



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 44 OF 2011

AL-HUSNAIN MOTORS LIMITED.....APPELLANT

VERSUS

DAVID ESHIUNWA SAYA (*Suing as the Legal Representative*

***of the estate of the Late Micky Amunga Eshiuwa*).....RESPONDENT**

RULING

1. On 9th July 2019, this court on its own motion issued a notice to show cause directing the parties to attend the court on 4th October 2019 for the appellant to show cause why his appeal should not be dismissed for want of prosecution.
2. On the hearing date, the appellant was represented by learned counsel *Mr. Njogu* while learned counsel *Mr. Malaku* appeared for the respondent. *Mr. Malaku* urged the court to dismiss the appeal for want of prosecution as proposed with costs arguing that for the last ten years, the appellant had not taken any step to facilitate hearing of the appeal.
3. In its response, the appellant through its counsel on record filed an affidavit showing cause why the appeal should not be dismissed. The deponent, *Mr. Lawrence Nyoro Njogu* explained that the appellant's hands had been tied by the lower court which has failed to supply it with copies of the typed proceedings which were first applied for on 9th February 2011 and have not been supplied to date; that the appellant was still keen on prosecuting the appeal which in its view had a high probability of success.
4. In his oral submissions in court, *Mr. Njogu* replicated the depositions made in his affidavit. He requested the court to intervene in ensuring that the proceedings were availed immediately to enable the appellant compile the record of appeal and prosecute the appeal.
5. I have considered the explanation offered by the appellant in response to the notice to show cause. I have also perused the court record. The court record confirms that since the appeal was filed on 10th February 2011 which is over eight years ago, the appellant has not taken any single step towards progressing the appeal for hearing. I appreciate the appellant's contention that the lower court's failure to supply it with copies of proceedings has been responsible for the delay but the appellant ought to have made more effort in pursuing its request to the lower court to supply it with the typed copies of the proceedings. The letter annexed to the supporting affidavit shows that the last time the appellant wrote to the lower court seeking to find out the status of the proceedings was on 14th July 2015, over four years ago. The appellant cannot therefore entirely escape blame for the delay in the prosecution of the appeal.
6. I have noted from the record that to date, the trial court has not forwarded its original record to this court despite several requests by the Hon. Deputy Registrar. This means that even if the appellant had filed a record of appeal, no meaningful progress would have been made in the prosecution of the appeal given the unavailability of the lower court's file.
7. In view of the foregoing and given that the appellant has expressed its willingness to prosecute the appeal, I find that it would be fair and just to give the appellant an opportunity to be heard on its appeal especially taking into account that the most delay in the prosecution of the appeal has been occasioned by factors beyond its control.
8. I am thus satisfied that sufficient cause has been shown why the appeal should not be dismissed for want of prosecution. The appeal is consequently sustained.
9. In order to unlock the current stalemate with regard to the supply of proceedings and availability of the lower court file, I direct the Hon. Deputy Registrar to issue a summons to the Executive Officer in Charge of the Milimani Commercial Courts to attend the court on a date to be agreed upon by the parties to either produce the lower court's file or show cause why it should not be availed to this court. In the meantime, the said Executive Officer is directed to ensure that the appellant is supplied with typed copies of the proceedings in the lower court.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 17th day of October, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Ndonga holding brief for Mr. Njogu for the appellant

Ms Mbiti holding brief for Mrs. Keya for the respondent

Mr. Salach: Court Assistant