REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 285 OF 2014

MACHIRI LIMITED.....APPLICANT

VERSUS

KENYA MEDICAL ASSOCIATION.....RESPONDENT

RULING

1. Before Court is the Notice of Motion dated 12th February 2016 in which the applicant Machiri Limited seeks the following orders:

> **"1. That the memorandum of appeal dated 10th July 2014 and the record of appeal dated 22nd September 2014 be summarily rejected with costs.**
>
> 2. **That the stay of execution granted to the Appellant/ Respondent on 5th September 2014 in CMCC No 2699 of 2013 be set aside.**
>
> 3. **That the decretal amount of Kenya shillings eight hundred and twelve thousand five hundred and sixty four only ksh 812,564 deposited in court by the appellant/respondent be released to the respondent /appellant together with costs and interests at court rates to satisfy the judgement entered against the Appellant/Respondent on 11th June 2014.**
>
> 4. **That the costs of this application be borne by the appellant/Respondent."**

2. The application is premised on the grounds on its face and the supporting affidavit of James Mbugua Macharia. It is deposed that judgment was delivered in favour of the Applicant in June 2014 in the sum of ksh 812,564 together with costs and interest at court rates. That the Respondents were granted thirty days stay of execution from the date of judgement, which lapsed without them paying the decretal sum.

3. It is further contended that the Applicant proceeded to file a notice of motion seeking stay of execution pending the hearing and determination of the appeal. The application was allowed on the 5th of September on condition that the sum of ksh 812,564 be deposited in court within thirty days. However, this was not done. The Applicant instructed auctioneers who proclaimed the Respondent's property. Subsequently, both parties recorded a consent on the 17th December 2014 allowing the deposit of the decretal sum in two instalments and payment of auctioneers fee in order to stay the execution.

4. It is further asserted that Respondent filed their memorandum of appeal on 10th July 2014 and the

record of appeal on the 22nd September 2014 but have never taken steps to prosecute the appeal. That this has prejudiced the Applicant from enjoying the fruits of the judgement delivered in their favour. It is further stated that the Respondent is no longer interested in prosecuting the appeal and that the court should not aid the indolent to cause injustice and hardship to the Applicant.

5. The application is opposed by way of the grounds of opposition dated the 11th March 2016 as follows:

> **"1.That the application is frivolous, vexatious and an abuse of the court process**
>
> **2. That the application is incurably defective and ought to be struck out**
>
> **3. That the application is premature and misconceived for the reasons that;**
>
> a. **No directions have been given by this honourable court with regard to the appeal.**
>
> b. **The appeal has not been admitted by a judge of this honourable court.**
>
> **4. That no prejudice will be occasioned which cannot be compensated by costs if the appeal is set down for hearing.**
>
> **5. That striking out/dismissal of pleadings ought to be resorted in the clearest of cases.**
>
> **6. That the honourable court should administer substantive justice without undue regard to technicalities.**
>
> **7. That the application be dismissed with costs."**

6. The application was argued in court on 7th September 2016. I have considered the rival submissions by the counsels for the respective parties. I have also considered the lists and bundles of authorities filed.

7. A perusal of the court record reveals that the memorandum of appeal was filed on the 14th July, 2014. The record of appeal was filed on the 25th September, 2014. A further perusal of the record shows that the Lower Court record has not yet been availed to this court. The file is yet to be perused and the appeal either admitted to hearing or summarily rejected in accordance with section 79 B of the Civil Procedure Act.

8. The steps taken by the Respondent in this appeal so far include the compiling and filing of the record of appeal. The Respondent also wrote to the court on the 2nd of February 2016 requesting that the file be placed before a judge for directions. Although the said letter came in about 1 ½ years after the filing of the appeal, it is noted that the Deputy Registrar of this court failed to ensure that the Lower court record was availed to this court.

9. Although the court in appropriate cases can exercise its inherent powers as provided under section 1A, 1B, 3A Civil Procedure Act and Article 159 of the Constitution of Kenya to prevent the abuse of court process by a party who files an appeal then goes to sleep, the Respondent herein cannot be blamed entirely for the delay in this case. This court is therefore not inclined to allow the application. As stated by the Court of Appeal in the case of **Genevieve Bertrand v Mohamed Athman Maawiya & another [2014] eKLR:**

> **''Thus, it is apparent that although the appellant had a right of appeal that right was subject to section 79B of the Civil Procedure Act. Nevertheless, the power of summary rejection of an appeal under section 79B of the Civil Procedure Act, is to be exercised sparingly and in cases where it is very apparent that the appeal basically amounts to abuse of the court process"**

10. With the foregoing, the application is dismissed with costs in cause.

Dated, signed and delivered at Nairobi this 5th day of Oct, 2016

B THURANIRA JADEN

JUDGE