



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NUMBER 123 OF 2011

STANDARD CHARTERED BANK LTD.....APPELLANT/RESPONDENT

VERSUS

ONDIEKI AYUKAT/A ONDIEKI

AYUKA & CO. ADVOCATES.....RESPONDENT/APPLICANT

*(Being an Appeal the Ruling of the Principal Magistrate's Court at Nakuru The Hon. W. Kagendo)
delivered on 24th June 2011 in Civil Suit No 1892 of 2005)*

RULING

1. By its application dated 11th November 2014 the Respondent, Ondieki Ayuka practicing as & Ondieki Ayuka and Company Advocates seeks an order of dismissal of the appeal herein for want of prosecution, upon the grounds that the appellant has failed to prosecute the same or take any steps towards its prosecution for over three years, an action which is stated to be oppressive to the respondent and an abuse of the Court process. It is premised on the provisions of **Order 42 Rule 35 (1), (2) and Sections 1A, 1B and 3A of the Civil Procedure Act**.
2. In his affidavit in support, Ondieki Oyuka Advocate depones that the appeal was filed in July 2012 seeking reinstatement of the primary suit that had been dismissed for want of prosecution, and that despite the applicant taking dates in court for directions on several occasions, the appellant's Advocates have not attended court to prosecute the said application for directions. It is his submission that the appellant has lost interest in the appeal, and therefore fit for dismissal.
3. In opposing the application, a replying affidavit sworn by Gad Gathu Advocate for the appellants, it is deponed that since no directions have been taken, the application for dismissal is premature, and that the application for dismissal under **Order 35 Rule (2)** ought to be taken out by the Registrar by listing the appeal for dismissal.
4. The court has considered the affidavit evidence tendered by both counsel.

Order 42 Rule 35 (2) Civil Procedure Rules states:

“If within one year after service of the Memorandum of Appeal, the appeal has not been set down for hearing, the Registrar shall on notice to the parties list the appeal before a judge in chambers for its dismissal.”

Order 42 Rule 13 of Civil Procedure Rules mandates the appellant to cause the appeal to be listed

down for taking directions before a judge. This the appellant has done but on two occasions has failed to prosecute the application. The Court record shows that the appellant's Advocates did not attend court. It is evident that the applicant has been indolent and has kept the appeal hanging on the respondents neck, which is not only prejudicial but also oppressive and against the spirit of the provisions of **Section 1A and 1B of the Civil Procedure Act** that advocates for the just determination of proceeding in an efficient and timely disposal manner.

5. In line with the test as to whether or not to dismiss an appeal for want of prosecution set out in **Ivita -vs- Kyumbu (1984) e KLR 441** and adopted in numerous decisions, if delay is prolonged and inexcusable, can justice then be done despite such delay? Justice is justice to both parties, and also to the court whose position ought be considered.

If the court is satisfied with the appellants explanation for the delay the court will order that the matter be set down for hearing at the earliest opportunity.

6. I have considered the principles that ought to guide the court in this regard. There is no doubt that the appellant has shown no interest in the prosecution of the appeal.

I have also considered the position of the respondent/applicant who was dragged to the court by the appellant. The appellant is obligated to take steps to progress in the appeal. The last time the appellant took a step was taking a date for directions for the 20th April 2015 but did not attend court to prosecute the application. It is this application that awoke the appellant from its slumber. It ought to be penalised for its inaction – in costs. See **Jaribu Credit Traders Ltd -vs- Mumias Sugar Company Limited HCC No.465 of 2009**. Notwithstanding the wording in **Rules 35(2) of Order 43 Civil Procedure Rules**, it is the duty of the appellant to move the court, and not wait for the Deputy Registrar of the court to list the appeal for directions before the Judge. I refuse to accept the Appellants assertion that until the Deputy Registrar lists the appeal down for dismissal, the court is toothless and therefore cannot dismiss the same. In this case, the Respondent has moved the court. Indeed either party to the appeal may move the court for either directions under **Order 42 Rule 13** or any other procedural steps towards efficient and timely disposal of the appeal. The court will not sit and wait for time when an appellant may decide to take steps to prosecute its appeal. It must be rudely awakened, and for that it must pay the cost. The appeal will not be dismissed as it belongs to the appellant, and not to the Advocates who in my view have caused the inordinate delay.

7. In the interest of Justice to both parties, the court makes the following orders, being informed by the above observations:

1. The application dated 11th November 2014 is disallowed.

2. The appellant is to take necessary steps towards the prosecution of the Appeal and in any event within 60 days from the date of this ruling failing which the appeal shall stand dismissed.

3. The appellants Advocates shall pay costs of the application to the Respondent/applicant assessed at Kshs.5,000/= in view of the circumstances obtaining and reasons stated.

Dated, signed and delivered in open court this 7th day of April 2016.

JANET MULWA

JUDGE