



**REPUBLIC OF KENYA**

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

**CORAM: A.K NDUNG'U J**

**CIVIL APPEAL NO. 96 OF 2013**

**JACK OCHIENG'.....APPELLANT/RESPONDENT**

**-VERSUS-**

**KENNEDY OOKO JACOB T/A**

**SSEBO INTEL COMPANY AUCTIONEERS.....1<sup>ST</sup> RESPONDENT**

**FAULU KENYA LIMITED.....2<sup>ND</sup> RESPONDENT/ APPLICANT**

***(Being an appeal from the ruling and order of Hon. E.M. Nyagah (P.M.) dated 18<sup>th</sup> July 2013 in Migori SPMCC No. 11 of 2013)***

**RULING**

1. The applicant herein has moved this court vide an application dated 9<sup>th</sup> October 2019, brought under **Sections 1A, 1B, 3A** of the **Civil Procedure Act, Order 51 Rule 1(1)** of the **Civil Procedure Rules 2010** seeking to have the appeal dismissed for want of prosecution. The application is based on the grounds that since the last time the matter was in court on 2<sup>nd</sup> October 2014, the appellant has never taken any steps to have the matter set down for hearing and he appears to have lost interest in pursuing the matter. The applicant is of the view that the suit amounts to an abused of court process and should be dismissed with costs.

2. The appellant did not respond to the application despite service.

3. The applicant's counsel filed written submissions in compliance with this court's directions to dispose of the application by way of written submissions.

4. Upon perusing the application, the supporting affidavits and counsel's submissions, I find that the sole issue for determination is whether the appeal should be dismissed for want of prosecution.

5. The legal principle guiding the dismissal of appeals for lack of prosecution is found under **Order 42 Rule 35** of the **Civil Procedure Rules** which 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.*

6. This court is also guided by the overriding principle which aims at facilitating the just, expeditious, proportionate and affordable resolution of the civil disputes.

7. In a nutshell, the background of this application is that the appellant/respondent filed an appeal against the decision of the trial court dismissing his application for injunctive orders. The appellant had obtained a loan facility of Kshs. 80,000/= from the applicant on 5<sup>th</sup> April, 2012. When he defaulted in making payments, the applicant moved to attach the appellant's goods. The application before the trial court was made for lifting of the warrants of attachment and the release of the goods back to the appellant.

8. The trial court's refusal to grant the application for injunction is what caused the appellant to file a memorandum of appeal before this court. The appeal was filed simultaneously with an application seeking *inter alia* an injunction to restrain the respondents from selling his goods. Hon. Sitati J. considered that application and dismissed it with costs in a ruling dated 19<sup>th</sup> June 2015.

9. Since the dismissal of his application, the appellant has not made any move to prosecute this appeal. It has been more than 5 years since the court dismissed his application and more than 7 years since the appellant made a move to progress the matter. No response has been filed against the application to dismiss the appeal. It can be taken that there is no plausible explanation for the delay in the matter.

10. While the court must not be seen to drive a party from the seat of justice without hearing, the duty of the court to maintain a suit or in this instance an appeal should be balanced against the duty to ensure that the respondent is not prejudiced by a party not desirous of expediting the conclusion of their matter. It is not in the interest of justice to have the appeal hang over the respondents for that period of time without good reason. I find that the 2<sup>nd</sup> respondent's application is merited.

11. Costs of any action or other matter or issue shall follow the event unless there is good reason to order otherwise.

12. Accordingly, I allow the application dated 9<sup>th</sup> October 2019 with costs of the appeal and the application to the 2<sup>nd</sup> respondent/applicant.

**Dated and Delivered at Kisii this 14<sup>th</sup> day of October, 2020.**

**A. K. NDUNG'U**

**JUDGE**