REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 133 OF 2013

OMAR SHARIFF…..1ST APPELLANT

SALIM KONDE WASHE..2ND APPELLANT

CROWN PETROLEUM KENYA LIMITED.....................3RD APPELLANT

VERSUS

M C (MINOR SUING THROUGH HER NEXT FRIEND AND FATHER **HENRY MUSULUMA...RESPONDENT**

(*Being an appeal from the judgment and/or Decree of Resident Magistrate, Honourable E. Rianyi in Naivasha PMCC No. 911 of 2007 delivered on 1st August 2013***)**

RULING

1. By an application dated 15th October 2014 and filed on the 17th October 2014, under **Order 42 Rule 13(1) , 35(1), (2) and Order 17 Rule 2 of** the **Civil Procedure Rules**, the Respondent sought for orders that:

1. That the appeal hereof be dismissed for want of prosecution

2.That the decretal amount of Kshs.566,295/= deposited in an interest earning account **No. [particulars withheld]** at the **African Banking Corporation Limited** be released to the Respondents advocates.

2. In his grounds in support of the application and the supporting affidavit sworn by D. W. Muyundo, it is stated that the Memorandum of Appeal was filed on the 16th August 2013 and since then, no action has ever been taken towards placing the same before a Judge for directions or any other action. It is avered that the appellant has lost interest in the appeal that now hangs on the Respondent's neck causing him prejudice and has since been kept away from the judgment proceeds.

In response to the application, the Appellants by their Replying affidavit sworn by their advocate Evans Juma Matunda on the 26th October 2015, it is stated that failure to take steps has been occasioned by absence of the lower court file and proceedings that cannot be traced in the said Naivasha court registry despite efforts by way of correspondence and personal visits to the court registry.

It is stated that as the appeal has not been admitted or directions taken, then the application is premature, and ought to be dismissed, and that no prejudice has been occasioned to the Respondent by the delay.

The court has considered the application and affidavit evidence on record by both parties.

3. The Respondents have not demonstrated to the court that they have applied for any of the documents stated. No letters, requests or at all have been addressed to the Deputy Registrar of the court to seek assistance of the court registry in tracing the file if indeed it has been missing. The court has not seen any letter requesting for typed proceedings or certified copy of the judgment or decree. Mere allegations supported by no evidence cannot suffice to persuade a court to exercise its discretion in disallowing the application in their favour.

Order 35(2) of the Civil Procedure Rules states:

> ***"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."***

It is obvious that the provisions of the above rule have not been complied with. I state here that any party, and specifically the respondents, may approach the court for dismissal under the above provisions notwithstanding that it indicates that it is the Registrar of the court who ought to take such action. The purpose for having the application heard by the Judge is to give the Respondent a chance to explain and or give reason for the delay before such drastic action of dismissal of an appeal(or case) is taken. I have stated above, and is evident from the replying affidavit that no plausible or reasonable explanation was offered by the Respondents.

4. The test upon which the court ought to apply in an application such as the present were enunciated in the case of **Ivita -vs- Kyumbu (1984) KLR 441** and adopted in numerous other case ass **Communications Courier and Another -vs- Telcom (K) Ltd 1999) @ KLR** that**:**

> ***"The test is whether the delay is prolonged and inexcusable and if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and the Defendant, so both parties to the 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 the 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. 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 the delay is prolonged, if the court is satisfied with the plaintiffs excuse for the delay the action will not be dismissed but will be ordered that it be set down for hearing at the earliest available time."***

That is the test applicable in this appeal. And I add that it is the plaintiffs/appellants who ought to take steps to progress their case since they are the ones who dragged the Respondent to court by the Appeal. See **Jaribu Credit Traders Ltd -vs- Mumias Sugar Co. Ltd HCCC No. 465 of 2009**.

As stated above, the Appellant has not offered any good reasons for the inordinate delay of over two years without any step being taken. They have failed, in my view to offer any plausible explanation why the appeal should not be dismissed. Justice is Justice to all the parties to the appeal. The Respondent has been kept out of use of his judgment proceeds that obviously has prejudiced his interests.

5. **Section 1A and 1B of the Civil Procedure Act** advocates for the speedy disposal of cases and to keep such a case or appeal as is seen in this application on the court registry shelves is negating the very spirit and essence of the "oxygen" principles; and is but an abuse of the court's discretion and process that must be guarded Judiciously and cautiously. The Appellants inertia runs contra to the overriding objective stated in **Sections 1A, 1B and 3A of the Civil Procedure Act.**

6. As to whether the delay is intentional and inexcusable, the court finds that there being no plausible explanation for the delay. It is its finding that the appellant has lost interest in the appeal and therefore

the delay is intentional, in excusable and caused prejudice to the Respondents. In assessing the prejudice caused to the respondent by the delay the court should also assess the likely prejudice of the dismissal of the appeal to the appellant. I have noted that the decretal sum was deposited in an interest earning account in the parties advocates names. It is my considered view that dismissal of the appeal will not occasion the appellant prejudice to the level it would cause the respondents for the continued pendancy of the appeal in court, where the respondents are shut out from enjoyment of the decretal sums. **See Njuki Gachugu -vs- Githu (1977) KLR 108.**

7. Having stated as above, and having made a finding that no plausible explanation for the appellants intercia and delay have been sufficiently explained and tendered, I find the delay of two years seven months inordinate and inexcusable. Consequently, the Respondents application dated 15th October 2014 is hereby allowed in terms of **Prayer 1 and 2.** The appeal is hereby dismissed for want of prosecution and the sum of Kshs.566,295/= plus accrued interest deposited in **Account No. [particulars withheld]** at the **African Banking Corporation Limited** in joint names of the parties advocates be released forthwith to the firm of **D.W. Muyundo & Associates Advocates.**

8. Each party shall bear its own costs of this application, but the appellant is condemned to pay costs of the appeal.

Dated, signed and delivered in open court this 4th day of February 2016.

JANET MULWA

JUDGE