



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 16 OF 2018**

**WINSTAR SECURITY GUARDS LTD.....1<sup>ST</sup> APPELLANT**

**THE BELLA VISTA HOTEL AND RESTAURANT.....2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**NATHAN MULUPI INDIMULI.....RESPONDENT**

**RULING**

1. The application before me is a Notice of Motion dated 18<sup>th</sup> February, 2020 brought under the provisions of Sections 1A, & 3A of the Civil Procedure Act and Order 42 Rule 35(2), Order 51 Rule 1 of the Civil Procedure Rules, 2010, Article 165 sub-articles (6) and (7) of the Constitution of Kenya and all enabling provisions of the law. The respondent seeks the following orders-

(i) That this Honourable Court be pleased to dismiss the appeal dated 16<sup>th</sup> February, 2018 and filed on 16<sup>th</sup> February, 2018 for want of prosecution; and

(ii) That costs of this application and the appeal be borne by the appellant.

2. The application is brought on the grounds on the face of it and is supported by an affidavit sworn on 11<sup>th</sup> March, 2020, by Nathan Mulupi Indimuli, the respondent herein. In opposition to the said application, on 26<sup>th</sup> October, 2020, K.N Kibara, an Advocate representing the 2<sup>nd</sup> appellant filed a replying affidavit sworn on the same day.

3. The application was canvassed by way of written submissions. The respondent's submissions were filed on 19<sup>th</sup> April, 2021 by the law firm of M. Ananda & Company Advocates, while the 2<sup>nd</sup> appellant's submissions were filed on 19<sup>th</sup> July, 2021 by the law firm of Muturi, Gakuo & Kibara Advocates.

4. Mr. Ananda, learned Counsel for the respondent submitted that the 2<sup>nd</sup> appellant filed a memorandum of appeal on 16<sup>th</sup> February, 2018 but no steps had been taken to prosecute the said appeal for more than 3 years. He submitted that the lower Court judgment was entered in favour of the respondent on 19<sup>th</sup> January, 2018 and that the 2<sup>nd</sup> appellant was enjoying a stay of execution, which was granted by consent. He also submitted that no concrete effort had been made since the year 2018 to have the proceedings of the lower Court typed and to have the appeal listed for hearing under the provisions of Order 42 Rule 11 of the Civil Procedure Rules. He stated that as such, this Court cannot act on the appeal in accordance with the provisions of Section 79B of the Civil Procedure Act. He indicated that it was clear that the 2<sup>nd</sup> appellant has lost interest in prosecuting the appeal herein and the same should be dismissed for want of prosecution, with costs to the respondent.

5. He submitted that the letters dated 21<sup>st</sup> February, 2018, 13<sup>th</sup> April, 2018 and 30<sup>th</sup> May, 2018 relied on by the 2<sup>nd</sup> appellant, were written more than three years ago and had not been followed up by any tangible efforts by the said appellant thus it did not amount to sufficient grounds. Mr. Ananda relied on the case of **Mwangi S. Kimenyi v Attorney General & another** [2014] eKLR, Misc Civil Suit No. 720 of 2009, where the Court held that the exercise of the Court's discretion should be guided by whether the delay has been intentional and contumelious; whether the delay or the conduct of the plaintiff amounts to an abuse of the Court process; whether the delay is inordinate and inexcusable; whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or is likely to cause serious prejudice to the defendant; and what prejudice the dismissal will cause to the plaintiff.

6. Mr. Kibara, learned Counsel for the 2<sup>nd</sup> appellant relied on the case of **John Harun Mwau v Standard Limited & 2 others** [2017] eKLR, in which the Court of Appeal while allowing the appellant to prosecute its appeal quoted the case of **Ngwambu Ivita v Akton Mutua Kyumbu** (1984) KLR 441, where it was held that even if 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.

7. He submitted that the Trial Court on 19<sup>th</sup> January, 2018 delivered judgment in SRMCC No. 240 of 2015 in favour of the respondent herein and the 2<sup>nd</sup> appellant being dissatisfied by the said judgment lodged a memorandum of appeal on 16<sup>th</sup> February, 2018.

8. It was submitted by Mr. Kibara that the 2<sup>nd</sup> appellant had on numerous occasions requested the Trial Court's Registry to supply them with typed and certified copies of the proceedings and judgment to enable them file the Record of Appeal but they had not responded on the issue to date. He indicated that the 2<sup>nd</sup> appellant had been unable to fix the matter for mention before the Deputy Registrar for directions on how to proceed with the appeal. Mr. Kibara invited this Court to take judicial notice of the Covid-19 pandemic that caused the scaling down of Court operations in the year 2020 and as such, the 2<sup>nd</sup> appellant had not inordinately delayed the pursuit of this appeal. He further submitted that the delay which had been explained was excusable and would not occasion any injustice to the respondent

9. He argued that the respondent had not demonstrated the prejudice that would be occasioned to him as a result of the delay herein, if the 2<sup>nd</sup> appellant pursues the appeal to its logical conclusion. Mr. Kibara contended that the respondent had failed to discharge the burden of proof which lies on him as dictated by Sections 107 and 109 of the Evidence Act, Cap 80 Laws of Kenya. He was of the view that the respondent would not suffer any prejudice that could not be compensated by an award of damages.

