**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 427 OF 2018**

**SUNTRA INVESTMENT BANK LIMITED.....APPELLANT**

**VERSUS**

**GEORGE MBUGUA KIARIE.....1ST RESPONDENT**

**CUSTODY & REGISTRAR SERVICES LIMITED.....2ND RESPONDENT**

**CENTRAL DEPOSITORY SETTLEMENT.....3RD RESPONDENT**

**CORPORATION LIMITED.....4TH RESPONDENT**

**RULING**

This ruling relates to the 1st respondent's application brought under Section 3A, 1B & 3A of the Civil Procedure Act, Order 17 Rule 2(1), Order 42 Rule 13 (l), 35 (l) & (2) of the Civil Procedure Rules and all the enabling provisions of the law vide a chamber summons dated 10th March, 2021 seeking the following orders;

**(a) THAT the Appeal be dismissed for want of prosecution by the Appellant.**

**(b) THAT Barclays Bank of Kenya Ltd be ordered to release the Decretal Sum of Kenya Shillings One Million, Nine Hundred and Fourty Six Thousand, Fourty Hundred and Six and Twenty cents (Kshs 1,946,406.20) in compliance with their Bank Guarantee given on 17th July 2019 in favour of the 1st Respondent.**

**(c) THAT the costs of this Application and the appeal be provided for.**

The application is predicated on the grounds set out on the application and is further supported by the affidavit of **JAMES H. GITAU MWARA,** advocate for the 1st respondent. That being aggrieved by the lower court's decision delivered on 31 st May 2018 in **CMCC NO. 2227 OF 2009, GEORGE MBUGUA KIARIE —VS- SUNTRA INVESTMENT BANK LIMITED & OTHERS,** for Kshs. 859, 880/= with interest at court rates from the time of filing suit, together with the costs of the suit, the appellant sought to appeal the said decision. According to the 1st respondent, the appellant despite filing its Memorandum of Appeal on 12th September, 2018 and the Record of Appeal on 14th September, 2018 and subsequently serving the respondents on 8th October, 2018, the appellant has failed to take any steps to have the appeal set down for hearing. That due to the 2½ years delay in prosecuting the appeal, the 1st respondent has suffered great inconvinience as he has been denied access to his new dividends and bonuses. Further that, this court has the discretion to dismiss the present appeal as it is an abuse of the court process.

Counsel for the 1st respondent reiterated the grounds of the application in his affidavit sworn on 10th March, 2021. In his submissions, Counsel for the 1st respondent has submitted that in determining the present application, the Court should be guided by Order 42 Rules 35 (l) & (2) of the Civil Procedure Rules. The 1st respondent has refuted the validity of the letters produced by the appellant in opposition to the application for dismissal, which he contends was sneaked into the court file after the filing of the present application. Counsel submits that the four letters ought to have been copied and served physically or electronically on them on behalf of the 1st respondent to show the appellant indeed did not go to deep slumber after obtaining the Stay of Execution of the money Decree.

It is the 1st respondent's assertion that the lack of signature and proper advocate's stamp rendered the letters worthless and as such the lack of response from the Deputy Registrar or the Registry is thus justified. Counsel for the 1st respondent contends that the correct procedure for fixing a Hearing date is to serve the other parties' advocates with the Invitation Letter to fix a hearing date afterwhich the stamped invitation letter is then served on the Registry for booking of the day for fixing. That if there are no hearing dates available then the Registry remarks are put on the appellant's letter. To support its case, the 1st Respondent has made reference to the cas eof **ABRAHAM MUKHOLA ASITSA V SILVER STYLE INVESTMENT COMPANY LTD [2020]eKLR** the Honourable Court observed the holding in **PINPOINT**

**SOLUTIONS LIMITED & ANOTHER VS. LUCY WAITHEGENI WANDERI (AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF JAMES NYANGA MUCHANGI) [2020] eKLR** where the court acknowledged its inherent power to dismiss appeals that have not been prosecuted thus clogging the judiciary system.

The appellant opposed the application via a replying affidavit sworn on 14th June, 2021 by **MARK KARIUKI MAINA,** the Head of Customer Care/ Agents Coordination of the Appellant who, although confirms the two years delay, maintains that the delay has not been occasioned by the appellant disinterest in pursuing the appeal. The appellant avers that there have been numerous efforts to fix the appeal for hearing. However, due to the huge backlog at the time, civil appeals were fixed for hearing based on the year of filing. The appellant has further sought to show its efforts to fix the appeal for hearing as hereunder;

a) Letter dated 3rd March 2020 produced and marked as "MKM-3".

b) Letter dated 4th May 2020 produced and marked as "MKM-4"

c) Letter dated 15th October 2020, produced and marked as "MKM- 5".

d) Letter dated 10th February 2021, marked and produced as "MKM-6"

The appellant depones that it is in the interests of justice for this court to uphold its non-derogable right to hearing and access to justice and that it is ready and willing to take directions on expeditious hearing of the Appeal since it continues to incur substantial bank charges on the Bank guarantee. To support its averments, the appellant has relied on the case of **ELEM INVESTMENT LTD VS JOHN MOKORA OTWOMA [2015] eKLR** where Justice Aburili held:-

> **"To fail to accord it that opportunity in the circumstances of this case would be to tantamount to ousting it from the judgment seat for no fault of its own making. I find that Mrs Njuguna counsel for the appellant has sufficiently demonstrated to this court that she has made concerted efforts on several occasions by writing to the lower court asking for the file to no avail. It is not clear why the lower court has not responded to any of her correspondence. She cannot be held responsible for the lack of communication from that court."**

