



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL APPEAL NO.2 OF 2016

BETWEEN

HILLSPARK INVESTMENT LIMITED

T/A KISHI CLASSIC.....APPELLANT

AND

FESTO OGWENO/FESTUS OGWENO.....RESPONDENT

(An appeal from the judgment of Hon. N. Kariuki, RM delivered by

Hon. S. Ndegwa, (PM)

in Homa Bay CMCC No.64 of 2013 dated 19th January, 2016)

RULING

1. The application dated 23rd February 2017 is made pursuant to **Order 17 Rules 2 (3)** of the **Civil Procedure Rules** seeking dismissal of the appeal filed by the appellant/respondent for want of prosecution and thereafter an order be made for the release of the decretal sum deposited in court by the appellant.
2. The application is premised on grounds that the appeal was filed on 11th February 2016 yet to-date not even the records of appeal have been filed. The appeal is described as being filed in bad faith with the intention of denying the applicant the fruits of his judgment. The applicant's contention is that the respondent has all along deliberately delayed the prosecution of the case right from the subordinate court to the superior court.
3. The applicant explains that he is a businessman and his business has been crippled by the respondent's negligence, so it is in the interest of justice that the application be allowed to enable him lead a normal life and go back to his business.
4. The applicant explains the history of this matter in the supporting affidavit where he deposes that even in the subordinate court, the appellant failed to enter appearance within the stipulated time and subsequently an interlocutory judgment was entered, and after testifying an exparte judgment was entered in his favour in the sum of Kshs.98,050/= . The respondent proceeded to execute the judgment and it was at this stage that the appellant/respondent applied for setting aside the judgment and pleading to be allowed to file defence – these prayers were granted.
5. The matter was heard inter partes and judgment entered in favour of the applicant on
6. On 11th February 2016, the respondent filed an appeal being **HCCA NO.2 OF 2015** and sought stay of execution pending hearing of the appeal. However once stay was obtained, the respondent did not take any steps to facilitate the hearing and determination of the appeal.
7. It is on account of the foregoing, that the applicant urges for dismissal of the appeal saying a year has lapsed from the date of filing the appeal without any steps being taken to have the matter fixed for hearing.
8. Although the respondent filed a replying affidavit, it was expunged from the record as it was only filed and served a day before hearing of the application, in violation of provisions of **Order 51** of the **Civil Procedure Rules**. This meant respondent's counsel could only respond on points of law only.
9. The oral submissions by Mr. Osoro, on behalf of the applicant reiterated what is contained on the face of the application and the

supporting affidavit.

10. In opposing the application, Mr. Mose submitted that the applicant did not refer to **Order 42** which addresses procedures and issues around appeal. It was his contention that even when invoking **Order 17**, the applicant ought to have sent a notice to show cause why the appeal should not be dismissed. He invokes provisions of **Article 47** of the **Constitution** which provides for fair and expeditious administrative action, saying the delay in prosecuting the appeal was caused by the Executive Officer at Homa Bay Law Courts, who was enjoined to deliver proceedings expeditiously.

11. He also refers to **Article 159** of the **Constitution** in urging this court to deliver substantive justice saying the respondent took critical steps of filing an appeal, requesting for proceedings and depositing the decretal sum in court and the delay in prosecuting the appeal was not inordinate.

12. In reply Mr. Osoro wonders how counsel can deign to invoke **Order 42** when he has not even filed a decree – which infact makes his appeal incompetent and warrant a summary dismissal under **Section 79** of the **Civil Procedure Act**.

13. Mr. Osoro points out that **Order 17** covers everything filed in court where there has been inactivity. He argues that it is not the duty of the applicant to issue a notice to show cause to the respondent as that would be the pressure of the court.

14. There is no dispute that the respondent lodged an appeal against the lower court's judgment in February 2017 and to date the same has not been prosecuted.

15. The respondent's counsel insists that the Executive Officer at Homa Bay Law Courts is to be blamed for the delay as he failed to deliver the proceedings from the trial court timesously. However the only attempt made at obtaining the proceedings were not satisfactorily demonstrated to this court.

16. With the greatest of respect to the respondent's counsel, this is not a situation falling under **Section 79B**, in reference to summary dismissal of the appeal. That would only occur at the stage of admission or refer of appeal where the high court peruses the trial court's decision and finds *ab initio* that there is no reason to interfere with the same, thus rejecting the appeal summarily.

17. The scenario prevailing here is different – the respondent filed an appeal but has taken no steps under **Order 17 Rule (2) (1)** –

“In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if the cause is not shown to its satisfaction, may dismiss the suit.”

Order 17 (3) provides –

“Any party to the suit may apply for the dismissal as provided in sub-rule 1.

18. This dents the argument raised by Mr. Mbae that the application is bad in law because there ought to have been a notice to show cause issued by the court. The applicant was within the provisions of the law to make this application.

19. No satisfactory explanation has been given for the one year of inactivity and infact the general conduct of the respondent and his counsel scream laxity and lack of diligence.

20. Consequently, I am satisfied that the application is merited and I allow it to the effect that the appeal filed herein be and is hereby dismissed with costs to the applicant.

Delivered and dated this 15th day of May, 2017 at Homa Bay

H.A. OMONDI

JUDGE