



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 175 OF 2009

**KENYA MEAT COMMISSION.....APPELLANT**

**-VERSUS-**

**MUNICIPAL COUNCIL OF MOMBASA.....RESPONDENT**

**SAFEWAYS LIMITED.....INTERESTED PARTY**

**RULING**

1. By virtue of a Notice to Show Cause issued under the provisions of Order 42 Rule 35 (2), of the Civil Procedure Rules, this court listed the Appeal herein for dismissal for want of prosecution on 31.8.2018.

2. In response to the Notice to Show Cause, the Appellant through its counsel on record **Mr. Francis M. Kadima**, filed a Replying Affidavit sworn on the 14.9.2018 in which there is a request vide letters from the Ethics and Anti-Corruption Commission attached thereto, that the proceedings herein be stayed in favor of ELC. No. 60 of 2012 since they both revolve around the same parcel of land in Shimanzi where the Appellant's cold storage is located.

3. It is averred that to avoid embarrassing this Court, the Appellant opted to litigate ELC NO. 60 of 2012 because in its view the same has the capacity to dispose this Appeal and it is in the best interest of Justice if this Appeal is stayed.

4. It is also averred that no prejudice will be suffered by the respondents if the Appeal is stayed as the decretal sum of Kshs. 5, 4774, 571/= awarded to the Respondent and Interested party has been deposited in a joint interest earning account by the Appellant.

5. I have considered the affidavit evidence, the annexures thereto and submissions by both parties' advocates on record and the relevant applicable law and precedents relied upon. In my view, the issues for determination is whether this Appeal should be dismissed.

6. **Order 42 Rule (35) (2)** in my view, is meant to take care of dormant appeals which are simply abandoned after they are filed such that no interest is demonstrated by the appellant in taking any single step towards progressing it for admission, directions or hearing for a minimum period of one year.

7. I am guided by the principles rightly summarized in the case of **Ivita Vs Kyumbu (1984) KLR 441:-**

**“The test by the court in an application for the dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus even if 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 available time. It is a matter in the discretion of the court”.**

8. It is not controverted by the Respondent, that there exists ELC No. 60 of 2012 in which the parties herein are also parties and that the subject matter of the said suit is the same as the subject matter of this instant suit. I have looked at the amended Plaint in ELC. No. 60 of 2012 a copy of which has been annexed as “FMOK-3” and I am in consonance with the appellant's argument that the subject matter of this suit is the same with that in ELC. No. 60 of 2012. I note that at paragraph 15 of the same it is stated that the entire proceedings in Mombasa Civil Suit no.1900 of 2006 were a nullity.

9. Be that as it may, this Court finds that the Appellant's excuse for the delay in setting down this matter for hearing is its preference of ELC NO. 60 of 2012 over this instant Appeal which it believes is reasonable since ELC. No. 60. of 2012 will conclusively determine the rights of all the parties herein.

10. This Court also notes that the decretal sum herein having been deposited in a joint interest earning account of the parties advocates, there will be no prejudice suffered by the interested party if this Appeal is not dismissed.

11. It is noteworthy that this Court cannot exercise its discretion over this Appeal by staying it pending the outcome of ELC.NO.60 of 2012 as it has not been properly moved by any of the parties herein.

12. However, for the foregoing reasons and considering that the court is enjoined to administer substantive justice to parties before it, I find that although there is delay on the part of the Appellant in prosecuting this Appeal, there are overwhelming reasons for the same to be sustained.

13. In the end the Notice to Show Cause is set aside on condition that;

**a. the appellant ensures that the appeal is ready for directions with regard to hearing within ninety (90) days from the date of this ruling.**

**b. failure to comply with the above condition, the appeal will stand dismissed.**

13. The costs shall abide the Appeal.

**Dated, signed and delivered at Nairobi this 13th 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 15<sup>th</sup> 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