



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 166 OF 2014

SIMON GITHUI KIBUCHI.....1ST APPELLANT

JOSEPH THEURI NDERITU.....2ND APPELLANT

VERSUS

HANNAH WANJIKU NJENGA.....RESPONDENT

(Being an appeal from part of the Judgment by Honourable M.A. Otindo (Resident Magistrate) in Nakuru CMCC NO. 434 of 2012 reasons the 29th Day of October 214)

RULING

1. By their application dated 31st May 2016 the Respondent sought an order of dismissal of the appeal for want of prosecution.

Reasons advanced are that for a period of one year and six months since filing of the appeal on the 21st November 2014 no action had been taken towards its progression and therefore for the wider interest of justice, a dismissal order ought to be granted.

2. The Appellants oppose the application by a verifying affidavit sworn on the 6th October 2016 by one Joan Oburu, Claims Manager at Directline Assurance Company Limited the Insurers of the Accident motor vehicle No. KBH 647S at the material time.

3. I have considered submissions by counsel and the affidavit evidence on record. The appellants application is brought under the provisions of **Order 17 Rule 2(3) of Civil Procedure Rules**. The said provisions do not provide for dismissals of Appeals but suits. The correct legal provision is **Order 42 of Civil Procedure Rules Rule 35(2)** thereof provides that:

(2)“If within one year after 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.”

I agree with the respondent that the application is brought under the wrong provisions of the law. However that in my opinion cannot be a good ground to decline to determine the same. **Order 51 Rule 10 of the Civil Procedure Rules** grants the court wide discretion to hear the application on merit. **Article 159(2)(d)** of the the Constitution too enjoins the court to administer justice without undue regard to procedural technicalities.

4. What then is the merit of the application?

It is not disputed that there is a delay of over one and half years from the date of filing and service of the Memorandum of Appeal - See **Order 42 Rule 35(2) of Civil Procedure Rules**. By all standards that is an unreasonable delay unless it is sufficiently explained.

The explanation tendered is that no proceedings and judgment of the lower court have been supplied despite request being made. I have perused the replying affidavit. No letter of request for proceedings has been exhibited, nor any other correspondence directed to the Executive officer of the trial court in respect of the proceedings and judgment.

5. It is trite that he who alleges must prove -See **Sections 107 and 108 Evidence Act**. As such, the averments in the replying affidavit without any demonstrable proof are mere statements. See **International Air Transport Association & Another -vs- Akarim Agencies Col. Ltd (2014)e KLR and Surya Holdings Ltd & 2 Others -vs- CFC Stanbic Bank 2014) e KLR**.

6. I do not agree with the applicants that it is only the Deputy Registrar of the court who can move the court for an order of dismissal.

If it were so, it would be a sad day for the litigants as Deputy Registrars of the court ordinarily and in practice, have also to be moved to take any action in a suit or appeal.

The aggrieved party is always at liberty to approach the court by application for any order they may wish to. That too, is a technical procedure I am not persuaded to strictly apply to the detriment of a party in a suit or appeal.

The applicants cannot hide their failures in the technicalities which in any event I have stated I shall not pay regard to. Substantive Justice demands that a matter be heard on its merits.

7. In **Ivita -vs- Kyumbu (1984) KLR 441** the test upon which the court ought to apply in an application such as this were stated, that is, among others:

a)whether the delay is prolonged and inexcusable

b)whether Justice could still be done despite the delay.

The applicant must satisfy the court that the respondent is not prejudiced by the delay and that the delay will not cause injustice to the respondent.

8. I have considered the entirety of submissions. It is the appellants who dragged the respondent to court, hence their duty to take steps to progress their case. See **Jaribu Credit Traders Ltd -vs- Mumias Sugar Company HCCC No. 465 of 2009**.

The appellants have not adduced any reasonable or excusable reasons and explanations for the delay. It is not enough that the decretal sum is deposited in court. The applicant has been kept away from enjoyment of the decretal sum for the period of over 1½ years at the time of filing of the application.

There is no doubt that the respondent is prejudiced by the unreasonable delay and the appeal that has been hanging round her neck for the period, while the appellants lie in their comfort without taking a single step to progress the appeal.

9. **Section 1A, 1B and 3A of the Civil Procedure Act** enjoins all parties to litigation to administer justice expeditiously. The applicants are obligated to do so.

I am not persuaded that the respondents have made a good case or at all to warrant dismissal of the application. To the contrary, I find their inertia and delay, coupled with no plausible explanations for the delay unexcusable.

For those reasons, the respondent's application dated 31st May 2016 is merited. I allow the same in terms of Prayer 1 and 2. The appeal filed herewith is dismissed with costs.

It is so ordered.

Dated, Signed and Delivered this 13th Day of July 2017.

J.N. MULWA

JUDGE