10. Mr. Kibara argued that dismissal of the appeal herein would be a draconian measure that would bar the 2<sup>nd</sup> appellant's appeal which is arguable and has high chances of success from being determined on merit. He relied on the provisions of Order 50 Rule 6 of the Civil Procedure Rules, 2010 and the case of **Wambua Katiti v Obed Mose Nyagaka** [2019] eKLR, in which the Court cited the Court of Appeal decision in the case of **Kivanga Estates Limited v National Bank of Kenya Limited** [2017] eKLR, where it was held that striking out a pleading though draconian, the Court will at its discretion resort to it where for instance, it is satisfied that the pleading which has been brought is an abuse of its process or where it is found to be scandalous, frivolous or vexatious. The Counsel for the 2<sup>nd</sup> appellant urged this Court to exercise its discretion in order to meet the ends of justice.

#### **ANALYSIS AND DETERMINATION.**

11. This Court has considered the application herein, the affidavit filed in support thereof, the replying affidavit by the 2<sup>nd</sup> appellant's Counsel and the written submissions by Counsel for the parties. The issue that arises for determination is whether the application herein is merited.

12. In the affidavit filed by the respondent, he deposed that the memorandum of appeal herein was filed on 16<sup>th</sup> February, 2018 and served on the 19<sup>th</sup> February, 2018 but the 2<sup>nd</sup> appellant had not made any effort to fix the appeal for directions or hearing. He averred that the omissions by the said appellant have occasioned delay and suffering to the respondent who is not able to enjoy the fruits of the judgment that was delivered on 19<sup>th</sup> January, 2018, thereby occasioning him prejudice.

13. The 2<sup>nd</sup> appellant's Counsel in his replying affidavit deposed that after filing the memorandum of appeal, he requested the Trial Court's Registry on numerous occasions to supply them with typed and certified copies of the proceedings and judgment of the lower Court to enable them to file the Record of Appeal. He averred that he had not received any correspondence to date from the said Registry. He attributed the delay in filing the Record of Appeal to the Trial Court for failing to supply the typed and certified proceedings, judgment and decree.

14. He also averred that the 2<sup>nd</sup> appellant's rights of access to information as encapsulated under Article 35(1)(a) of the Constitution of Kenya, 2010 had been violated. The 2<sup>nd</sup> appellant's Counsel stated that in the event that the orders sought herein are granted, the 2<sup>nd</sup> appellant will suffer great injustice and prejudice as it will be condemned unheard. The 2<sup>nd</sup> appellant's Counsel further averred that Courts have discretion to extend time under Order 50 Rule 5 of the Civil Procedure Rules for the ends to justice to be met. He deposed that his client has always been desirous of prosecuting the appeal and that the memorandum of appeal herein raises arguable grounds thus this Court should grant the 2<sup>nd</sup> appellant an opportunity to be heard.

15. It is trite that the applicable law on the process of appeals is regulated by the Civil Procedure Act, Cap 21 Laws of Kenya and the Civil Procedure Rules, 2010. The relevant provision on dismissal of an appeal for want of prosecution is found under Order 42 Rule 35(1) & (2) of the Civil Procedure Rules, 2010 which states that-

**(1) "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."** (emphasis added).

16. In the present application, the respondent submitted that the 2<sup>nd</sup> appellant failed to move the Court for directions after filing of the appeal or to cause the same to be listed for hearing under Order 42 Rule 11 of the Civil Procedure Rules, thus this Court cannot act upon the appeal as per the provisions of Section 79B of the Civil Procedure Act. He also stated that since the filing of the memorandum of appeal on 16<sup>th</sup> February, 2018, no concrete effort had been made to get the proceedings typed and have the appeal listed for hearing. The 2<sup>nd</sup> appellant on the other hand contended that the delay has been occasioned by the Court's failure to supply it with typed and certified copies of the lower court proceedings and judgment.

17. Pursuant to the provisions of Order 42 Rule 11 of the Civil Procedure Rules, 2010, an appellant is required within thirty days of the

filing of an appeal, to cause the matter to be listed for directions under Section 79B of Civil Procedure Act. Looking at the said provisions, a Judge is under an obligation to peruse the memorandum of appeal together with the lower Court record so as to deduce whether there exists sufficient grounds to interfere with the decree and in the event the judge is satisfied that no plausible grounds exist, the appeal is summarily dismissed.

18. Order 42 Rule 13(1) of Civil Procedure Rules, 2010 on the other hand provides that on notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal, the appellant shall cause the appeal to be listed for the giving of directions by a Judge in chambers. It is not disputed that since the 2<sup>nd</sup> appellant served the memorandum of appeal upon the respondent on 19<sup>th</sup> February, 2018, it has not caused the appeal to be listed for hearing and/or mention for directions.

