



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 285 OF 2018

BENJO (K) LIMITED.....APPELLANT

-VERSUS-

**JAMES KIMANI GATIBA (Suing in his capacity as
the Administrator of the estate of GEOFFREY**

KATIBA KIMANI(DECEASED).....RESPONDENT

RULING

- 1) The respondent herein took out the motion dated 18th October 2019 in which she sought for this appeal to be dismissed for want of prosecution. Salome M. Beacco, learned advocate for the respondent filed an affidavit she swore in support of the motion.
- 2) When served with the motion, the appellant herein filed the replying affidavit sworn by Allan Odongo, learned advocate for the appellant to oppose the application. When the motion came up for interpartes hearing, this court with the concurrence of parties directed the application to be disposed of by written submissions.
- 3) I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the application. I have equally considered the written submissions. The main order sought by the respondent is for this appeal to be dismissed for want of prosecution.
- 4) It is argued that the appellant has lost interest in the appeal and that is why it has taken no steps to prosecute its appeal since the date of its filing i.e on 25th June 2018. It is submitted that the continued pendency of this appeal has greatly prejudiced the respondent since he is unable to enjoy the fruits of his judgment.
- 5) In response, the appellant beseeched this court not to dismiss the appeal on the basis that the delay to prosecute the same was not occasioned by it but by the court. It is said that there was a delay in procuring certified copies of the decree, judgment and typed proceedings on the part of the trial court. In other words, it was submitted that the trial failed to furnish the appellant with certified copies of the typed proceedings and judgment.
- 6) The appellant further argued that the application is premature because the appeal has not been admitted to hearing under Section 79B of the Civil Procedure Act and under Order 42 of the Civil Procedure Rules. The appellant stated that it is eager to prosecute the appeal and it therefore beseeched this court to indulge it to prosecute the appeal.
- 7) Having considered the material placed before this court together with the written submissions, it is apparent that the averment by the appellant/respondent to the effect that the trial court delayed in supplying the appellant with certified copies of proceedings and the judgment. The averment is not contested by the respondent/

applicant.

8) It is also not disputed that the appeal has not been admitted to hearing, therefore the appeal cannot be listed for hearing unless such a condition has been fulfilled. This court is alive of the fact that notwithstanding that the appeal has not been admitted, the court retains the power to dismiss the appeal in exercise of its inherent power for want prosecution under Section 3A of the Civil Procedure Act where the appellant has intentionally failed to take the necessary steps to have the appeal placed before a judge in chambers for admission.

9) On the basis of the reason advanced by the appellant to explain the delay to prosecute the appeal, I am convinced that the appeal should not be dismissed for want of prosecution. Consequently, the motion dated 18th October 2019 is found to be without merit. The same is dismissed with costs abiding the outcome of the appeal.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 6th day of November, 2020.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the Respondent