



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO. 63 OF 2013

I. GHANI.....1ST APPELLANT

GEORGE NJUGUNA.....2ND APPELLANT

VERSUS

EASTERN PRODUCE (K) LIMITED....RESPONDENT

RULING

[1] Before the Court for determination is the Notice of Motion dated **2 February 2017**. The said application was filed by the Respondent pursuant to **Sections 1A, 1B and 3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**, and **Order 17 Rule 2(3)** of the **Civil Procedure Rules 2010**, for orders that:

[a] the orders made on **5 November 2014** staying execution of the Decree in **Eldoret CMCC No. 796 of 2002** be discharged and/or set aside;

[b] the Appellants' appeal against the Respondent be dismissed for want of prosecution;

[c] costs be borne by the Appellants.

[2] The application was premised on the grounds, inter alia, that the Appellants have not taken any steps to have the application dated **13 May 2015** fixed for hearing and yet the interim order of stay of execution that was granted *ex parte* on **5 November 2014** subsists to date. The application is supported by the affidavit of **Mr. Alfred King'oina Nyairo**, Advocate, sworn on **2 February 2017**, whose averments are, in essence, a reiteration of the proceedings herein, dating back to **5 November 2014** when the interim stay order was granted on the foot of the application dated **13 May 2014**. It was thus averred that the Appellants' indolence appears buoyed by the subsisting stay orders; and that it would be in the interest of justice not only to have the stay order set aside, but to dismiss the appeal as well for want of prosecution.

[3] The Appellants, on their part, were of the posturing that the application has been brought in bad faith and is only meant to waste precious time; and thereof ought to be dismissed with costs. In the Replying Affidavit sworn by the **1st Appellant** and filed herein on **8 June 2018**, it was averred that the Appellants have been desirous of pursuing the appeal but had been hampered by the typing of proceedings by judicial officers; and that now that the record has been filed, they stand to suffer immense prejudice should the stay order be vacated.

[4] The application was urged by way of written submissions, which I have carefully considered. I have also perused the proceedings to date; and note that indeed, the application dated **13 May 2013** has been pending for longer than necessary. That notwithstanding, it is my careful consideration that the instant application is misconceived for the following reasons: First and foremost, **Order 17 Rule 2** of the **Civil Procedure Rules**, is specific to suits as opposed to appeals. It provides that:

(1) **In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.**

(2) **If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.**

(3) **Any party to the suit may apply for its dismissal as provided in sub-rule 1.**

(4) The court may dismiss the suit for non-compliance with any direction given under this Order

[5] It would thus be improper to dismiss this appeal simply on the basis that there is on record an application which has remained unprosecuted from **May 2013**. The proper procedure would be to move the court for the dismissal of that application. In any event, where an appeal remains unprosecuted for unduly too long, the relevant provision of the law would be **Order 42 Rule 35** of the **Civil Procedure Rules**. Secondly, it appears that the delay has been attributable to the Court, as was acknowledged on **28 June 2017**. As it is, the appeal is yet to be admitted as required by **Section 79B** of the **Criminal Procedure Act**.

[6] In the premises, I would accordingly strike out the application dated **2 February 2017** with no order as to costs and direct that the application dated **13 May 2014** be disposed of on merits; and that in the meantime, the appeal be progressed towards hearing and determination.

It is so ordered.

DATED SIGNED AND DELIVERED AT ELDORET THIS 7TH DAY OF JUNE, 2019.

OLGA SEWE

JUDGE