19. In the case of **Haron E Ogechi Nyaberi v. British American Insurance Co. Ltd** [2012] eKLR, the Court held that:

***“It is however, clear to this court that the Registrar cannot give notice of directions to the parties of an appeal and cannot himself fix an appeal for directions before a judge unless and until the Appellant has caused it by first complying with rules 11 and 13 thereof. Appellant’s compliance to those rules is the gate-opening for admission of appeal and for the taking of directions. It is to be observed, therefore, that it will be the Appellant who shall really cause the appeal to be listed for giving directions before a judge by:***

***a) Serving the Memorandum of Appeal; and***

***b) Filing and serving the Record of Appeal.***

20. In this matter, the 2<sup>nd</sup> appellant served the memorandum of appeal on the respondent but it is yet to file and serve the Record of Appeal so that the appeal can be admitted and listed for directions. In **Pyramid Hauliers Co. Limited v James Omingo Nyaaga & 3 others** [2017] eKLR, Nyakundi J., when dealing with a similar application stated as follows-

***“the issue on delay has been well captured in the case of Eastern Province Kenya Ltd v Rongai Workshop & Transporters Ltd & Another [2014] eKLR and in Ikta v Kyumbu (sic) [1984] KLR 441 by laying down the test to be applied.***

***“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 (sic) 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.”***

21. On whether the delay is prolonged and inexcusable in this appeal, the 2<sup>nd</sup> appellant filed the memorandum of appeal on 16<sup>th</sup> February, 2018. It is above three years since the said appeal was filed but no directions have been taken to date before a Judge. It is evident that there has been delay in listing the instant appeal for directions and subsequent hearing. The 2<sup>nd</sup> appellant’s explanation is that there has been failure by the Trial Court to provide it with copies of typed and certified proceedings and judgment so that it can prepare, file and serve a Record of Appeal. It is also claimed that the court’s scaled down operations in the year 2020 due to the Covid-19 pandemic slowed down the process.

22. Article 35 of the Constitution of Kenya, 2010 provides for the right to access to information held by a Public Officer. This Court notes that the delay of over three years in the supply of typed and certified lower Court proceedings to the appellant is inordinate. The 2<sup>nd</sup> appellant’s Counsel annexed three letters to his replying affidavit wherein they had requested to be supplied with copies of typed and certified proceedings and judgment for purposes of pursuing the appeal. It is however clear that the said letters were written two years before the respondent moved this Court with the current application dated 18<sup>th</sup> February, 2020. The said letters are dated 21<sup>st</sup> February, 2018, 13<sup>th</sup> April, 2018 and 30<sup>th</sup> May, 2018. After writing the said letters with no response being received from the Executive Officer, Mombasa Chief Magistrate’s Court, it is apparent that the 2<sup>nd</sup> appellant and his Counsel slept on their laurels and made no efforts to visit the said Executive Officer to find out why the proceedings were not being supplied to them. This Court would not have hesitated to dismiss the appeal herein for want of prosecution save that Order 42 Rule 35(1) of the Civil Procedure Rules envisages that dismissal of appeals for want of prosecution can only take effect after directions have been given under the provisions of Order 42 Rule 13(1) of the Civil Procedure Rules or after the Deputy Registrar has moved the Judge for dismissal of an appeal for want of prosecution. That is yet to happen in the appeal filed by the 2<sup>nd</sup> appellant.

23. In the case of **Jurgen Paul Flach vs Jane Akoth Flach** [2014] eKLR, Kasango J held that before an appeal can be set down for dismissal for want of prosecution, directions ought to have been given.

24. As much as the 2<sup>nd</sup> appellant is guilty of a procedural default to adjudicate its appeal, I am satisfied that some of the concerns raised are legitimate and beyond its control. This Court therefore has the inherent power under Section 3A of the Civil Procedure Act, Cap 21 Laws of Kenya and Order 51 Rule 6 of the Civil Procedure Rules to extend time to the 2<sup>nd</sup> appellant to file its Record of Appeal. The upshot is that the application dated 18<sup>th</sup> February, 2020 is dismissed. I hereby make the following orders-

(i) That the Executive Officer Mombasa Law Courts shall supply the 2<sup>nd</sup> appellant with copies of typed and certified proceedings and judgment in Mombasa SRMCC No. 240 of 2015, within 45 days from today’s date upon payment of the requisite fees;

(ii) That the Record of Appeal will be filed and served upon the respondent within 21 days from the 45 days allowed for its preparation;

(iii) In the event of default by the 2<sup>nd</sup> appellant, the appeal herein will stand automatically dismissed; and

(iv) That the costs of this application shall abide the outcome of the appeal.

It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA on this 15<sup>th</sup> day of October, 2021. In view of the declaration of measures restricting Court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April, 2020 and subsequent directions, the ruling herein has been delivered through Teams Online Platform.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of-**

**Mr. Ngaira holding brief for Mr. Ananda for the respondent**

**Ms Oruta holding brief for Mr. Kibara for the 2<sup>nd</sup> appellant**

**Mr. Oliver Musundi – Court Assistant.**