



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**CIVIL SUIT NO. 32 OF 2003**

**ROBERTO LOSURDO.....APPLICANT**

**VERSUS**

**TIPMADHU SEASIDE CHALETS LIMITED.....RESPONDENT**

**CORAM: Hon. Justice R. Nyakundi**

**A.B. Patel Advocates for the applicant**

**Khaminwa & Khaminwa Advocates for the respondent**

**RULING**

The applicant through a notice of motion filed in court on 5.8.2019 expressed to be brought in terms of Rule 83 and 84 of the Court of Appeal Act Section 1A, 1B, 3A, 63 E of the Civil Procedure Rules sought an order of this court to struck out the notice of appeal dated 13<sup>th</sup> June 2014.

In support of the application before me an affidavit by counsel **Mr. Mwadilo** seized of the matter deposed that the intended appellant has never taken positive steps to file the record of appeal.

According to Learned counsel the respondent pursuant to a schedule of events under Order 42 of the Civil Procedure Rules.

**Background**

The plaintiff **Losurdo** on 1.10.2003 initiated such against **TipMadhu Seaside Chalets Limited** seeking the following reliefs:

- a. Let Kshs.50,000,000/= being salary for the year 1998.*
- b. Let Kshs.50,000,000/= being loss of salary for the year 1999.*
- c. Let Kshs.11,200,000/= being costs of transfer, all tickets, lodging and taxi.*
- d. Interest thereon at court rates from the date hereof until payment in full.*

Subsequently, on 9.6.2014 Judgment on the merits of the claim was delivered by **Meohi J** that resulted in the dismissal of the plaintiffs claim in its entirety against the respondent/defendant.

Being aggrieved with the Judgment of the court the plaintiff preferred an appeal by filing a notice of appeal to the Court of Appeal which has stayed in limbo. The respondent has moved this court to have a service out for want of running any steps to file the substantive appeal.

**Analysis**

I have considered the primary record and further the instant notice of motion together with affidavit in support invoking the jurisdiction of this court to strike out stale claims.

**The law**

What is not inordinate, delay arise depend on the facts of each particular case. These vary infinitely from case to case but it should not be too difficult to recognize inordinate delay when it occurs that this inordinate delay is in excusable. As a rule until a credible excuse is made out. The natural inference would be that it is inexcusable.

Considering the record and affidavit evidence adduced it is to be noted that the plaintiff did not even bring himself within the provisions

2- If within one year after the Ruling of the memorandum of appeal, the appeal shall not have been set down for hearing. The Registrar shall by notice to the parties list the appeal before a Judge in chambers for dismissal.

In delivering what constitutes delay the court in **Ivita v Kyumbu 1984 KLR 441** held:

***“the test is whether the delay is prolonged and inexcusable and, if it is, can justice be done despite such delay.”***

In Allan v Sir Alfred Mc Alphine and Sons Ltd 1968, ALL ER the court stated that:

***“where there has been inordinate delay***

**Determination**

The answer to this question raised by the applicant can be followed by involving the jurisdiction of the Court of Appeal.

The ground rules which this application can be entertained are provided for under the Court of Appeal Act Rule 83 and 84. In my Judgment the court in overall. On 9.6.2014 detailed the dispute conclusively as between the plaintiff and the defendant. There is no cause of action that has arisen to warrant this court to exercise jurisdiction.

The notice of motion as filed is fatally defective and its good for dismissal which I hereby do with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 11<sup>TH</sup> DAY OF DECEMBER 2019.**

.....

**R. NYAKUNDI**

**JUDGE**