



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL APPEAL NO. 5 OF 2014
(CORAM: F. GIKONYO J)

MERCY MUTHONI NJUE.....APPELLANT

VERSUS

AYUB MUTHURI.....1ST RESPONDENT

SAWASAWA ACADEMY LTD.....2ND RESPONDENT

RULING

Dismissal of Appeal for want of prosecution

[1] The court has been asked vide application dated 19th April 2016 to dismiss this appeal for want of prosecution. The application is expressed to be brought under order 17 rule 2, order 51 rule 1 of the Civil Procedure Rules, sections 1A, 1B and 3A of the Civil Procedure Act and all enabling provisions of the law. The major ground cited is that since the filing of the record of appeal, the Appellant has not taken any further steps to prosecute her appeal. According to the 1st Respondent, it has been over 14 long years since he filed Civil Case No 870 of 2002 yet he is still yearning for justice; which he says has become elusive because of the machinations of the Appellant. He saw this appeal as one of those maneuvers by the Appellant to frustrate justice due to the 1st Respondent, thus, to him the appeal is an abuse of the process of court and should be removed out of the way. The application was supported by the affidavit of the 1st Respondent and grounds set out in the application and the submissions filed herein.

[2] The Applicant amplified his arguments in the submissions. More importantly, he noted that the record of appeal was filed on 27th March 2014 but since then the appeal has not been fixed for hearing despite the fact that the 1st Respondent is enjoying a stay of execution. He blamed the 1st Respondent of occasioning inordinate delay upon the course of justice. He gave examples of numerous instances which support that view. The Applicant also cited a plethora of judicial decisions whose effect was to show that the law loathes delay. He also attacked the documents annexed by the 1st Respondent in an attempt to show the steps she has taken to progress this appeal. On that basis, the Applicant beseeched court to dismiss this appeal in line with the policy that court cases should be heard and disposed of expeditiously.

[3] The 1st Respondent, in her affidavit in reply and submissions deposed and argued that, as a matter of natural justice, she should be given an opportunity to be heard on the merits of her appeal. She denied that she has delayed this case and she gave an account of events which have been taking place in this appeal

some of which are administrative duties of the Deputy Registrar in preparing the appeal for admission or otherwise. According to her, the delay has been caused by factors beyond her control. She also cited judicial decisions to support her avowed position that she should be heard on merit and urged the court not to dismiss her appeal.

DETERMINATION

Dismissal draconian

[4] I am acutely aware of the need to hear and determine cases on merits. I am equally alive to the policy of law that cases should be disposed of expeditiously. These two tenets of law are important and go hand in hand. Therefore, where inordinate and inexcusable delay has been established, the court should not hesitate to dismiss a proceeding despite the unpleasant nature of such order. Doubtless, inordinate delay causes prejudice to the defendant and fair trial, and whatever the source or cause, prejudice has the same effect; it rattles justice. This has been said before time without number and I will state it again by citing a work of court in the case of **LAWRENCE MWAI VS. NYARIGINU FARMERS & ANOTHER [2017] eKLR** that:-

The court took elaborate journey through the record and the entire file before it dismissed the suit. In doing so, the court was acutely alive to the fact that dismissal of suit without hearing the merits was quite draconian judicial act. But the court also observed that if that be the most appropriate course to take in a proceeding in order to prevent prejudice to the other parties, then it ought to take it and order dismissal of the suit. See below what the court stated in the ruling of 28th April, 2016 that:-

I am also quite alive to the fact that summary dismissal of a suit without hearing the merits is most draconian a judicial act, comparable only to the proverbial drawing of the sword of the Damocles. However, despite the unpleasant nature of the dismissal order, if it is the only appropriate measure to take in a proceeding, the court should not hesitate to take it. See what was stated in *Allen v Sir Alfred Mc Alpine [1968] All ER 543*:

“To put right this wrong, we will in this court do all in our power to enforce expedition; if need be we will strike out actions where there has been excessive delay. This is a stern measure, but it is within the inherent jurisdiction of the court, and the rules of the court expressly permit it. It is the only effective sanction that they contain.”

