



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NUMBER OF 1005 OF 2004

SIMON KINYANJUI KARIUKI. APPELLANT

VERSUS

FRANCIS NGIGE WAWERU. RESPONDENT

R U L I N G

On 30th July, 2015, the Respondent/Applicant Francis Ngige Waweru, filed the Chamber Summons dated 30th day of July, 2015 praying that the Appeal herein be dismissed for want of prosecution.

The application was brought under Sections 1A, 1B and 3A of the Civil Procedure Act, order 35(1) of the Civil Procedure Rules, 2010 and all the enabling provisions of the law. The summons are premised on the grounds that for more than 10 years the Appellant has never set the appeal down for hearing, the appellant has lost interest in the appeal, that it is in the interest of justice that litigation must come to an end and that all the previous orders have been vacated.

The application is supported by the Affidavit of the Respondent wherein he depones that he filed Milimani CMCC No. 5186 of 2003 against the Appellant herein seeking forceful eviction of the Appellant from his plots registered as title No's Muguga/Muguga/1886 – 1892.

That the suit in the subordinate court was determined in his favour and the court ordered that the Appellant be evicted from the Respondent's parcels of land aforesaid.

The Appellant being dissatisfied with the judgment of the lower court, filed the Appeal herein. He also obtained orders of stay of execution pending appeal but the same were vacated on the 25th October, 2006.

That for over ten (10) years the appeal has been pending without any action, the delay is inordinate, unreasonable, inexcusable and unfair and he prays to this honourable court to bring the litigation to an end.

He further depones that at the end of the day, he will stand highly prejudiced since he is unable to execute the decree as the original records from the subordinate court have been transferred to this honourable court.

The Respondent filed submissions on the 13th day of January 2016 which reiterates the contents of the supporting affidavit but in addition, his learned counsel submitted that the Appellant has never filed a Record of Appeal and that the Appeal has never been admitted.

He further submitted that though the original record was forwarded to this court way back on the 15th

May, 2008 the Appellant has never taken steps to prosecute the appeal leave alone failing to deal with preliminary issues. He argued that it was the Respondent who has been fixing hearing dates for the appeal and not the Appellant and in most cases when the matter comes up for hearing, it is the Appellant who has been seeking adjournments.

Counsel for the Respondent further submitted that the Appellant has not given plausible reasons why he has not taken steps to prosecute the Appeal for the last eleven (11) years. According to the learned counsel, Order 42 Rule 35 (1) and (2) of the Civil Procedure Rules should not aid an indolent Appellant who has chosen to sit back and take no action in his appeal when the Respondent has moved the court under Sub-rule (2) on the basis that sub rule (2) is only available to the court or the Registrar. This is because the steps preceding the applicability of sub rule (1) entirely lie within the control of the Appellant and not the Respondent.

For it is the duty of the Appellant, after launching the appeal by filing the Memorandum of Appeal to obtain certified copies of the proceedings from the lower court, prepare the record of appeal before the same can go for admission before the judge. He relied on the case of **East African Portland Cement Co. Limited Vs Richard Muema Nyamai (2008) eKLR** in which the learned Justice O K Mutungi quoted the case of **Anne W Chege and Another Vs Peter Kisuna Muasya**, and dismissed an Appeal for want of prosecution though directions had not been given. He has also relied on the case of **Awadh Yusuf & Another Vs Pilipeter Rugwamba [2014] eKLR** and also the case of **Adan Karama Petroleum Limited T/a A.K. Filling Stations Vs National Environmental Management Authority [2007]**.

In the later case, the learned Hon. Justice Waweru dismissed an appeal pursuant to an application by the Respondent to have it dismissed for want of prosecution. The said Application was brought under Order 41 Rule 31(2) of the Civil Procedure Rules and Section 3A of the Act. He proceeded to consider the application under the inherent powers of the court donated to the court under Section 3A of the Act.

The application is opposed vide a replying affidavit sworn on the 23rd October, 2015 wherein the Respondent blames his former advocate for failing to take steps to prosecute the Appeal despite his efforts to pursue the said Advocates to take steps in the Appeal. He was forced to change, his Advocate and instructed the firm of Ole Kaikai & Co. Advocates who has stopped active practice due to his engagement by the Kajiado County Government. It was during one of his visits to the said Advocates when he was informed by the Secretary that the Advocate was no longer in active practice. He was also informed about the application before the court and his efforts to get his file from the said Advocate did not bear fruits and he was forced to engage the services of the Advocate on record without his file though he was able to reconstruct a file by getting copies from the court record. He contends that he has a good Appeal with high chances of success and that dismissal of the same will cause untold suffering to himself.

