REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 341 OF 2018

DPL FESTIVE LIMITED.....1ST APPELLANT/RESPONDENT

PAUL RUTO.....2ND APPELLANT/RESPONDENT

-VERSUS-

KENYA POWER & LIGHTING CO. LTD.....1ST RESPONDENT

NATIONAL TRANSPORT & SAFETY AUTHORITY.....2ND RESPONDENT

PATRICK MUTUA MBEVI.....3RD RESPONDENT/APPLICANT

RULING

1. The application dated 10th March, 2021 brought by the 3rd Respondent, namely **Patrick Mutua Mbevi** (hereafter the Respondent/Applicant) seeks the dismissal of the appeal herein for want of prosecution. The motion is expressed to be brought under Section 1A, 1B & 3A of the Civil Procedure Act, Order 17 Rule 2(3) and Order 51 Rule 1 of the Civil Procedure Rules and is based on the grounds on the face thereof and the supporting and further affidavits of **Francis Mulu,** counsel for the Applicant**.** The gist of the affidavits is that the Appellants herein, namely **DPL Festive Limited** and **Paul Ruto** (hereafter the Appellant/ Respondents) lodged their appeal in 2018 and have since not set it down for hearing or evinced any intention to prosecute the appeal and as such it should be dismissed.

2. The motion was opposed by way of grounds of opposition dated 4th June, 2021 and a replying affidavit sworn by senior counsel **Zehrabanu Janmohamed.** Senior counsel deposed that her firm took over the conduct of the matter in March 2021 from the firm of Menezes & Partners Advocates, the Appellants' erstwhile advocates; that upon taking over, she noted that while a request for the lower court ruling and proceedings had been made in July 2018, the appeal had never been admitted and the ruling and proceeding had not been supplied. She asserted that the Respondents are keen to prosecute the appeal and will be greatly prejudiced if the appeal is not heard and determined on merit.

3. By his further affidavit, counsel for the Respondent/Applicant stated that the Appellant/Respondents have not demonstrated any follow-up action taken in pursuit of copies of the ruling and proceedings of the lower court; that the continued sustenance of the appeal is prejudicial to the Respondent/Applicant's suit for damages pending in the lower court; and that the appeal ought to be dismissed. keeping the Applicant in anxiety unnecessarily which causes him prejudice as he remains uncompensated to date.

4. The 1st Respondent did neither filed a response nor submissions to the motion, counsel indicating that the said Respondent supported the motion. The 2nd Respondent did not participate in the motion. Th motion was canvassed by way of written submissions.

5. The Respondent/ Applicant anchored his submissions on the provisions of Order 17 Rule 2 and reiterating the matters in his affidavits asserted that the Appellant/ Respondents have not sufficiently explained their delay of 3 years to prosecute the appeal. He urged the court to allow the motion.

6. On the part of the Respondents, senior counsel submitted on two fronts. Firstly, she argued that the motion is defective, incompetent, and bad in law for invoking the wrong legal provision, namely Order 17 Rule (2) 3 raher than Order 42 Rule 35 (1) and (2) of the Civil Procedure Rules. Relying on the case of **Rosarie (EPZ) Limited v Stanlex Mbithi James [2015] eKLR** as cited in **Coast Bus Safaris & 2 Others v Willis Omusinde Omboyo (suing as the legal representative of the Estate of the late Hezron Ochieng Omboyo) [2018] eKLR** senior counsel stated the provisions of Order 42 Rule 35 (1) & (2), envisage dismissal of an appeal where directions have been given and where the record of appeal has been served but the appeal not set down for hearing after 3 months and one year respectively.

7. She stated that none of the events anticipated in the said Rule have occurred hence the motion cannot succeed. Secondly, senior counsel submitted, that the delay in prosecuting and appeal has not been intentional, contumelious and/or inexcusable and has been sufficiently

explained in the replying affidavit. Thus, the court ought to exercise its discretion in favour of the Respondents as no prejudice will be visited on the Applicant if the appeal is heard and determined on the merits.

8. The court has considered the material canvassed in the present motion. There can be no dispute that the correct provision to invoke in an application of this nature is Order 42 Rule 35 and not Order 17 Rule 2(3) of the Civil Procedure Rules. The erroneous invocation however without more cannot defeat a deserving motion. In the court's view the error is one of form and not substance. Article 159 (2) of the Constitution and Section 1A and 1B of the Civil Procedure Act enjoin the courts to eschew undue regard to technicality and to resolve disputes in a manner that is just, expeditious, proportionate, and affordable. The Court of Appeal in discussing the two provisions in **Perera v Nation Media Group & 2 others (Civil Appeal 122 of 2016) [2021] KECA 135 (KLR)** observed that:

> **"Case law on the invocation and application of the above principle now form a well-trodden path. We take it from the cases of Jaldesa Tuke Dabelo vs. IEBC & Another [2015]eKLR; Raila Odinga and 5 Others vs. IEBC & 3 Others [2013] eKLR; Lemanken Arata vs. Harum Meita Mei Lempaka & 2 Others [2014]eKLR; Patricia Cherotich Sawe vs. IEBC & 4 Others [2015]eKLR. The principles enunciated therein and which we find prudent to highlight are as follows: Rules of procedure are handmaidens of justice; a court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties depending on the appreciation of the relevant circumstances and the requirements of a particular case; the exercise of the jurisdiction under Article 159 of the Constitution is unfettered especially where procedural technicalities pose an impediment to the administration of justice also that Article 159 (2)(d) of the Constitution is not a panacea for all procedural ills."**

