



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 80 OF 2017

KENYA POWER & LIGHTING COMPANY LIMITED.....APPELLANT

VERSUS

ANDY INTERNATIONAL.....RESPONDENT

RULING

1. On 3rd October, 2019, the Respondent filed a Notice of Motion application dated 26th August, 2019 seeking for the following orders:
 - a) *That this Honourable court be pleased to dismiss the Appeal dated 13th April, 2017 and filed on 14th April, 2017 for want of prosecution.*
 - b) *That the sum of Kshs.894,814.75 deposited in a joint interest earning account between M/s Hamilton Harrison & Mathews Advocates and M/s M. Ananda & Co. Advocates with NIC Bank Limited vide account No.1005513298 plus all accrued interest be released to the firm of M. Ananda & Co. Advocates for the Respondent.*
 - c) *That costs of this application and the appeal be borne by the Appellant.*
2. The grounds upon which the application is premised can be summarized as such, that;
 - a. it is over one year since the memorandum of appeal was served on the advocates for the Respondent and the Appellant has failed to set the Appeal down for hearing;
 - b. the Appellant has not sought leave of the court to extend the period for preparation of the record of Appeal and setting the appeal down for hearing;
 - c. the Appellant has not complied with mandatory provisions of Order 42 Rule 13(1) and 35(2) of the Civil Procedure Rules; and d. finally that the appeal should be dismissed for want of prosecution and the amount deposited in court, being the security for the appeal be released to the Respondent.
3. The application is further supported by an affidavit sworn on 2nd October, 2019 and a further affidavit sworn on 19/12/2019 both by Salome Kagwiria, the Respondent's manager. In its further affidavit the Respondent/Applicant submits that the Appellant lost interest in the appeal after orders of stay were granted on 23/2/2018. It is deponed that the correspondences requesting for copies of proceedings is not enough proof that the Appellant is exercising any effort to prosecute the appeal. It is sought that the appeal be dismissed for want of prosecution
4. The Appellant opposed the application vide a replying affidavit sworn by its advocate, **Winfred Gitao** on 14th November, 2019. It is averred that vide a letter dated 3/4/2017, the Appellant requested for certified copies of proceeding for purposes of preparing the record of appeal but the same has not been supplied. In addition, that the Appellant did follow up by writing several reminders to the court but none of its correspondences have been reverted to nor has the certified copies of proceedings been supplied. The Appellant annexed its letters dated 6/4/2017, 16/08/2018, 27/09/2018, 22/11/2018, 7/12/2018, 30/01/2019, 20/03/2019 and 26/06/2019, all addressed to the Chief Magistrate seeking to be supplied with certified copies of proceedings. It is deponed that the Appellant has constantly been taking active steps to file the record of appeal but, the failure thereof is due to the fact that certified copies of the proceedings have not been supplied despite having had the same paid for.
5. In light of the above, the Appellant avers that it is unable to set the appeal for directions hence the instant application is premature and misconceived. It is averred that if the prayer for the release of the sum deposited as security for the appeal is granted, it will prejudice the pending appeal and render it nugatory. It is deponed that the Respondent will suffer no prejudice if the Appellant is given more time to prosecute its appeal.

6. The application was disposed by way of written submissions in accordance with the directions issued by this court on 25/11/2019. Both parties filed their submissions. The Respondent/Applicant filed its submissions on 07/02/2020 whilst the Appellant filed its submissions on 24/02/2020.

The Respondent/Applicant's submissions

7. The Respondent submitted that it was incumbent upon the Appellant to fix the appeal for directions under Section 79B of the Civil Procedure Act and Order 42 Rule 11 of the Civil Procedure Rules by causing the lower court file to be taken to the High Court for perusal. It is averred that the correspondences annexed to the Appellant's Replying affidavit were never copied to the Respondent and do not demonstrate any interest to pursue the appeal.

8. It is further submitted that the allegation by the Appellant that the court file was missing has no basis as there is no certificate of confirmation of the said loss from the Executive Officer or the Deputy Registrar to confirm the loss. It is submitted that the allegations should not be used as an excuse by the Appellant for the indolence on prosecuting the appeal. The Respondent seeks the court to dismiss the appeal and the money deposited in the joint account as security of appeal to be released to the Respondent. The arguments are buttressed by reliance on the case of *Mbogo and Another-vs-Shah (1968) EA*.

Appellant/Respondent's submissions

9. The Appellant submitted that the dismissal of appeal for want of prosecution is governed by the provisions of Order 42 Rule 35 of the Civil Procedure Rules. The bottom line being that directions must have been given before an appeal can be dismissed for want of prosecution. In the instant case the Appellant submits that directions have never been given hence the orders sought by the Respondent cannot be entertained because the application is premature. It is submitted that the options available to the Appellant is to have the Deputy Registrar list the appeal before a judge in chambers for dismissal and not to move the court as it has. It is submitted that it is only the Deputy registrar who can list the appeal before a judge if directions have not been issued. According to the Appellant, the Respondent ought not to have filed the instant application and by doing so the Respondent is usurping the duties of the Deputy Registrar.

