



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 50 OF 2017

MORRIS MUTURI NYAGA.....1ST APPELLANT

JARED ODEK OUMA.....2ND APPELLANT

CITY HOPPER LIMITED.....3RD APPELLANT

VERSUS

FAITH MUTHONI NJUE.....RESPONDENT

RULING

1. The appellant/applicant in this instance has brought the Notice of Motion dated 28th May 2021 supported by the grounds set out in its body and the facts deponed in the supporting affidavit. The applicant applied for the appeal filed in 15th February 2017 to be struck out for want of prosecution and for the appeal to be dismissed with costs.
2. The respondents' learned advocate filed an affidavit he swore in support of the motion. The appellants filed the replying affidavit sworn by Mr. Kevin Ngire, the Deputy claims Manager of Directline Assurance Company for the appellants to oppose the motion.
3. I have considered the grounds stated on the face of the motion dated 28th May 2021 and the facts deponed in the rival affidavits. It is the submission of the respondent that it has been 4 years and 8 months since the appellants filed their memorandum of appeal and that the appeal ought to have been dismissed as early as 2018 since the appellant served the memorandum of appeal on 15th February 2017.
4. It is stated that the appellants have made no effort to prosecute their appeal and that they were aroused from their slumber when the respondent filed this application to dismiss the appeal for want of prosecution.
5. The respondent submitted that the applicant has been denied the fruits of her judgment from 19th January 2017 when judgment was delivered and that the ends of justice will not be served when the appellants have not been interested in taking any action since the filing of the said appeal.
6. The appellant opposed the application arguing that the appellant's appeal has merit and in the event that the respondent application is allowed the appellants stand to lose their constitutional right for their case to be heard and determined on merits as opposed to having it be dismissed for want of prosecution.
7. The appellants stated that the function of typing proceedings is squarely an administrative issue of the trial court and that the court should take judicial notice of the backlog of the files pending typing of the proceedings at the lower court registry therefore the court should allow the appellant time to follow up on the same.
8. It is the appellants' submissions that the appeal is not yet ripe for dismissal for want of prosecution and on this they relied on the case of **Jurgen Paul Flach v Jane Akoth Flach Nakuru Civil Appeal No.119 of 2012**, where the court rightly stated that where directions had not been issued dismissal of an appeal for want of prosecution cannot be granted.
9. Having considered the averments made in the rival affidavits, it is clear that the respondents have not controverted the averments made by Mr. Kevin that the appellants have written several letters requesting to be supplied with proceedings to enable them prepare the record of appeal.
10. I am satisfied that the appellants did not sit on their laurels but Have instead taken necessary steps to have the appeal ready for hearing. The appellants appear to have been frustrated by the failure by the court to supply them with typed proceedings. I am persuaded that the appellants have given sufficient explanation to this court not to dismiss the appeal.

11. In the end, I decline to dismiss the appeal for want of prosecution and instead dismiss the motion dated 28.05.2021 with costs abiding the outcome of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 8TH DAY OF DECEMBER, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

.....for the 1st Appellant

.....for the 2nd Appellant

.....for the 3rd Appellant

.....for the Respondent