



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NUMBER 62 OF 2013

LEONARD MOMANYI.....1ST APPELLANT/RESPONDENT

HENRY NYAKIBA OLANGO.....2ND APPELLANT/RESPONDENT

VERSUS

JENNIFER A. ODHIAMBO(suing as the legal

representative of the estate of

CHRISTINE ODHIAMBO AHENDA(deceased).....RESPONDENT

(Being an appeal from whole of the Judgment delivered by the Honourable

Mungai (CM) on behalf of Hon. Mikoyan D.K. SRM on the 18th April, 2013)

RULING

1. The Notice of Motion Application dated 23rd June 2015 is brought by the Respondent in this appeal, Jennifer A. Odhiambo being the Legal Representative of the Estate of Christine A. Ahenda, deceased.

It is premised on the provisions of **Order 42 rule 35(2) and Order 51 Rule of the Civil Procedure Rules.**

The Respondent seeks orders that the Appeal filed on the 14th May 2013 be dismissed for want of prosecution and puts forth grounds that no steps have been taken for more than two years towards prosecution of the appeal and that that delay has kept the Respondent away from enjoyment of her judgment fruits.

2. In opposition to the application the appellant filed a Replying Affidavit sworn by one Joan Oburu, a claims manager with Direct Line Assurance Co. Ltd the Insurer of the motor vehicle KAN 681R subject of the accident.

It is her disposition that failure to prosecute the appeal for the period was due to unavailability of typed proceedings, the judgment and decree following the judgment delivered in April 2013.

That by a letter dated 25th March, 2015 and annexed to the affidavit, a request was made for the proceedings but are yet to be provided. No other action was taken up to the time this application was

filed.

In further support of its proposition that the appeal ought not be dismissed, the appellant submitted that since no directions have been taken under **Order 42 Rule 13 of Civil Procedure Rules**, the appeal cannot be dismissed.

3. In my considered view, the above rule presupposes that the Record of Appeal has already been filed hence the necessity of taking directions on the hearing of the appeal. It is a further submission that and pursuant to **Order 42 Rule 35 of the Civil Procedure Rules** unless directions have been taken this rule is not applicable.

4. The appellant relies heavily on the decision of Hon. Wendo, J. In **Gateway Insurance Co. Ltd -vs- Gakuru (2014) e KLR** where the court disallowed an application for dismissal of an appeal for want of prosecution after a period of 10 years. I will come to this later in this ruling.

5. The applicant has urged that there is no justice to allow an appeal that has not been prosecuted for more than two years to remain alive, and continue to prejudice the respondent.

It is submitted that the delay has not been explained nor excusable and that since May 2013, only one letter of request for proceedings was sent to the Deputy Registrar requesting for proceedings, and the other after this application was filed.

Relying on the case of **Antony Kaburi Kario & 2 Others -vs- Ragati Tea Factory Co. Ltd & 10 Others 2014 e KLR** it is the duty of the plaintiff to get on with its case, and that the delay of two years was not excusable.

6. I have considered the oral arguments.

There is no doubt that the appellant took no action at all to follow up the typing of proceedings in the trial court upto when the present application was filed in 2015.

7. In my view, the provisions of **Order 42 Rules 11 and 13** presupposes that the appellant has already obtained proceedings and filed a Record of Appeal whereupon the appeal is listed before a judge under section 79B for taking directions under **Order 35 Rule 13** of the **Civil Procedure Rules**. It is only after the Record of Appeal has been filed that a Judge would peruse and consider whether or not there is sufficient ground for interfering with the decree or part of a decree or order appealed from or reject the appeal summarily under Section 79C. It is only after that if no steps are taken by the appellant for a period of three months to fix the appeal for hearing would an application for dismissal be filed.

9. Under **Order 42 Rule 35 C of Civil Procedure Rules** if no action is taken to progress the appeal the Respondents or registrar may apply for its dismissal.

That being the procedure provided under the rules, does it then give an appellant an open cheque to file the Record of Appeal when it desires, and to delay as long as the circumstances favour the appellant? It is a firm No in my opinion.

10. **Section 1A, 1B and 3A of the Civil Procedure Act** and **Article 159** of the **2010 Kenya Constitution** enjoin the courts to facilitate the just, expeditious proportionate and affordable resolutions of civil disputes and just and efficient determination of the proceedings and business of the court timetiously and at a cost affordable by the respective parties.

11. I do not think the legislature envisaged a situation where an appellant after filing a Memorandum of Appeal should not move speedily to obtain all necessary proceedings to facilitate filing the Record of Appeal. That speed and effort must be demonstrated by follow up reminders and visits to the respective court registries. The appellant in this case is only hiding its inefficiency, carelessness and lack of interest in the appeal behind the provisions of law stated above.

So what is the position of the respondent who has been shut out of enjoyment of her fruits of judgments by the delay?

12. It is trite that a case or appeal belongs to the plaintiff or appellant. If no action is taken to progress it, the court on its own motion or upon application may dismiss the suit for want of prosecution. See **Order 42 of Civil Procedure Rules**.

The circumstances obtaining in the case **Gateway Insurance Co. Ltd -vs- Simon Gakuru HCA NO. 195 of 2005 (Nakuru) (2014) e KLR** are different, and the decisions does not bind this court being of concurrent jurisdiction. It is however persuasive.

13. The appellant in its replying affidavit has not demonstrated any plausible reason to explain the inordinate delay of over two years. I do not think if there was genuine interest and a follow up of the proceedings from the trial court it would have taken that long.

I find the delay not sufficiently explained, inexcusable and inordinate.

14. In the case **Salkas Contractors Ltd -vs- Kenya Petroleum Refineries Ltd (2004) e KLR**, the test and principles governing applications for dismissals for want of prosecution were stated. It must be shown that:

- a) **the delay is inordinate**
- b) **the inordinate delay is inexcusable or**
- c) **the defendant is likely to be prejudiced by the delay**

15. In this present application, I have already determined that there is inordinate delay that is not explained sufficiently and therefore inexcusable.

Obviously the respondent has been prejudiced by the delay by being shut out of the fruits of the judgment.

The **Ivita -vs- Kyumbu** case went onto state:

“So that the test is whether the delay is prolonged and inexcusable, and if it is so, can justice be done despite such delay. Justice is justice to both plaintiff and the defendant. So both parties parties to the suit must be considered and the position of the judge too----”

16. In my considered view, there is no justice to both parties if I were to allow the appeal to continue to remain in the court registry adding to the backlog more that it has.

The appellant has lost interest in the appeal. I allow the Respondents application and order that the appeal filed on the 14th May 2013 be dismissed with costs for want of prosecution.

Dated, Signed and Delivered this 2nd Day of February 2017.

J.N. MULWA

JUDGE