Similarly, the appellant has relied on the case of **ALLAN OTIENO OSULA V GURDEV ENGINEERING & CONSTRUCTION LTD [2015] eKLR** where Justice Aburili held that;-

> **I decline to strike out the appeal as prayed. I employ the principle that the right of appeal is constitutional right and in as much as there has been delay which has not been satisfactorily explained by the appellant, this court has to weigh the cost and prejudice that is likely to be occasioned to the appellant as well as the respondent, if the appeal is struck out at this stage without according the appellant an opportunity to be heard on the merits of the appeal.**

In its submission, the appellant states that Order 42 Rule 35 (1) and (2) is clear that there are only two scenarios where an application for dismissal for want of prosecution can be made. Firstly, Order 42 Rule 35(1) can only be invoked once there are directions under Order 42 Rule 13 and where the Appellant fails to act on those directions within the three months stipulated to set down the appeal for hearing. It is the appellant's submissions that no directions have been issued in the present appeal. Therefore, the application to have the Appeal dismissed for want of prosecution is premature. Reliance has been made to the case OF **KIRINYAGA GENERA/ MACHINERY —VS-HEZEKIE/MURIITHIIRERI [2007] eKLR**, where Justice Kasango held that;

> **"Directions have never been given in this matter. Directions having not been given the orders sought by the Respondent cannot be entertained."**

On the second scenario under Order 42 Rule 35 (2), the appellant sought to rely on the case of **MORRIS NJAGI & ANOTHER V MARY WANJIKU KIURA [2017] eKLR**; where Justice Gitari sought to expound the provision of Rule 35 (2) in the following terms;

> **"...is where the registrar with notice to the parties shall place the appeal before the Judge for dismissal if one year after service of memorandum of appeal the appeal has not been set down for hearing. The applicant is not in order to have brought the application under Order 42 rule 35 (2). Under this provision the respondent should have requested the Registrar to list the matter for dismissal."**

Counsel for appellant however submits that there is no evidence on record that the 1st Respondent made any request to the Deputy Registrar to list the matter for dismissal. To buttress this position, the appellant has cited the case of **ROSAVIE (EPZ) LIMITED -V- STANLEX MBITHI JAMES [2015] eKLR** where Mabeya J. stated:

> **"Since under Order 42 Rule 35 (1) the appeal cannot be dismissed before directions have been given, the Applicant should have taken advantage of Order 42 Rule 35 (2) and cause the registrar to list the appeal for dismissal. I have not seen any letter to the registrar requesting for the matter to be listed for dismissal. If there had been such correspondence which the registrar ignored, I would have been inclined to accede to the application."**

**Analysis and Determination:**

The court of appeal in the case of **PETER KIPKURUI CHEMOIWO V RICHARD CHEPSERGON [2021]eKLR** acknowledged the principles in dismissing an appeal for want of prosecution and cited with approval the holding in **Ivita –v- Kyumba [1984] KLR 441**; that

the test to be applied by the courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether the delay could be excused and justice can be done despite the delay. The appellant has not disputed that there indeed has been a delay of almost two (2) years in prosecuting the present appeal. However, the appellant has submitted letters which evidenced that it was indeed not indolent as it sought to have the appeal set down for hearing. The 1st respondent has argued that the letters were sneaked into the court file after the filingof the instant application, a perusal of the letters clearly indicate that "MKM-3", "MKM-4" and "MKM-5" was written way before the present application and filed online during the Covid-19 period. Consequently, I find the appellant weasnot indolent and made efforts to have the appeal set down for hearing.

The law on dismissal of an appeal for want of prosecution is contained in Order 42 Rule 35 (1) and (2) of the Civil Procedure Rules, which provides:

> **(1) "Unless within three months after the giving of directions under rule 13, the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty to either set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.**
>
> **(2) If within one year after 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.**

As correctly submitted by the appellant, the above rule contemplates two scenarios when an appeal can be dismissed. The first scenario, is where after the lapse of three (3) months after issuance of directions by court, no steps have been taken to prosecute the appeal the respondent can move the court for its dismissal. The second scenario; is where no steps have been taken to prosecute the appeal within one year after the service of the memorandum of appeal. The deputy registrar shall list the matter for dismissal. Under the first scenario, it is the Respondent to move the Court whilst under the second scenario, the action is by the registrar.

In the present case, a perusal of the court record reveals that no directions have been taken on the appeal, as such, the first scenario is a non-starter and cannot be sustained hence pre-mature. On the second limb, there is no request on record that the 1st respondent has made any request to the registrar to have the matter listed for dismissal under Order 42 Rule 35 (2).

I am of the view that this application could not be brought under **Order 42 rule 35 (1)**, (2) as no directions had been given and no notice had been issued by the registrar on the dismissal of the appeal. Accordingly, I decline to allow the application for dismissal of the appeal as the same is pre-mature. The application dated 10th March, 2021 is hereby dismissed. Costs shall follow the outcome of the appeal. The appellant is directed to take appropriate proactive steps to have this appeal set down for hearing as appropriate and in any event not later than 90 days from the date of this ruling.

**DATED AND SIGNED AT NAIROBI THIS 2ND DAY OF NOVEMBER, 2021.**

**.....**

**S.J. CHITEMBWE**

**JUDGE**