. That this honourable court be pleased to dismiss the instant appeal for want of prosecution.

ii. That costs of this application be borne by the Respondent/Appellants.

2. The application is premised on grounds set out in the motion, the supporting affidavit of advocate **Mongare Gekonga** and arguments presented to court. The major argument is that the respondents have not taken any significant step to prosecute the appeal since they filed the memorandum of appeal on 2nd May 2019. The Respondents were awakened by this application for dismissal of the appeal for want of prosecution.

3. To them, it seems that the Respondents have lost interest in this matter and are guilty of lethargy and inertia. According to the applicant, even the letters written by the respondents to the executive officer seeking to be provided with typed proceedings were written three months after the filing of the memorandum of appeal. The said letters are annexed to the replying affidavit and are dated 31st August 2019 (but was filed on 2nd September 2019) and 4th September 2020.

4. They also took issue with the replying affidavit which they say was sworn by **Kevin Nguire**, the claims manager at Direct Line Assurance Company Limited who is a complete stranger to these proceedings.

5. Citing Article 159(2) of the Constitution 2010, the applicant stated that justice is to be done to all and without delay. They think this appeal is meant to delay the applicant from enjoying the fruits of his judgment which he has been waiting for since 28th March 2019.

6. In sum, the applicant considers the delay herein to be inordinate and inexcusable, and have asked the court to prevent any further prejudice being occasioned upon the applicant from the indolence of the Respondents by dismissing the appeal in order to enable the applicant to realize the fruits of his judgement.

7. The applicant relied on the case of *Nazish Motors Ltd & 3 Others V Veronicah Nyambura Maina [2019] eKLR*

Appellant: we are diligent suitors

8. The Respondents opposed the application dated 3rd September 2020 through the replying affidavit sworn by **Kevin Ngure** on 09/10/2020. The appellants set out the grounds which have made it impossible to prosecute the appeal. They argued that the delay has been occasioned by failure of the trial court to furnish the Respondents with certified copies of judgment, typed proceedings and decree.

9. The respondents also lamented that directions on the appeal have not been given under Section 79B of the Civil Procedure Act. Based on this state of affairs, they take the view that; (i) the application for dismissal for want of prosecution is pre mature; and (ii) Order 42 Rule 35 and the principle thereto is not applicable in this appeal. They relied on the case of *Jurgen Paul Flach Vs Jane Akoth Flach, Nakuru Civil Appeal No. 119 Of 2012, Kirinyaga General Machinery Vs Hezekiel Mureithi Ileri [2007] eKLR, Allan Otieno Osula Vs Gurdev Engineering & Construction Ltd [2015] eKLR*

10. The Respondents claim to have been pro- active and undertook requisite steps in the disposal of the appeal by following up the typing of proceedings. On 1st December 2017 the appellants' advocates wrote to the executive officer at Narok law courts requesting for typed proceedings to enable them prepare and file a record of appeal.

11. That the function of typing proceedings is squarely an administrative issue of the trial court that the Respondents have no control of. They invited this court to look at the backlog of files pending for typing of proceedings at the lower court registry and allow the appellant's time to follow up on the same. That it would not be in the interest of justice to punish a party for failure to obtain typed proceedings which action lies in the purview of court.

12. That there is no prejudice at all to be suffered by the applicant as conditions for stay of execution pending hearing of the appeal were fully complied with. The sum of **Kshs. 938,816.00** being half the decretal award was paid to the applicant and the other half being **Kshs. 938,816.00** deposited in court as security pending hearing and determination of the appeal. The Respondents stand to suffer prejudice in the event that the appeal is dismissed for want of prosecution since the appellants would have lost their right to appeal.

13. That the Respondents' appeal has merits as demonstrated in the memorandum of appeal and in the event that the applicant's application is allowed as prayed the Respondents stand to lose their constitutional right to appeal and the right to have their case heard and determined on its merits as opposed to having the same dismissed for want of prosecution. That this court has pronounced itself on diverse occasions on striking a balance between the competing rights of the rival parties as the scenario therein. They cited the case of *Njai Stephen V Christine Khatiala Andika [2019]eKLR.*

14. The Respondents submitted that the hardship and prejudice likely to be occasioned to the Appellants in this matter is greater than the hardship to be occasioned to the Applicant since the Respondents will lose their opportunity to prosecute their appeal and have the same determined on its merits. the Respondents submitted that the applicant has not demonstrated any prejudice if any, that they are likely to suffer in the event that the Respondents are given more time to prosecute their appeal

15. Therefore, the applicant's application herein lacks merit as the applicant has failed to demonstrate why the appeal herein should be dismissed. That the application is grossly misconceived and pre mature and the Respondents pray that the application be dismissed with costs to the Respondents.

16. On 20/01/2020 this matter came up for hearing. This court directed that the application be disposed of by way of written submissions.

