



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 503 OF 2013

BORA CAPITAL LIMITED.....APPELLANT

VERSUS

JANE NJERI MUNYI.....RESPONDENT

RULING

1. The Respondent filed a Chamber Summons application dated 15th June, 2015 seeking dismissal of this appeal for want of prosecution. The motion is supported by the affidavit of Helene R. Namisi. She claimed that the Appellant has failed to set down this appeal for hearing or directions for a period of one (1) year since the matter was last before court on 20th May, 2015. That since the filing of the memorandum of appeal on 24th September, 2013, the Appellant has not filed its record of appeal nor taken any steps to proceed with the appeal. That the said delay has occasioned the Respondent inconvenience and prejudice. That the decretal amount has been paid in full by the Appellant thereby defeating the purpose of this appeal. It was further stated that the pendency of this appeal is causing the Respondent undue hardship and costs of time expended and legal fees incurred.

2. In response thereto the Appellant filed grounds of opposition as follows;

- i. That the Respondent's application shows no evidence of any prejudice that will be suffered at all and none has been demonstrated.
- ii. That in any case the decretal amount has been paid in full hence no question of prejudice can be raised by the Respondent.
- iii. That the lower court file and record was only requested for by the High Court in June, 2015 hence the delay in availing the lower court record was not the fault of the Appellant.
- iv. That so much activity has been going on in relation to this file and there is an application for taxation pending ruling in High Court Misc. 581 of 2014 Wiskam Auctioneers v. the Appellant.
- v. That if the lower court typed proceedings are ready, the Appellant is ready to file the record of appeal within 10 days of the determination of this application.
- vi. That the Respondent's application is therefore premature, frivolous and vexatious, is an abuse of court process and ought to be dismissed.

3. The Chamber Summons was dispensed with by way of oral submissions. Miss Nderu counsel appearing for the Respondent submitted that since the decretal sum had been settled, the appeal has been

overtaken by events. That no sufficient reason has been given for the delay in prosecuting the appeal. That the basis of the appeal is that the decretal sum should not be paid in monthly installments and that no certificate of delay has been exhibited by the Appellant.

4. Mrs. Mutua counsel for the Appellant on the other hand contended that the appeal has not been overtaken by events for the only reason that the decretal sum has been paid. That there are other grounds of appeal which do not touch on the decretal sum. She submitted that the delay in prosecuting the appeal was as a result of the late requisition of the court file by this court and that the Appellant has been following up on the typing of proceedings which has taken quite a lot of time to be ready. That the Appellant's advocates have been informed that the same have been typed but have not been certified. She expressed that she is ready to prosecute the appeal within a period ordered by this court. She contended that no loss or prejudice has been established by the Respondent.

5. In reply thereto, Miss. Nderu submitted that litigation must come to an end. That the Appellant has not demonstrated that there is an attempt to set the matter for directions. She rebutted that the Respondent continues to incur costs.

6. I have considered the application herein. The reason advanced by the Appellant for the delay, that the matter had stalled since the court had called for the lower court file is not warranted. This is because the court called for the file way after this application had been filed. I note that there was an application dated 29th September, 2013 the same year this appeal was filed. That application was dismissed on the 20th May, 2014 for non-attendance by the Appellant/Applicant. The taxation being referred to by the Appellant was done and the Bill of Cost was struck out by the Deputy Registrar on the 15th June, 2015. There was no other action in this file until 15th June, 2015 when the Respondent filed this motion. Bearing in mind that there were activities that were going on in the file until the 15th June, 2015, this court finds that the delay in prosecuting the appeal has been explained and its only fair that the Appellant be granted a chance to prosecute the same.

7. The court notes that the application herein was filed on the 15th day of June, 2015 and on the same day, the file was in court before the Deputy Registrar when the Bill of Costs was struck. It is therefore true that the application herein was brought prematurely. In the premises, the application dated the 15th June, 2016 is hereby dismissed with no orders as to costs.

8. In view of the age of the matter, the Appellant is hereby ordered to file a record of appeal within seven (7) days from today thereafter prosecute the appeal within three months from the date of filing of the record of appeal failing which the appeal shall stand dismissed.

Dated, signed and delivered at Nairobi this 2nd day of February, 2017.

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L NJUGUNA

JUDGE

In the presence of

.....***for the Appellant***

.....***For the Respondent***