

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 116 OF 2017

SUPA HAULIERS LIMITED.....APPELLANT/RESPONDENT

VERSUS

TITUS WAMBUA MATANO.....RESPONDENT/APPLICANT

RULING

1. The application dated 10th May, 2018 seeks orders that:

“1. The Appeal herein be dismissed for want of prosecution of Appeal.

2. The Decretal amount of Kenya Shillings One Million Five Hundred Thousand deposited in the joint account of Aratit Menezes Advocates Account 05443872006 be released to the Plaintiff/Respondent.

3. The costs of the suit and of this application be borne by the Appellant.”

2. It is stated in the grounds and the affidavit in support of the application that the judgment of the lower court was delivered on 22nd February, 2017 for the sum of Ksh.1,503,160/= in favour of the Applicant. That the Respondent herein applied for stay of execution which was allowed on condition that the sum of Ksh.1,500,000/= be deposited in a joint interest earning bank account of the counsels for both parties. That the Respondent filed the appeal herein on 16th May, 2017 but since then has taken no steps to prosecute the same. The Applicant has decried the delay and stated that the Respondent has lost interest in the appeal.

3. The Respondent filed the grounds of opposition dated 18th June, 2018. It is stated that the application is incompetent as no directions have been taken as provided for under Order 42 rule 13 Civil Procedure Rules.

4. The Respondent also filed a replying affidavit in response to the application. The delay in prosecuting the appeal is attributed to the delay by the lower court in supplying the copy of the proceedings, judgment and decree. That the lower court file is yet to be availed to this court. It is contended that the appeal has high chances of success.

5. The appeal was disposed of by way of written submissions. I have considered the said submissions.

6. The principles governing the dismissal of a suit for want of prosecution are that delay must be inordinate, the inordinate delay is inexcusable and the Defendant is likely to be prejudiced. In the case of **Ivita vs Kyumbu [1984] KLR 441**; the court stated that:

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the Plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the Plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the Plaintiff’s excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”

7. The Respondent has exhibited a letter dated 18th March, 2017 and stamped as received in court on 17th October, 2017 and 20th March, 2017 requesting for typed proceedings. It is not clear why the said letter has been stamped as received twice and there is no explanation for the same. However, there is also the letter dated 13th November, 2017 stamped as received in court on 11th June, 2018 and letter dated 22nd November, 2017 stamped as received in court on 23rd November, 2017 which letters were also requesting for proceedings. The record of appeal was filed in court on 19th June, 2018 after the filing of the application at hand. The lower court file is yet to be availed to this court. Consequently, this court is inclined to allow the appeal to be ventilated on merits.

8. With the foregoing, I dismiss the application with costs in cause. The appeal to be listed for directions within 90 days from the date hereof. In default the appeal to stand dismissed.

Dated, signed and delivered in Nairobi this 21st day of Nov., 2018

B. THURANIRA JADEN

JUDGE