The question is: What are the facts of this case?

[5] Is this a case which should be removed from the way at all or any cost? The Memorandum of Appeal was filed on 27th February 2014. Upon filing of the Memo of appeal, within thirty days, the Appellant should, under Order 42 rule 11 of the Civil Procedure Rules, cause the matter to be listed before the judge for directions under section 79B of the Civil Procedure Act. It is not, therefore, right to state that the delay was occasioned by the Deputy Registrar in not preparing the matter for admission or otherwise under section 79B of the Civil Procedure Act. The approach that I am seeing being adopted now of shifting that obligation to the court is a complete departure from Order 42 rule 11 of the Civil Procedure Rules. Again, after service of the memorandum of appeal, the Appellant should cause the appeal to be listed for directions by the judge. That notwithstanding, I observe that the Appellant was so pre-occupied with obtaining stay of execution and much time was spend on that venture- obviously for selfish reasons- until she forgot her other equally important statutory duties which could have hastened prosecution of her appeal, thus, the delay in this matter.

[6] Nonetheless, is it still possible to do justice to the parties despite the prolonged delay? In answering this question I do not want to fall prey to the intuitive feeling that first attends to a human being that such offending appeal should be removed without much ado. I should be guided by the constitutional command that courts should always strive to do substantive justice through hearing matters on merit. Except, however, at the same time, the court must ensure that no prejudice is suffered by any party.

Chesoni J (as he then was) in the case of **IVUTI vs. KYUMBU (1984) KLR, 441** asked the same question I have asked at the opening of this paragraph and reiterated the principles which should always guide the court in determining application for dismissal of suit for want of prosecution: that approach has the charm of pragmatism in administration of justice. See also a work of court in the case of **FREDRICK KANYIRIWERU vs. EAST AFRICAN BUILDING SOCIETY & ANOTHER [2015] eKLR** that:-

I have stated before, and I will state again, the test applicable in dismissal of suit for want of prosecution is whether there has been inordinate delay which is inexcusable. However, courts of law should be careful not to gauge "inordinate delay" in its dictionary meaning but by looking at the entire circumstances of the case. Accordingly, any explanation given for the delay should be evaluated thoroughly to see whether the delay is excusable in the interest of justice. This approach inclines heavily towards sustaining rather than dismissing cases in a summary manner as that would be most cruel judicial act comparable only to the proverbial drawing of the sword of the Damocles. Thus I admire the opinion by Chesoni J (as he then was) in the case of Ivita Vs Kyumbu: whether, despite the delay, it is still possible to do justice for all the parties in the suit.

Pragmatic approach

[7] Applying the above test, I am inclined at adopting a more pragmatic approach on the matter. The record of appeal has already been filed, and upon perusal thereof, I refuse to reject this appeal summarily. Again, I am satisfied that the record of appeal contains all the documents required under Order 42 rule 4 of the Civil Procedure Rules. Therefore, this appeal is ready for hearing. Accordingly, I direct:-

(a) That the appeal be set down for hearing as soon as possible. I will assign the date myself so that any further delay is obviated.

(b) That the Appellant shall file and serve written submissions within 14 days of today. And on such service, the Respondents shall file and serve submissions within 14 days thereof.

(c) That, meanwhile, let the original record of the trial court be transmitted to this court forthwith. In this manner, delay is avoided and justice will be served to all parties in the appeal. Such is the novel balancing act which the court will always find itself engaged into for the sake of justice.

Costs

[8] As the Appellant is responsible for the delay which prompted the filing of this application, I direct that she will pay thrown-away costs of the application to the Applicant. It is so ordered.

Dated, signed and delivered in open court at Meru this 2nd day of March 2017

F. GIKONYO

JUDGE

In the presence of:

Mr. Kiogora advocate holding brief for M/s. Kiome advocate for appellant.

Mr. Mbaabu advocate for applicant absent.

F. GIKONYO

JUDGE