



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. 166 OF 2008**

**SYRUP DISTRIBUTORS LIMITED ..... APPELLANT/APPLICANT**

**VERSUS**

**LOKI DEVELOPERS .....RESPONDENT/RESPONDENT**

**RULING**

By way of a notice of motion dated 30<sup>th</sup> March, 2016, the appellant/applicant has moved this honourable court under **Article 159 of the Constitution, sections 1A, 1B, 2, 3 and 3A of the Civil Procedure Act** seeking the following orders:

1. *That this application be certified urgent and heard ex parte in the 1<sup>st</sup> instance by reason of the said urgency.*
2. *That the order made by this honourable court on 18/6/15 dismissing this appeal for want of prosecution under Orders 17 rule 2(1) and 42 rule 35 (2) of the Civil Procedure Rule, and all other consequential order and/or orders made thereafter be set aside and this appeal be reinstated and fixed for hearing on priority basis by reason of its age and nature and complexity of the appellant's claim against the respondent.*
3. *That the costs of this application be provided for.*

The application is premised on the grounds set out on the body of the same and is supported by the affidavit sworn by **GLADWELL GATHONI KIRIKA** on 30<sup>th</sup> March, 2016.

The deponent who is the Managing Director of Syrup Distributors Limited [the appellant] herein, avers that the appeal was dismissed by the court on 18<sup>th</sup> May, 2015 and that no notice to show cause why the same should not be dismissed for want of prosecution was served on the appellant/applicant. That consequently, when it was listed for dismissal on 18<sup>th</sup> May, 2015, it was dismissed for want of prosecution and the said order was made in the absence of the appellant.

When the application came up for hearing on 3<sup>rd</sup> May, 2017, counsel for the respondent sought for an adjournment which the court declined to grant. He sought time to file a response to the application but the court noted that it was over one year since the application was served on him but he had not filed any response to the application by 3<sup>rd</sup> May, 2017 when the same came up for hearing. In the interest of justice, the court allowed him a right of audience which he exercised by way of oral submissions.

On his part, counsel for the applicant submitted that the appellant has an arguable appeal in that the same

arises from an order for eviction issued by a magistrate court in CMCC No. 12932/2005 on 19<sup>th</sup> July, 2006 when she had no power to hear and determine the matter. He submitted that under **Cap 281** [repealed] the definition of a court was given as High Court and not magistrate's court. That the value of the subject matter was also in excess of the jurisdiction of a magistrate's court.

Counsel for the applicant sought refuge in **Article 159 (2) (d) of the Constitution** which provides for hearing of matters by the courts without undue technicality. He relied on the oxygen rules and asked the court to do justice to the parties. He further submitted that upon discovering that the appeal was dismissed, the applicant moved with haste and filed the present application. He also brought to the attention of the court **Civil Case No. 2181/2007 [Kenya Railways Corporation v Loki Developers Ltd & Another]**, which is still pending before court involving the same subject matter as the present appeal.

In his reply, counsel for the respondent submitted that there is no relevance of Case No. 2181/2007 [supra] to the application herein. He averred that the case was last in court on 12<sup>th</sup> June, 2009, when the court ordered that the matter be fixed for hearing.

Submitting on the principles of **Order 17 and 42 of the CPR**, he told the court that **Order 17 and 42 of CPR** requires that in an application such as the one before the court, the applicant is required to prove that there is no inordinate delay in bringing the application and if there is, he should give a good reason for the delay. The court was told that the applicant is guilty of laches and he did not explain why the appeal was not set down for hearing.

He further submitted that under **Order 17 of the CPR**, there is no requirement for service of the notice but it provides for giving of notice and therefore the reason given by counsel for the applicant that he was not served, is not a good one. That **Article 159 (2) (d)** should not be relied on in cases. The court was told that justice should look both ways and that the court has not been given good reasons to enable it exercise its discretion. He urged the court to dismiss the application.

In reply, counsel for the applicant reiterated the earlier submissions that he had made.

This court has taken due consideration of the material before it. The main ground in support of the application is that the appellant was not served with the notice to dismiss the suit for want of prosecution.