9. The court went on further to discuss the import of Section 1A and 1B of the Civil Procedure Act by stating that:

> **"Principles that guide the Court in the application of the above overriding objective principle also now form a well-trodden path. We take it from the case of Hunter Trading Company Ltd vs. Elf Oil Kenya Limited, Civil Application No. NAI. 6 of 2010, stated inter alia as follows:**
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> **"It seems to us that in the exercise of our powers under the "02 principle" what we need to guard against is any arbitrariness and uncertainty. For that reason, we must insist on full compliance with past rules and precedents which are "02" compliant so as to maintain consistency and certainty. We think that the exercise of the power has to be guided by a sound judicial foundation in terms of the reasons for the exercise of the power. If improperly invoked, the "02 principle" could easily become an unruly horse."**
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> **Further in City Chemist (NBI) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli vs. Orient Commercial Bank Limited Civil Appeal No. Nai 302 of 2008 (UR No.199 of 2008) (unreported) the Court reiterated that:**
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> ***"That, however, is not to say that the new thinking totally uproots well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application."***

10. Moving on to the substance, Order 42 Rule 35 of the Civil Procedure Rules 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 either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.**
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> **(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."**

11. The Appellant/Respondents have emphasized that the appeal is not ripe for dismissal as none of the events envisaged in the provisions have occurred as indeed the appeal has not been admitted. It is true that the admission of the appeal is the duty of the court, which in this case has not been discharged. Ordinarily, the appeal is admitted after the record of appeal has been filed and the lower court file submitted. The Appellants in this case have never filed the record of appeal or written to the court to admit the appeal.

12. There is nothing in Rules 11,12 and 13 to prevent a keen appellant from taking the initiative in perfecting his appeal for hearing. Where, as seems to be the case here, the appellant is content to sit back and wait endlessly for the court to initiate action, a respondent is not hamstrung. First, he has the option of prodding the Deputy Registrar to move under Order 42 rule 35(2) of the Civil Procedure Rules. Equally, I am of the considered view that such a respondent is not barred from invoking the overriding objective and the court's inherent jurisdiction under Section 1A, 1B & 3A respectively of the Civil Procedure Act in seeking the court's intervention. To deny audience to such a respondent in the situation described in my opinion would amount to abdication of duty and a travesty of justice.

13. An indolent appellant cannot be allowed to use the provisions of Order 42 Rule 35 both as sword and shield. As observed in **Osho Chemicals Ltd v Tabitha Wanjiru Mwaniki (2018) eKLR** the court bears the duty imposed by Section 1B of the Civil Procedure Act, to further the overriding objective in Section 1A. Parties and advocate are also under a duty to "*assist the Court to further the Overriding objective of the Act of the Civil Procedure Act* ". No more needs to be said on this question.

14. Concerning the delay of the Appellant/Respondents herein in perfecting and prosecuting their appeal, the explanation given is barely plausible. Three years is a long time and as the Applicant/Respondent has correctly observed, there is no tangible demonstration of follow up with the letter of July 2018 seeking copies of the ruling and proceedings of the lower court. There is no denying that the delay in this case is inordinate, and it is not enough for the Appellant/Respondents to attempt to transfer all the blame upon the lower court and this court as well. This was an interlocutory appeal, and the Respondent /Applicant is justified to complain that he has been prejudiced as his suit in the lower court remains pending.

15. That said, it is just and fair that in spite of delay herein, the court ought to facilitate the right of parties to be heard on the merits of the appeal so long as justice can still be done between them. In this instance, the Applicant/Respondent can be compensated by costs. The Court of Appeal in **Richard Ncharpi Leiyagu v Independent Electoral and Boundaries Commission & 2 Others (2013) eKLR** reaffirmed the importance of the right to hearing as follows:

> **"The right to a hearing has always been a well-protected one in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day, there should be proportionality."**

16. In the result, the court will decline to dismiss the appeal at this stage but will instead make the following orders:

a). The appeal be and is hereby formally admitted to hearing.

b). The Appellant/Respondents are directed to proceed to file and serve the record of appeal within sixty days of today's date.

c). Upon compliance with (b) above, the Appellant/Respondents are to set down the matter for hearing within 60 days, calculated from the date of compliance.

d). In the event of default on the part of the Appellant/Respondents on any of the directions in (b) and/or (c) above, the appeal will stand automatically dismissed for want of prosecution with costs to the Respondent/Applicant.

e). The costs of the motion dated 10th March 2021 are awarded to the Respondent/Applicant in any event.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 2ND DAY OF DECEMBER 2021

C.MEOLI

JUDGE

In the presence of:

For the 3rd Respondent/Applicant: Mr Mulu

For the Appellant/Respondents: Mr Chebiego h/b for Ms. Olung'a

C/A: Carol