The submissions by the learned counsel for the Appellant reiterates the contents of the replying affidavit and blames the delay in prosecuting the appeal to the previous advocates on record for him. The Appellant has relied on the case of **Nagle Vs Fielder (1966), 2QBD 633 at page 648, Birket Vs James (1978) A. C 297** which have been adopted in a great number of Court of Appeal cases which have set out the principles which guide the court when dealing with applications for dismissal of matters for want of prosecution.

He submitted that though there has been a long delay on the part of the Appellant in prosecuting the appeal the delay is not inordinate. That the court registry took long to complete the proceedings and when the same were complete the executive officer did not inform the parties that the same were ready.

He further submitted that the Appellant could not trace the skeleton file from the lower court and it was not until the application was made that the namely appointed advocates were able to trace the file at the High Court. He relied on the case of **Inter Vs Kyumba (1984) KLR 441, National Bank of Kenya Vs Juma Construction Limited & 4 Others (2010) eKLR, Utalii Transport Co. Ltd & 3 Others Vs NIC Bank & Another (2014) eKLR, Kaimenyi Vs Kipra Misc. 720/2009, Kirinyaga General Machinery Vs Hezekiel Mureithi Ireri HCCC No. 98/2008 and Austin Securities Vs Northgate and English Stores Ltd [1969] 1 Wlr 529.**

I have considered the materials before me and the submissions by the learned counsels for the parties herein. The application before me is for dismissal of the appeal for want of prosecution and the same is brought under Sections 1A, 1B and 3A and Order 35(1) of the Civil Procedure Rules. The same has been brought under the wrong provisions of the law as the current order is 42 Rule 35. I will, however, not dismiss the same on that account but I will proceed to consider it under Sections 1A, 1B and 3A of the Civil Procedure Act under the inherent jurisdiction of the court and in doing so, I am persuaded by the decision of my learned brother Justice A. Mabeya in the case of **Inter Vs Kyumba (1983) KLR 44** wherein he quoted the case of **National Bank of Kenya vs Juma Construction Ltd & 4 others (2010) eKLR** and stated in part: -

“The power to dismiss a suit is a discretion exercised by the court deriving its authority under Section 3A of the Civil Procedure Act. In exercising this discretion, the court has to act judicially and fairly and not in a manner likely to be prejudicial to any of the parties.”

In considering an application like this, the test is whether the delay is prolonged and inexcusable and if it is, can justice be done despite the delay?

The court also has to consider the prejudice to be suffered by the Respondent if the application is allowed. The judge in the case of **Inter Vs Kyumba** held that: -

“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 can 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 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.”

As the court stated in the case of **Kaimenyi Vs Kipra**: -

“dismissal of a case is a draconian judicial act which drives the plaintiff away from the seat of judgment. It should be done sparingly and in cases where dismissal is the feasible and just thing to do. Therefore, courts should strive to sustain suits rather than dismiss them especially where justice would still be done and fair trial had despite the delay. Any explanation for the delay which is given should be properly evaluated by the court to see whether it is reasonable. That notwithstanding, a court of law should not hesitate to dismiss a suit for want of prosecution where it strongly feels the sustenance of the suit will only breed extreme prejudice to the defendant. But in ascertaining prejudice to the defendant it must also weigh the prejudice the dismissal will cause to the plaintiff. The balance thereof need not be symmetrical, but the impulsion should come from the dictates of justice and where need be, the suit should be sustained”

I have considered the authorities cited by the Respondent but the interest of justice persuades me to exercise my discretion in favour of the Appellant. It is true that the Appellant has taken too long to prosecute the Appeal but in my view the delay has been explained and for those reasons I will dismiss the Respondent’s application dated 30th July, 2015 but I make the following orders: -

1) The appeal is hereby admitted under Section 79 (B) of the Civil Procedure Act.

2) The following directions are given under Order 42 Rule 13.

(i) The appeal is certified ready for hearing.

(ii) The same to be heard in Nairobi for one day before a single Judge.

3) The Appeal be prosecuted within forty five (45) days from today, failure to which the same shall stand dismissed.

4) Costs of the Application shall abide the outcome of the Appeal.

Dated, signed and delivered at Nairobi this 2nd day of June, 2016.

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L NJUGUNA

JUDGE

In the presence of

..... ***for the Appellant***

..... ***for the Respondent***