



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 73 OF 2010

JOSFAN KAIYA CHEBANA.....APPLICANT/DEFENDANT

VERSUS

TIMESALES LIMITED.....RESPONDENT/PLAINTIFF

(Being an appeal from the Judgment of the Honourable Resident Magistrate Honourable Mr. C.A. Otieno in Nakuru CMCC No. 907 of 2002 delivered on 15th March 2010)

RULING

1. I have heard the parties on the application dated 24th January 2018.

It is evident that the appellant has been indolent in the prosecution of the appeal filed eight years ago. In two occasions under Notices to show cause why appeal should not be dismissed for want of prosecution, the court has indulged the appellant but it appears like he is not interested in the prosecution of the appeal.

2. The appeal belongs to the Appellant and its continued pending in court no doubt has prejudiced the Respondents.

Reason given by the Appellant that the court file has been missing from the court registry is not supported by any sound submission. The only letter written to the Executive officer to help trace the alleged missing file was dated the 12th July 2017. No follow up has been demonstrated.

3. I have noted that the Record of Appeal was filed in January 2013. Five years down the line, no directions have been taken under **Order 42 rule 13**. The trial court file is not in this court, at least not in the court file.

4. I note that the Deputy Registrar was directed to bring up the trial court file on the 31st May 2013 (Hon. Emukule J, now retired). No explanation as to why the trial court file was not availed has been offered. The appellant has said nothing, because he has not followed up its availability. This is but unreasonable inactivity and indolence on his part.

5. The overriding objective in civil litigation, and specification under provisions of **Section 1A, 1B and 3A of the Civil Procedure Act** is to obviate hardship, expense and to focus on substantive justice. Summary dismissal of cases is never a favourite idea to the courts as it denies parties a chance to be heard on merits.

That is not to say that a court will shy away from dismissing suits where it has been shown that the party is not interested in finalisation of the case or is just out to punish the other by either orders of stay or just outright disinterest in the case/appeal.

6. I have considered all the relevant factors in this motion and come to the finding that the appellants indolence.

For those reasons, I put the blame on the appellant who has gone to sleep. He ought to be penalised to awaken him and for the prejudice he has put the Respondent into, having to carry the burden of the suit on its shoulders.

7. **Order 42 Rule 35 of Civil Procedure Rules** empowers the court to dismiss an appeal in which no action has been taken for over a year – unless sound and satisfactory reasons are demonstrated for the inordinate delay – **Protein & Fruits Processors Ltd & Another -vs- Diamond Trust Bank Kenya Ltd (2015) e KLR**.

8. Directions are yet to be taken. The trial court file is not availed.

Had these been done, I would have dismissed the appeal for want of prosecution – See **Order 42 Rule 35(1) of Civil Procedure Rules** has

not been explained. However, I will not move to dismiss the appeal but make the following orders:

- 1. The Deputy Registrar of this court is directed to call for the trial court file and prepare the same for admission of the appeal within 30 days, or show cause why the said file cannot be availed.**
- 2. The appeal shall be mentioned before the Deputy Registrar Honourable Omido for confirmation of the status of the trial court filed on the 28th June 2018 at 9.00 a.m.**
- 3. Costs of this application shall be paid by the Appellant to the Respondent/Applicant within 30 days. I assess such costs at Kshs.5,000/= payable, in any event within 30 days failing which the appeal shall stand dismissed.**
- 4. This file is to be placed before the Deputy Registrar Honourable Omido on the 14th June 2018 for further directions on the trial court file availability.**

Dated, signed and delivered this 7th Day of June 2018

J.N. MULWA

JUDGE