



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 18 OF 2018

DIRECTLINE ASSURANCE

COMPANY LIMITED.....APPELLANT/APPLICANT

-VERSUS-

SIMON CHEGE NGUGI.....RESPONDENT

LAWRENCE MURIUNGI GICHUNGE.....INTERESTED PARTY/APPLICANT

RULING

1. The Appeal herein was filed on the 16th January, 2018.
2. Thereafter, the Appellant filed the application dated the 19th day of January 2018 seeking a stay of execution of the Decree pending the hearing and determination of the Appeal which application was heard and determined by Mbogholi J, vide a ruling delivered on the 31st March, 2018.
3. The matter was listed for Notice to show cause on the 11th day of October, 2019 when counsel for the Appellant requested to be given time to file an affidavit in response to the Notice to show cause. The matter was stood over to the 7th November, 2019 for mention to confirm compliance. On the said date counsel for the Appellant informed the court that he was not able to file the affidavit due to the three days rule. He sought for more time to do so, time was extended and he was ordered to file the same within seven (7) days from the aforesaid date. The matter was then fixed for mention on the 20th November, 2019 to confirm compliance. Come the 20th November, 2019 the Appellant had complied but the affidavit had been filed outside the seven (7) days period that had been ordered by the court which prompted counsel for the Respondent to apply for the affidavit to be expunged from the record.
4. The court noted that no good reason had been given why the timeline was not complied with and it ordered that the same be expunged from the record.
5. Counsel for the Respondent urged the court to dismiss the Appeal under Order 42 Rule 35 (2) which provides as follows:-

“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. She submitted that, the Memorandum of Appeal was served upon her on the 21st February 2018 together with an application for stay of execution which was disposed off and a stay granted. That since then, not a single action has been taken to further the hearing of the Appeal herein not even a record of Appeal has been filed.
7. She argued that, under the circumstances, it is apparent that the application for stay was just to stay execution which stay has denied the Respondent a chance to enjoy the fruits of his judgment. She urged the court to dismiss the Appeal.
8. In her response, counsel for the Appellant submitted that the Appeal was not due for dismissal as it was last in court on the 7th November, 2018 and one year had not lapsed by the time it was listed for Notice to show cause. She stated that the Appellant was still interested in pursuing the Appeal to its logical conclusion and it's only fair that he be allowed to prosecute the same.
9. In her rejoinder, counsel for the Respondent contended that, it has not been denied that no action has been taken for a whole year since the appeal was last in court. That, it has also not been denied that a Record of Appeal has not been filed.

10. The court has considered the oral submissions made by counsels for the respective parties. The Appeal had been listed for notice to show cause under **Order 42 Rule 35 (2)** of the Civil Procedure Rules which provides:-

(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”.

11. Counsel for the Respondent submitted that the Memorandum of Appeal was served on her, on the 21st February, 2018 which fact was not disputed by the Respondent. Since then no action has been taken in the Appeal not even a Record of Appeal has been filed. The argument by counsel for the Appellant that the matter was last in court on 7th November 2018 and therefore, not ripe for dismissal does not hold any water.

12. This is because under **Order 42 Rule 35 (2)**, the one year period started to run from the date of service of the memorandum of appeal and it requires that the Appeal be set down for hearing within one year after the said service.

13. The court has perused the record and I can confirm that the Record of Appeal has not even been filed. The proceedings in the lower court matter have already been typed, certified and the lower court file forwarded to this court. There is no reason why the Appellant has not filed a Record of Appeal.

14. However, the court appreciates that the power of the court to dismiss a Suit/Appeal for want of prosecution is discretionary but the same should be exercised judiciously.

15. This was the holding in the case of **Moses Muriira Maingi & 2 Others vs Mwangi Kamuru & Another- Nyeri Civil Appeal No. 151 of 2010** and also in the case of **ET Monks & Co. Limited vs Evans [1985] KLR 584** wherein Kneller J (as he then was) held inter alia that:-

“Whether an application for dismissal of the suit for want of prosecution should be allowed or not is a matter of the discretion of the judge who must exercise it judiciously”.

16. The court shall among other things consider whether the delay was lengthy, whether it has rendered a fair trial impossible and whether it was inexcusable. However, each case will turn on its own facts and circumstances”.

17. The same principles have been followed in the case of **Ivita vs Kyumba [1984] KLR 441** where the court held thus:-

“The test applied by the court in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable; and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the Plaintiff’s excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter in the discretion of the court”.

18. The court has considered the above principles and the submissions made by the parties in response to the notice to show cause. The court finds that though there is a delay in prosecuting the appeal, justice can still be done to the parties despite the delay. The Respondent did not allege any serious prejudice that will be occasioned to him if the appeal is not dismissed.

19. In the premises, the court will not dismiss the appeal but it will make the following orders:-

- i. *The Appellant to file and serve a Record of Appeal within 21 days from today’s date.*
- ii. *Thereafter, list the appeal for directions within 15 days from the date of filing of the Record of Appeal.*
- iii. *Failure to comply with either of the two conditions, the Appeal shall stand dismissed.*

20. The Respondent is awarded costs of Kshs. 10,000/= to be paid within 14 days from the date hereof.

Dated, signed and delivered at **NAIROBI** this 5th day of December, 2019

L. NJUGUNA

JUDGE

In the presence of:

.....for the Appellant/Applicant

..... for the Respondent

.....for the Interested Party