**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAKURU**

**CIVIL APPEAL NO. 198 OF 2010**

**MALINDI SALT WORKS LIMITED............APPELLANT/APPLICANT**

-VERSUS-

**RONGAI WORKSHOP & TRANSPORT LTD.................RESPONDENT**

**RULING**

**(On Application dated 9th September 2014)**

1. This appeal, was dismissed for want of prosecution by the Hon. Emukule J, (as he then was) on the 16th July 2014.

The appellant by its application dated **9th September 2014** under provisions of **Sections 1A, 1B**, **3A and 63(e) of the Civil Procedure Act and Order 12 rule 7, 42 rule 20 and 21 and 50 of the Civil Procedure Rules** sought an order to set aside the dismissal order and re-admission of the appeal for hearing.

2. Grounds for the application are stated on the face of the application and a supporting affidavit sworn on the 9th September 2014 by Austin Ayisi advocate having the conduct of the appeal for the applicant/appellant.

Two affidavits in opposition to the application are filed, one by Mahinda advocate sworn on the 1st October 2014, and a supplementary affidavit by Adams Maiyo Advocate sworn on the 25th March 2019. Grounds of opposition are also filed on the 1st October 2014.

3. I have considered the affidavits for and in opposition to the application.

The applicant admits that the dismissal of the appeal resulted from an inadverted mis-diarisation of the hearing date as 19th August 2014 instead of 16th July 2014 in the advocates firms master diary hence the non-attendance by the advocate.

4. The respondent submitted that the appellant was not interested in the appeal in that the present application was filed under certificate of urgency and listed for hearing on 8th October 2014 and again on 29th November 2014 when hearing was stood over generally and it took no further action to list it for hearing. It is submitted that it is the respondent who moved the court for a hearing date and not the appellant showing lack of interest in the appeal, being a delay of one year eight months.

5. It is also urged that the appeal was filed by a 3rd party who was not a party in the primary suit thus

incompetent, to the effect that, contrary to the applicants submission, no chances of success exhibit themselves towards that end.

It is further submitted that the appeal having been filed in 2010, the inexcusable delay has prejudiced the respondent.

6. On the inordinate delay in progressing the appeal, no plausible reasons have been advanced. The advocate who allegedly mis-diarised the hearing date of the application has not been disclosed nor has he filed an affidavit as to the alleged inadvertence and mistake.

7. An appeal/case belongs to the plaintiff/Appellant. It is its duty to take steps to progress it to conclusion. Failure without plausible reasons for delay shows disinterest and subjects the appellant to prejudice and denies it enjoyment of its fruits of the judgment and therefore injustice to the respondent bearing in mind that it is the appellant who preferred the appeal against the respondent.

8. **Section 1A, 1B and 3A** of the enjoins all parties to a case including the court to administer justice expeditiously **– Ivita –vs- Kyumbu (1984) KLR 441 and HCCC No. 32 of 2010 Utalii Transport Company Limited & Another –vs- NIC Bank Ltd.**

9. The main concern by the court in the application is whether sufficient reasons have been advanced for failure by the Appellant advocate to attend court leading to the dismissal of the appeal, and not the merits of the same.

I have considered the Authorities provided by the Applicant.

10. In my view they are irrelevant. They do not address the issues at hand. I find it unacceptable that even after its application was stood over generally on the 29th November 2014 the appellant took no action to list it for hearing. It is the respondent who took it upon itself to fix it for hearing 1½ years thereafter. This is in my view is a party who has lost interest in the appeal. And even when it was fixed for hearing, no advocate attended court to prosecute the same.

11. It is further noted that the application was brought under a certificate of urgency. The conduct of the applicant shows no such urgency. As stated in the case **Kenya Shell Limited –vs- Kiburu & Another (1986) KLR 410** the court is under an obligation to balance the two parties competing and rival interests being minded that a party ought not be denied his constitutional rights to be heard under **Article 50** of the Constitution. This right is not absolute, as the other party's rights ought to be considered and ought not be shut out endlessly - or curtailed by indolence by the opposite party See the **Ivita Kyumbu Case** (Supra).

12. A Case belongs to the litigant, not its advocates. It is its duty to follow up progress with its advocates.

No demonstration whatsoever has been exhibited by the appellant of any interest or any efforts to list it for hearing since 2014.

For the above reasons, I find no merit whatsoever in the application dated the 9th September 2014. It is disallowed and dismissed with costs.

**Signed, delivered and dated at Nakuru this 11th Day of July 2019**.

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**J.N. MULWA**

**JUDGE**