The major issue I should determine is whether the applicant has given good reasons on the basis of which this court can exercise its discretion in its favour to set aside the orders dismissing this appeal. The appeal was dismissed under **Order 42 rule 35 (2)** which provides:

***“If within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.”***

Under this sub rule, the registrar is obligated to give notice to the parties before an appeal can be dismissed. However, the rule does not specify the nature of the notice that ought to be given to the parties. Counsel for the respondent adopted this line of argument but it is not clear from the material placed before the court, whether indeed a notice was served and/or given to the appellant before the suit was dismissed. As I had noted earlier in this ruling, the respondent did not file a response to the application and I did not hear his counsel suggest that a notice in whatever form was indeed served as required.

On the issue of the delay, the court has noted that the matter was last in court on 12<sup>th</sup> June, 2009 when the court ordered that a date be fixed in the registry. Thereafter, no action was taken in the matter by either party until the dismissal on 18<sup>th</sup> June, 2015. Counsel for the respondent has argued that the delay in failing to prosecute the suit has not been explained and that the same is inordinate. On his part, counsel for the appellant/applicant lays blame on the court for failing to give him a hearing date on account of shortage of judges to hear and determine appeal, which to this court, is untenable and far from the truth as

one cannot reasonably comprehend how for all those years he was unable to secure a hearing date for the appeal.

The law governing dismissal of suits is well settled and courts have pronounced themselves in many of their determinations on this. In the case of **UTALII TRANSPORT COMPANY LIMITED & 3 OTHERS V NIC BANK & ANOTHER**, [2014] eKLR that:

when the applicant states and correctly so, 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.”***

Then exhorts that:

***“Over one year has lapsed without the plaintiffs taking any step to progress their case.”***

And makes a strong conclusion that:

***“The plaintiff’s inertia runs contra to the overriding objective of the court stipulated in section 1A, 1B, 3A of the CPA. The first intuitive feeling one gets is that the offending proceeding should quickly be removed out of the way of the innocent party, but the law prohibits a court of law from such impulsive inclination, and requires it to make further enquiries into the matter under the guide of defined legal principles on the subject of dismissal of cases for want of prosecution a view which is undergirded by the fact that dismissal of a suit without hearing the merits is draconian act which drives the plaintiff from the judgment seat. It is, therefore, a matter of discretion by the court. See opinions of Danckwerts, LJ in NAGLE V FIELDEN, [1966] 2 QBD 633 at p 648 and Lord Diplock in BIRKET V JAMES, [1978] AC 297.”***

A great number of cases in the court of appeal have adopted that approach but I do not wish to multiply them. Accordingly, I will discern the principles which the law has developed to guide the exercise of discretion by court in an application for dismissal of suit for want of prosecution. These principles are:

- 1. Whether the delay is intentional, contumelious and therefore, inexcusable.*
- 2. Whether there has been inordinate delay on the part of the plaintiffs in prosecuting the case.*
- 3. Whether the delay is an abuse of the court process.*
- 4. Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the defendant.*
- 5. What prejudice will the dismissal occasion to the plaintiff?*
- 6. Whether the plaintiff has offered a reasonable explanation for the delay.*
- 7. Even if there has been a delay, what does the interest of justice dictate; lenient exercise of discretion by the court?*

The decision whether a suit should be reinstated for trial is a matter of discretion and depends on the facts of the case. See the case of **IVITA V KYUMBU**, [1984] KLR 441, Chesoni, J [as he then was] stated thus:

***“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite the delay. Justice is justice to both the plaintiff and the defendant; so both parties to a suit must be considered and the position of the judge too, because it is no***

*easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time."*

A party should always take steps to progress his case to a logical conclusion. Where a plaintiff commits acts of inordinate delay, he occasions justice to the defendant but as I have stated earlier, dismissal of a case is a draconian judicial act and should be done sparing and in cases where dismissal is the feasible and just thing to do. Courts should strive to sustain rather than dismiss suits especially where justice would still be done and fair trial had, despite the delay. The respondent herein has not shown any prejudice that it is likely to suffer if the appeal is reinstated.

In the result, the following orders are made in respect to the application dated 30<sup>th</sup> March, 2016:

- 1. The order made on 18<sup>th</sup> June, 2015 dismissing the appeal is set aside and the appeal is reinstated for hearing.*
- 2. In view of the age of the matter, the court hereby makes a further order that, the same be prosecuted within 90 days from the date of this ruling, failing which it shall stand dismissed.*
- 3. Costs of the application shall abide the outcome of the appeal.*

**Dated, signed and delivered at Nairobi this 5<sup>th</sup> day of May, 2017.**

.....

**L. NJUGUNA**

**JUDGE**