



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 311 OF 1987**

**SIMON GACOKI AYUB.....APPELLANT**

**VERSUS**

**KABARE FARMERS CO-OPERATIVE SOCIETY LTD.....RESPONDENT**

**RULING**

The ruling herein relate to the following matters;

Civil Appeal No. 311/1987

Civil Appeal No. 312/1987

Civil Appeal No. 313/1987

Civil Appeal No. 314/1987

Civil Appeal No. 315/1987

Civil Appeal No. 316/1987

Civil Appeal No. 317/1987

Civil Appeal No. 318/1987

Civil Appeal No. 319/1987

Civil Appeal No. 320/1987

Civil Appeal No. 324/1987

They were all listed for notice to show cause why they should not be dismissed for want of prosecution, on the 20<sup>th</sup> September, 2019.

On the said date, Mr. Kimathi Advocate appeared for all the appellants and sought leave to file an affidavit in response to the notices and the matters were stood over to the 24<sup>th</sup> October, 2019 for the hearing of the notice to show cause.

On the 16<sup>th</sup> day of September, 2019, counsel filed an affidavit in civil appeal number 318/1987 which is in respect to all the matters listed herein above. Earlier on, he had filed another affidavit in the same matter, on the 7<sup>th</sup> November, 2019 which he withdrew together with yet another affidavit which had been filed by his predecessor on 20<sup>th</sup> September, 2019. These proceedings can be found in civil Appeal Number 318/1987.

The court has considered the contents of the said affidavit sworn by counsel for the appellants in which, he has responded to the notice to show cause as hereunder;

1. That on the 28<sup>th</sup> January, 2000 a Mr. Benjamin Njau whom he has described as one of his clients wrote to the Attorney General through the Chief Justice requesting for the matter to be heard and settled quickly.

2. That his clients continued to follow up their claims through various visits to the court and to their previous advocates on record M/S Owino Opiyo Advocate without any positive response from either.
3. On the 28<sup>th</sup> July, 2016, the Appellants wrote to the Complaints Commission complaining about their former advocate for his failure to update them in the matters.
4. On the 24<sup>th</sup> October, the appellants wrote a letter to the registry requesting for the proceedings in the 12 matters which letter was never responded to.
5. That the files were missing and on the 27<sup>th</sup> May, 2019, the High Court Civil Registry wrote to them informing them that the files had been traced and it was then that they instructed the current advocate on record to take over the matter. He filed his notice of change of advocates on the 20<sup>th</sup> September, 2019.

The deponent avers that on the 6<sup>th</sup> October 2019, he held a meeting with some of the appellants and out of the twelve appellants, four of them are now deceased. He has stated that they are still interested in pursuing the appeals and has urged the court not to dismiss them.

The appeals were listed for notice to show cause pursuant to notices issued 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"***

The principles to be applied in a case such as this one are set out in the case of *Allen vs. Sir Alfred MC Alpine & Sons Limited (1968) where salmon L.J.* stated as follows;

- i. There has to be inordinate delay. It is not possible to lay down a tariff so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary from case to case but it should not be too difficult to recognize inordinate delay when it occurs.*
- ii. That this inordinate delay is inexcusable. As a rule, until a credible excuse is made out the natural inference would be that it is inexcusable.*
- iii. That the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff, or between each other or between themselves and third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater likelihood of serious prejudice at the trial."*

The above principles have been followed in Kenya in the case of *Ivita vs. Kyumba (1984) KLR 441* where the court held;

***"The test applied by the courts 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, 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."***

The court has perused the record of the proceedings and has noted that the appeals were all filed in 1987 and they were last in court between the year 1994 and 1995. The affidavit in response to the notice to show cause shows that apart from the letter dated 28<sup>th</sup> January, 2000, the other letters were done in the year 2016 and 2017.

The delay between 1995 when the appeals were last in court upto the 2000 has not been explained. The court has noted the two letters dated 13<sup>th</sup> November, 2017 and the other dated the 28<sup>th</sup> November, 2018. The letters were done twenty four (24) years after the appeals were last in court and thirty two (32) years after the filing of the appeal. The appeals have been in court for more than three decade which, in all fairness, is unacceptable.

The appellants herein have blamed their advocate for the delay. In the case of *Habo Agencies Limited vs. Wilfred Odhiambo Musingo(2015) eKLR* the court stated that it is not enough for a party in litigation to simply blame the advocate on record for all manner of transgressions in the conduct of litigation. Courts have always emphasized that the parties have a responsibility to show interest in and to follow their cases even when they are represented by counsel.

A similar reasoning was taken by the Court of Appeal in Civil Appeal number 80 of 2007 (*Rajesh Rughani vs. Fifty Investments Limited & Kemi & Muhia Advocates* where the court stated;

***"Our re-evaluation of the record leads us to conclude that no credible, satisfactory and sufficient explanation for the delay has been given. It is insufficient to blame previous counsel on record without an explanation as to the action taken by the litigant to show he did not condone or collude in the delay"***.

This court shares the same view with that of the Court of Appeal in the above matter and find that the delay is inordinate and inexcusable. The court is not satisfied with the appellants excuse for the delay.

In the end, the appeals are hereby dismissed for want of prosecution. Costs to the respondent.

Dated, Signed and Delivered at **NAIROBI** this **5<sup>TH</sup>** Day of **DECEMBER, 2019**.

**L. NJUGUNA**

**JUDGE**

**In the Presence of**

..... For the Applicants

..... For the Respondent