



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 16 OF 2010

ESRI STAR LIMITED.....APPELLANT

VERSUS

ABDALLA OPYAYO JUMA.....RESPONDENT

(Being an appeal from the judgment and decision of Hon T Gesora, SRM,

delivered on the 1st May 2010 in the original Mombasa SRMCC No. 4025 of 2003)

RULING

The Facts

1. This ruling is in respect of the respondent's notice of motion application dated 23rd September 2019. The application brought under Article 159(1) (b) of the Constitution, Order 42 Rule 13(1) and 35 (1) of the Civil Procedure Rules seeks the dismissal of this appeal for want of prosecution.
2. The undeniable facts are that this is an appeal from a judgement delivered on 1st February 2010 at Mombasa in SRMCC No. 4025 of 2003. The appellant filed a memorandum of appeal on 9th February 2010. It thereafter applied for stay of execution of the judgement. On 7th June 2012, the court granted stay after confirming that the appellant had deposited the decretal amount of Kshs. 507,000/= in a joint interest earning account in the name of counsel for the parties.
3. Of pertinence is that this is the second time the respondent is applying to have this suit dismissed for want of prosecution. On 23rd April 2018, the respondent made a similar application and Ong'udi J delivered a ruling on the same on 19th December 2018. The Honourable judge noted that the appellant had enjoyed stay orders for over 8 years, much to the disadvantage of the respondent and granted orders as follows:

i. As a wake-up call to the Appellant/Respondent I hereby direct that out of the Kshs. 507,000/= deposited herein a sum of Kshs. 300,000/= shall be released to the Respondent/Applicant forthwith, through his advocates on record.

ii. Secondly the Appellant/Respondent is directed to comply with the necessary process and have this appeal set down for hearing within the next 90 days. If there is failure to comply with (ii) above let the Respondent/ Applicant file the necessary application for dismissal.

The parties' submissions

4. It is the respondent's submission that the appellant has enjoyed stay since 2010 thus depriving him the benefit of his lawful judgement. The respondent referred to the appellant's failure to prosecute the appeal as "unmitigated flagrant abuse of the court process which is both against the constitution and the law." According to him, the fact that the appellant failed to fix the matter for hearing within 90 days as ordered by Ong'udi J shows that the appellant has lost complete interest in prosecuting the appeal and hence the same should be dismissed with costs for want of prosecution. The respondent also prayed that the memorandum of appeal and the appeal herein be struck out together with the stay arising from it with costs and interests to the respondent.
5. The advocate for the appellant, Ms. Kipsang, swore an affidavit in opposition to the respondent's application. She denied any laxity in prosecuting the appeal and admitted that the delay to prosecute the appeal was occasioned by reasons not attributable to the appellant. She swore that the delay was attributable to a former advocate at her firm who failed to update the position of the file and/or outcome. That as a result of the miscommunication, the appellant's file was not allocated to any counsel for further action. She submitted that it would be unfair

and unjust to strike out this appeal as the mistakes of an advocate should not be borne by the client. She requested this court to instead give directions and/or a hearing date and finalise this appeal to its logical conclusion.

Issue for determination

6. Having considered the application, the reply thereto and the submissions by the parties, it is evident that the only issue to be determined is: **Whether, given the facts and the applicable law, this suit should be dismissed for want of prosecution?**

Analysis and Determination

7. The law governing dismissal of an appeal for want of prosecution is contained in **Order 42 Rule 35 of the Civil Procedure Rules**. The Rule 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.

(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.

8. Aburili J in *Elem Investment Ltd v John Mokora Otwoma [2015] eKLR* had thus to say about **Order 42 Rule 35 of the Civil Procedure Rules**:

A reading of the above provision (Order 42 Rule 35) shows that it is clear that an appeal can be dismissed for want of prosecution in two instances. Firstly, where there has been failure to list the appeal for hearing three months after directions have been given under Order 42 Rule 13 of the CPR or, secondly, if after one year of service of the Memorandum of Appeal the appeal has not been listed for hearing.

In these two scenarios, the procedure is different. In the first scenario, the Respondent is given the option to either list the appeal for hearing or to apply for its dismissal. Under that scenario however, the appeal can only be dismissed if it has been admitted and directions have been given.

9. I agree with the learned judge's view. Before this appeal is dismissed therefore, it should be established that the appeal was admitted and directions were given. I have perused the court file and it appears that directions have not been given in this matter. But whose duty is it to ensure that an appeal is admitted and directions taken? Common sense dictates that the appellant should of course take charge of its case by ensuring among others, the case is admitted and directions given. Indeed, even the law supports this position. That is why **Order 42 Rule 13(1)** provides:

“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.”

10. As such, there is no doubt that the appellant ought to have taken all necessary steps to ensure its matter was ready for hearing. That is what Ong'udi J ordered in the ruling of 19th December 2018. The Appellant did not comply with this order. There is also no doubt that for almost a decade, the appellant has not taken the necessary steps to ensure this matter is ready for hearing. The question then begs: **should the court fail to dismiss the appellant's case simply because it has not been admitted and directions given?** My answer is a resounding no, especially bearing in mind the period of time that has passed and the fact that it is the appellant's duty in the first place to ensure that directions are given.

11. This is an old case and I am persuaded that the conduct of the appellant has been anything else but diligent. The advocate for the appellant while admitting inordinate delay blamed it on a former employee and requested this court not to impute the advocate's mistakes upon the client. In my view, these reasons do not justify the long reluctance to prosecute. Equity and the law do not aid the indolent or recalcitrant. The litigation belongs to the party and not the advocate hence the appellant should also have taken necessary steps and followed up with its advocates to enquire on the progress of its case. In the circumstances, I find the appellant and his counsel guilty of an inexcusably and inordinately delaying the prosecution of the appeal.

12. I find that the respondent has been held hostage for nearly 10 years. Delay defeats justice. Failure to comply with court orders and direction demean and erode the integrity of the administration of justice. It would definitely not be in the interests of justice to have the respondent continue to suffer delay in the hands of an indolent or just indifferent appellant. It is high time the respondent enjoys the fruits of his judgement.

13. For the foregoing reasons, my final order and determination is that the appeal be and are hereby dismissed with costs to the respondent. Any sums held in court as security for the due performance of the decree pending outcome of the appeal be forthwith released to the respondent.

14. It is so ordered.

Dated, signed and delivered at Mombasa this 15th day of May, 2020.

P.J.O. OTIENO

JUDGE