



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**HIGH COURT CIVIL APPEAL NO. 2 OF 2017**

**JOHN NJUGUNA NDUATI.....APPELLANT**

**VERSUS**

**NGAO CREDIT LIMITED.....RESPONDENT**

**RULING**

1. The subject notice of motion application herein is dated 15<sup>th</sup> March 2019, filed by the Respondent (herein “the Applicant”) seeking for orders that: -

*(a) The Honourable Court be pleased to strike out the Appeal herein with costs and interests at court rates for want of prosecution; and*

*(b) The cost of the application be provided for.*

2. It is based on the grounds on the face of it and the affidavit sworn by Eric Onyancha, the counsel seized of the matter. It is averred that, Appellant (herein “the Respondent”) instituted proceedings against the Applicant by vide a plaint dated 22<sup>nd</sup> February 2017 vide the Chief Magistrates’ Civil Case number 1097 Of 2017, seeking judgement as therein stated.

3. That the plaint was filed together with a notice of motion application of the same date seeking for various orders as stated therein. The application was disposed of vide filing of submissions. The ruling was delivered on 22<sup>nd</sup> February 2017, whereby the application was dismissed with costs to the Applicant. The Respondent then filed the Appeal herein.

4. The Memorandum of Appeal was filed together with a notice of motion application dated 13<sup>th</sup> June 2017 under certificate of urgency, seeking for stay of the decision in the matter together with all the consequential orders arising therefrom.

5. The Applicant avers that, ever since the Memorandum of Appeal was filed on 14<sup>th</sup> June 2017, the Respondent has not taken any steps to prosecute the Appeal. That, the indolence on the part of the Respondent shows that, he has lost interest in the matter and the Applicant is suffering from anxiety due to the delay. That, after filing the application herein dated 13<sup>th</sup> June 2017, the Appellant has failed to file written submissions as directed by the court. It is therefore in the interest of justice that, the Appeal be struck out.

6. The Application was served but was not opposed. The Applicant filed skeleton submissions which I have considered herein. In a nutshell, the Applicant submitted that, section 79B of the Civil Procedure Act allows the court to reject an Appeal, where it is of the view that, there are no sufficient grounds to interfere with the decree; part of the decree or orders appealed against, notwithstanding; section 79C for rejecting the appeal summarily.

7. Further, Order 42 Rule 11 of the Civil Procedure Rules, 2010, states that, upon filing of the Appeal, the Appellant shall within 30 days cause the matter to be listed before a judge for directions under section 78B of the Act. In addition, Order 42 Rule 13 (1) states 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” and Order 42 Rule 35 (2) states that, “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. The Applicant also relied on the cases of: *Pyramid Hauliers Co. Limited v James Omingo Nyaaga & 3 others (2017) eKLR, Eastern*

Province Kenya Limited v Rongai Workshop & Transporters Limited & Another (2014) eKLR, and Ikta v Kyumbu (1984) KLR 441 wherebut was held that: -

*“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 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 will be ordered that it be set down for hearing at the hearing at the earliest time. It is a matter of the discretion of the court.”*

9. In conclusion, the Applicant submitted that, there has been delay in prosecuting the Appeal, which has been pending for over two (2) years, and no reasons have been given for the delay. Reliance was placed on the case of: Kenya Nut Company Limited v Justine Musyoka Nkabi (2018) eKLR. Finally, the continuity of the Appeal is prejudicing the Applicant. Reference was made to the case of: Protein & Fruits Processors Limited & Another v Diamond Trust Bank Kenya Limited (2015) eKLR.

10. I have considered the application on merit and I note that on 14<sup>th</sup> June 2017, the Appellant (herein “the Respondent”) filed a notice of motion application dated 13<sup>th</sup> June 2017, in the Civil Division of the High Court, seeking for orders as stated therein. It was filed alongside was a Memorandum of Appeal of the even date. Upon hearing the application, the court ordered the consent of the parties on 23<sup>rd</sup> June 2017 that: -

*(a) The Appellant to pay Kshs. 2,612,852.33 in a joint interest earning account to be opened in the names of the parties’ counsels in the next 21 days;*

*(b) After deposit thereof, the parties will take 7 days to do reconciliation of the accounts, and take a mention date and directions on the hearing of the main Appeal.*

It was further ordered:

*(c) That a temporary order be and is hereby issued staying the ruling and order of the 23<sup>rd</sup> May, 2017 of the Senior Resident Magistrate the Hon. D. A. Ocharo (Mr) in dismissing the Appellants Application dated 22<sup>nd</sup> February 2017 together with all the consequential orders arising from the said decision of the 23<sup>rd</sup> of May, 2017 pending the hearing and determination of this application inter-partes.*

*(d) That for mention on 24<sup>th</sup> July, 2017 to confirm compliance.*

11. The matter was stood over on 27<sup>th</sup> July 2017 for directions on the hearing of the main Appeal. In addition, the parties were given directions on the filing of responses and submissions on the application. The Respondent had twenty-one (21) days for the same and the highlighting of the submissions was stood over to 28<sup>th</sup> September 2017. On that date, the Applicant sought for fourteen (14) days within which to file a further affidavit. It was granted and matter stood over to 14<sup>th</sup> November 2017.

12. On 14<sup>th</sup> November 2017, the Respondent sought for a further twenty-one (21) days, as he was alleged to have been out of the country. It was granted and the matter stood over to 14<sup>th</sup> December 2017. On that date, the Respondent did not appear in the court. The Applicant herein, who were Respondents to the subject application had filed their submissions. The matter was stood over to 30<sup>th</sup> January 2018 for highlighting of submissions.

13. By that date, the Respondent had not filed submissions; whereupon the Applicant sought for the dismissal of the Appeal; hence the subsequent application herein. As already stated, the application is not opposed. However, in that regard, I note that, the Applicant is seeking for the Appeal to be “struck out.” In my considered opinion, there are no reasons for striking out the Appeal. The grounds adduced are more of dismissal of the same than striking out.

14. Be that as it were, the Memorandum of Appeal herein, has been pending since 14<sup>th</sup> June 2017 when it was filed. The Appellant has not progressed the matter since then. The Appellant has not complied with the relevant provisions of the law as cited herein. In particular, the Appeal has not been listed for directions as required under Order 42 Rule 13 (1) of the Civil Procedure Rules, 2010. In that case, the provisions of Order 42 Rule 35 (2) Civil Procedure Rules, 2010 comes into play.

15. Further, the provision of Article 159 (2) (b) of the Constitution of Kenya 2010 states that; justice shall not be delayed and similarly section 1A and 1B of the Civil Procedure Act requires that; matters before the court be heard in a just and expeditiously.

16. In that regard, I allow the notice of motion dated 15<sup>th</sup> March 2019 as prayed for, save that, I order the Memorandum of Appeal filed herein be and is hereby dismissed with costs.

17. It is so ordered

**Dated, delivered on line and signed on this 7<sup>th</sup> day of May, 2020**

**GRACE L NZIOKA**

**JUDGE**

In the presence of:

No appearance for the Respondent

Mr. Onyancha for the Respondent

Delivered via virtual communication