ANALYSIS AND DETERMINATION:

Issue

17. Should this court strike out the memorandum of appeal and the record of appeal and consequently dismiss the appeal?

Of loathed delay

18. William Shakespeare, in *Hamlet Act III*, lamented:

“The Law's delay' is one of whips and scorns of time.”

19. Likewise, in *The Bar Review Journal Ireland* Vol. 13 Issue No.4 of 4.7.2008, a contributor, Thomson, in an article on delay, informed consents/employment injunctions observed that:

“The prolonged nature of modern litigation continues to be a source of torment; indeed, lengthy delays may make it impossible for a defendant to receive a fair trial”.

20. Our own Constitution of Kenya, 2010 in Article 159(2)(b) provides as a principle of justice, that:

“Justice shall not be delayed.”

21. Today, expeditious disposal of cases is embraced as a principle of justice. Parties now bear statutory obligation under the principle of Overriding Objective under the Civil Procedure Act and Civil Procedure Rules to assist the court to dispose of cases expeditiously. Therefore, delay which causes injustice should found a dismissal of a suit. Nevertheless, not to be forgotten is the constitutional emphasis on serving substantive justice to the parties. This is the philosophy which shapes our understanding of court's power to dismiss cases for want of prosecution.

Dismissal of appeal for want of prosecution

22. Dismissal of an appeal for want of prosecution is specifically provided for under Order 42 Rule 35(1) 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.”

23. Notably, the procedure for rejection and/or admission of appeal and of giving of directions in the Civil Procedure Rules is driven by the court. The Registrar's notice is required in some of the steps. Of significance is that admission or rejection of or directions on the appeal is possible only after the High Court has received the trial court's file and proceedings. See also Order 42 Rule 13 (4) of the Civil Procedure Rules, that the appeal shall not be heard unless the record of Appeal is duly filed.

24. Subject to the foregoing, the appellant bears the responsibility of ensuring the appeal is heard expeditiously. I do note also that under Order 42 Rule 13 of Civil Procedure Rules, where the appellant fails to fix the appeal for hearing, the respondent may fix the same for hearing and/or seek dismissal of the same for want of prosecution under Order 42 Rule 35 (1) of the Civil Procedure Rules or the registrar lists the appeal before a judge for dismissal under Order 42 Rule 35 (2) of Civil Procedure Rules

25. In this case;

- (a) The court has not given directions on the appeal;
- (b) There is no indication that the Registrar has issued a notice under Order 42 Rule 12 of Civil Procedure Rules; and
- (c) The original trial court's file and typed proceedings have not been forwarded to this Court.

. In such scenario, care should be taken not to be quick in dismissing such appeal for want of prosecution- it is only just to first establish the status of the appeal in so far as the requirements in law are concerned before condemning the appeal to the abyss.

26. In saying so, I appreciate the respondent's application is a *bona fide* quest to bring litigation to closure. I also do not take for granted arguments by learned counsel for the respondent that, since filing of memorandum of appeal no positive or significant step that has been taken by the appellants to prosecute the appeal. I do note, however, that Mr. Ngunjiri attributed the delay herein to the trial court's failure to supply the proceedings and judgment in time despite having applied for them.

27. In light of court's observations above, the applicable test is as was aptly put in the case of *Ivuta v Kyumbu [1984] KLR 441*: -

“...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.”

28. It bears repeating that, Courts should always strive to serve substantive justice by hearing cases on merit rather than dismissing them summarily. The latter action is painful as it deprives a party the right to be heard on the merits of his case. The discretion to dismiss suit should therefore be exercised sparingly and in clear cases. This principle recognizes the fundamental rights, and obligation of court of law to do substantive justice between the parties.

29. Although the memorandum of appeal was filed on 17/4/2019- over one year- no directions have been taken before a judge in chambers under section 79B of the Civil Procedure Act. The Respondents have indicated that they managed to obtain copies of typed proceedings and prepared the record of appeal. Ordinarily, an appeal will not be dismissed if the court is satisfied that the failure to set the appeal down for hearing within the prescribed time has been caused by the inability of the appellant or his advocate to obtain a copy of the judgment or order appealed against, and a copy of the record, or proceedings within a reasonable time of applying to the court therefor. In the circumstances, I will spare the appeal the hangman's noose. I dismiss the application dated 3rd September 2020. Costs shall be in the cause.

30. However, to avoid further delay in the appeal, I give the following directions: -

- a) The Deputy Registrar shall forward to this court, the original trial court's record together with typed proceeding.

b) The appeal be canvassed by way of written submissions. The Appellants to file and serve submissions in 30 days. Upon service, the respondent to file and serve submissions within 30 days thereof.

c) Mention on 14/12/2021.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 22ND DAY OF SEPTEMBER 2021

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F. GIKONYO M.

JUDGE

In the presence of:

1. M/s Kabete for the Respondent

2. M/s Oganga for the Appellant

3. Mr. Kasaso – CA

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F. GIKONYO M.

JUDGE