REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 146(B) OF 2015

JOSEPH GITAHI NJENGA….....1ST APPELLANT

PAUL KIHUMBA NJENGA.....2ND APPELLANT

- VERSUS-

DANIEL KARANJA KUBUBU …..... RESPONDENT

(SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF **STEPHEN KIBUBU KARANJA** (DECEASED)

(***Being an appeal from the whole of the Judgment of Hon. L. Komingoi, Chief Magistrate, Nakuru, delivered on 25th November 2015)***

RULING

1. This is an application by way of Notice of Motion brought under **Section 3A of the Civil Procedure Act Order 50 Rule 1 of the Civil Procedure Rules.** The respondent is seeking an order of dismissal of the appeal for want of prosecution with costs. The application was supported by an affidavit sworn by Daniel Karanja Kibubu, the respondent. He avers that the appeal was lodged by the appellant through a Memorandum of Appeal dated on 23rd December 2015 and filed on 6th January 2016. He further avers that the appellants filed an application for stay of execution of the judgment and decree arising therefrom which was compromised vide a consent recorded and adopted on the 28th day of January 2016.

2. The last activity on the file is in excess of one year. The appellants have not done anything in seeking to have the appeal prosecuted. It is trite that a party to a civil proceeding or an advocate for such a party is under a duty to assist the court to further the overriding objective of the act and to that effect to participate in the process of the court and to comply with the directions and orders of the court. It is also primary duty of the appellant to take steps to prosecute their appeal since they are the ones who dragged the respondent to court which steps the appellants herein have without any justifiable reason failed to take.

The appellants inertia in prosecuting the appeal runs contra to the overriding objective as stipulated in S**ection 1A, 1B and 3A of the Civil Procedure Act.** The estate stands prejudiced if the application in not allowed as the appellants seem to have lost interest in prosecuting the appeal. See **Milimani HCC No. 34 of 2003 – Depak Premshad Shah & Six Others -vs- Akiba Bank Ltd.**

3. The application is opposed through a Replying Affidavit sworn by Pauline Waruhiu, the General Manager – Claims at Directline Assurance Company Limited which is the insurer of the motor vehicle whose instance this claim is being defended.

It is deponed that proceedings were requested for on the 25th November 2015 but to date the said request letter has not elicited any response. It is deponed the delay in prosecuting this suit was not by the fault of the appellants as they have already deposited part payment of the decretal amount as ordered by the Honourable Court and further that the delay so occasioned is not so unreasonable and/or in ordinance as to prejudice the respondent and such delay can always be compensated by an award of damages and costs.

4. It is further avered that the present appeal can only be dismissed for want of prosecution under **Order 42 Rule 35(2) of the Civil Procedure Rules** after directions have been taken, which is not the case as the appeal is yet to be admitted in accordance with **Section 79B of the Civil Procedure Act** and without being admitted no step can be undertaken.

It is further stated that it is only the registrar of the Court who can list an appeal before a judge for dismissal.

5. It is further submitted that if in the event that application is allowed and the appellants are prevented from being heard they will suffer prejudice as they will lose their right to be heard.

Further, the appellants humbly believe they have a viable and arguable appeal with high chances of success. The court was urged to give the appellant an opportunity to be heard on the appeal by dismissing the application.

6. I have considered the submissions made by counsel. It is not in dispute that the Memorandum of Appeal was filed on 23rd December 2015. The appellant counsel did not comply with the provisions of **Order XLI rule 1A of the Civil Procedure Rules**, which states as follows:

> ***"Where no certified copy of the decree or order appealed against is filed with the Memorandum of Appeal the appellant shall file such a certified copy as soon as possible and in any event within such time as the court may order and the court need not consider whether to reject the appeal summarily under Section 79B of the act until such certified copy is filed."***

7. It is over a year since this matter was last in court. No evidence has been presented to the court to show that the appellants sent any more letters or reminders to the Deputy Registrar within this period. I refer to **HCC No. 32 of 2010 Utalii Transport Company Limited & Another Vs- Nic Bank** . The Hourable court stated that:

> "***It is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court***."
>
> Further, reference and consideration has been made to the authorities cited by both parties.

In **Civil Appeal No.180 of 2006 Kebirigo Tea Factory -VS- Kaleni Nyanchoka Ainya,** The learned Judge reviewed he decision in **ALLEN -VS- Sir Alfred Mcalpine & Sons. Limited** where the Learned Judge **Salmon** stated as follows:

> ***"A defendant may apply to have an action dismissed for want of prosecution either***
>
> ***a) because of the plaintiffs failure to comply with the rules of the superior court and***
>
> ***b) Under the courts inherent jurisdiction."***

8. To succeed in the application, the applicant has to show:

> **i)** ***That there has been inordinate delay ... It should not be too difficult to recognise inordinate delay when it occurs and that the inordinate delay is inexcusable."***

As a general rule, until a credible excuse is made out, the natural inference would be that it is inexcusable. See **Jaribu Credit Traders Ltd -vs-Mumias Sugar co. Ltd HCCC NO.465 of 2009**

9. **In Amalgamated Saw Mills -VS- Gladys Imbuka, Civil Appeal No. 96 of 2000, the court held that:**

> ***"An appellant must be proactive in pursing his appeal once filled. A party cannot sit back and do nothing for nearly 4 years on the pretext of waiting for certified copies of proceedings and judgment... the court is empowered to act in any matter where it appears that a party is abusing the court process."***

10. In my view the above statement confirms the appellants guilty of not doing anything to move the proceedings. Above the cited authorities make it clear in my mind that an application of this nature where the appellant has failed to prosecute their case, the respondent can move the court under **Section 3A of the Civil Procedure Act** to dismiss the appeal not only for want of prosecution but for being an abuse of the court process. See **Ivita -vs- Kyumbu(1984) e KLR** and **Court of Appeal Case Bi-Mach Engineers Ltd -vs- James Kahoro Mwangi (2011) e KLR** where same sentiments were expressed.

11. The only one step taken by the appellant on the 15th November 2015 cannot be said to have been enough. No action has been taken since depositing part of the decretal sum in court is itself not a step towards prosecution of the case. It is but a security for the due performance of the decree. The respondent has had no benefit of the said sum.

There is no doubt in fairness and prejudice on the respondents part.

It is therefore evident that the appellants have lost interest in the appeal which cannot be allowed to persist while the respondent continues to suffer. There being no good reasons demonstrated why the application should be disallowed, I proceed to allow the same and dismiss the appeal for want of prosecution with costs.

12. I further direct that the full decretal sum awarded to the respondent by the trial magistrate with accrued interest be paid out to the respondent.

It is so ordered.

Dated, Signed and Delivered this 11th Day of May 2017.

J.N. MULWA

JUDGE