10. The Appellant further submits that it has constantly been taking active steps to follow up the lower court proceedings so as to file the record of appeal as shown by the correspondences to the court. It is the Appellant's submissions that the failure to file the record of appeal was occasioned by factors outside its control. Allowing the instant application will therefore not only occasion injustice to the Appellant but also shut it out from accessing the court contrary to Article 50 of the Constitution of Kenya. On this line of argument, the Appellant called to its aid a plethora of judicial precedents including: *Jurgen Paul Flach-vs-Jane Akoth Flach [2014] eKLR*, *Njai Stephen-vs-Christine Khatiala Andika [2019] eKLR*, *Kirinyiga General Machinery-vs-Hezekiel Muriithi Ireeri [2007] eKLR* and *Morris Njagi & another -vs-Mary Wanjiru Kiura [2017] eKLR*.

Analysis and Determination

11. I have considered the application on the basis of its substance together with the respective submissions filed by the parties.

12. The subject appeal was filed vide a memorandum of appeal dated 13th April, 2017, seeking to set aside Judgment of the trial court delivered on 20th February, 2017. It sought to set aside the impugned judgment in its entirety. The Applicant contended that it has been over two years since the appeal was lodged and yet the Appellant has not taken any step to fix the same for either directions or hearing.

13. *In law, delay is one of whips and scorns of time. The prolonged nature of litigation is a source of torment; indeed, lengthy delays may make it impossible for a defendant in any suit to receive a fair trial.* It is against this view that I set out the applicable law in determining this application. I begin with the Constitution, 2010 under Article 50 (1) where it is provided:

“Every person has the right to have any disputes that can be resolved by the application of the law decided in a fair and public hearing before a court or if appropriate another independent and impartial tribunal or body.

(2) (E) the right to have the trial begin and concluded without unreasonable delay.”

14. The Constitution does not provide information as to the length of time between the commencement of the action or charge to the date of conclusion of the case. The prescriptive period in civil claims has been deliberately left to the legislature.

15. In the present case the applicable law on the process of appeals is regulated by the Civil Procedure Act and Civil Procedure Rules. The relevant provision on dismissal of an appeal for want of prosecution is provided for under Order 42 Rule 35(1) which states:

“Unless within three months, after granting 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.”

16. In the instant application, the Applicant submitted that the provisions of Order 42 Rule 35(1) and (2) of the Civil Procedure Rules have not been complied with by the Respondent. The arguments therein are that since filing of memorandum of appeal, no positive significant step has been taken by the appellant/applicant to prosecute the appeal. However, the Appellant contended that the issue is not an omission or

negligence on his part, but the failure of the court to supply the record in accordance to Section 79G of the Civil Procedure Act.

17. On the foregoing, there are two situations relevant to the facts of this case from the reading of Order 42 of the Civil Procedure Act and Rules. First, under Order 42 Rule 10 and 11, the appeal is deemed to have been brought and filed before the appellate court. Secondly, when it is filed and entered in the register, the appellant shall within thirty days cause the matter to be listed before a judge for directions under Section 79B of the Act.

18. Going by the provisions of Section 79B of the Civil Procedure Act, the judge is expected to peruse the memorandum of appeal and the lower court record to infer whether sufficient grounds exist to interfere with the decree. In the event the judge is satisfied that no plausible grounds exist, the appeal is to be summarily dismissed.

19. The relevant aspect of this provision is the requirement for the appellant to schedule the appeal for directions even before the registrar compiles and transmits the record of appeal to the appeals' court. See the case of **Pyramid Hauliers Co. Limited v James Omingo Nyaaga & 3 others [2017] eKLR**.

20. In view of what is stated above, there is no dispute that the appellant has not approached the court since the filing and serving of the memorandum of appeal. Therefore, the contention by the applicant is that the appellant has not even attempted to comply with Order 42 Rule 10 and 11 of the Civil Procedure Rules by fixing the appeal for directions or hearing.

21. The manner in which the superior courts have approached the issue on delay has been well captured in the case of **Eastern Produce Kenya Ltd v Rongai Workshop & Transporters Ltd & Another [2014] eKLR** and in **Ikta v Kyumbu [1984] KLR 441** by laying down the test to be applied.

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

22. The rationale of this decision is the supremacy of the courts to exercise discretion not to deprive a party the right to access court to pursue its claim which by reason of delay would not see the light of the day. This principle recognizes that the fundamental rights and obligation of a court of law is to do substantive justice between the parties.

23. I will now proceed to apply the legal principles laid in the case of Eastern Produce Kenya Ltd (Supra) to the facts of the present application.

(1) Length of the delay by the appellant from the record:

24. The appellant filed the memorandum of appeal on 10/4/2017 and it has been over two years and no directions have been taken before a judge in chambers under Section 79B of the Civil Procedure Act. The Appellant contended that the answer to this failure is the absence of the proceedings from the trial court. In my considered view, that is not what the law requires under Order 42 Rule 10 and 11 of the Civil Procedure Rules that the Appellant ought to schedule the appeal for directions even before the registrar compiles and transmits the record of appeal to the appeals' court.

(2) The reasons given by the appellant for the delay:

25. The reason advanced by the Appellant for the delay is the failure by the lower court to supply it with certified copies of proceedings and judgement. This court was presented with various correspondences requesting for the appellant to be supplied with the trial court's proceedings for purposes of pursuing the appeal. There is no evidence that the trial court has ever corresponded or acknowledged the appellant's letter on the issue.

26. The Kenyan constitution under Article 47 (1) provides for the right to access information held by a public officer. In this particular case, the long delay of over two years by the court not supplying the proceedings to the Appellant is inexcusable. The reasons contributing to the delay to furnish the record to the appellant by the registrar of the trial court has not been provided at all.

27. The consequences that arise from the liability by the Appellant to obtain the record cannot be wished away by invoking Order 42 rule 35 (1) of the Civil Procedure Rules. The strength and prosecution of the appeal is based on the record of the trial court. In regard to the circumstances of this case, the delay of over two years on the Appellant's appeal cannot be separated from the non-issuance of the lower court record.

(3) The third issue deals with prejudice and whether justice can still be done:

28. It is generally acceptable that a functional system of justice is a chain where each of the actors must add value to the chain in setting their eyes to the procedure and legal requirements of the law. The primary concern of courts is to balance the competing interests and priorities between the parties to ensure the fair administration of justice.

29. In the instant case, there are competing interests between the Applicant who has obtained a judgement from a competent court on its

claim, and on the other hand, the Appellant who as a result of the judgement, has a right to seek redress and challenge the decision of the trial court. Therefore, in the event this court refuses to extend time there will be denial of justice for the appellant to maintain the action.

30. In applying the principles discussed above, I find there is no doubt that the applicant is guilty of a procedural default to adjudicate his appeal. However, from the explanation given, I am persuaded that some of the concerns raised are legitimate and beyond the Appellant's control. This court, therefore, has the inherent power under Sections 3, 3A and Order 50 rule 1 of the Civil Procedure Act and Rules respectively to extend time and save an action from premature death. Under Order 50 rule 1 of the Civil Procedure Rules, it is stated that:

“The court may, on such terms as it thinks just, by order or extend or abridge the period within which a person is required by these rules or by any judgement, order, discretion to do any act in any proceedings.”

31. In the case of *Malcon Ben v Hon Daniel Toroitich Arap Moi & Another*, the supreme court dealt with the concept of interest of justice as dealt with in Section 16 of the Supreme Court Act and stated that:

“Interest of justice as a criteria of decision making by the supreme court and other courts is already declared by the constitution in the national values and principles of governance in Article 10.”

And in the case of *Allen v Alfred & Sons [1968] 1 ALL ER 543* the court held *inter alia*:

“What factors to take into account to ascertain whether the applicant would be prejudiced with the ultimate order. The varying factors include nature of the case, importance of the claim, rights of the parties etc.”

32. I agree with the appellant's contention that in the event the appeal is dismissed at this stage, he will suffer prejudice and injustice. Secondly, as the injury caused by the delay on the part of the appellant cannot be compensated by way of payment of costs.

33. Accordingly, the Notice of Motion application dated 26th August, 2019 be and is hereby dismissed and the following orders issue:

- a) **That the Deputy Registrar of the High Court supplies the original record of proceedings from the trial court to the appellant within 30 days from the date of this ruling;**
- b) **That the Appellant to prepare, file and serve the record of appeal upon the Applicant/Respondent within 14 days upon the expiry of 30 days;**
- c) **That the parties to appear before the Deputy Registrar to confirm compliance with the order and taking a date for directions on the hearing of appeal;**
- d) **That the costs of this application to abide the outcome of the appeal.**

It is so ordered.

Dated, Delivered and Signed at Nairobi this 19th Day of May, 2020.

D.O CHEPKWONY

JUDGE

In view of the declaration of measures restricting court operations due to the COVID-19 pandemics, and in light of the directions issued by His Lordship, the Chief Justice, on 15th March 2020. This ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious proportionate and affordable resolution of civil disputes