



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**

**CIVIL APPEAL NUMBER 493 OF 2008**

**CHETAN LALIT KUMAR VAKHARIA.....1<sup>ST</sup> APPELLANT/APPLICANT**

**HITEN LALIT KUMAR.....2<sup>ND</sup> APPELLANT/APPLICANT**

**VERSUS**

**DR. S O OWINGA.....RESPONDENT**

**R U L I N G**

The application before the court for determination is the one dated 16<sup>th</sup> June, 2015 brought by way of a Notice of Motion. The same is brought under Sections 63(3), Section 80, Sections 1A, 1B, 3A of the Civil Procedure Act and Order 50 Rule 6, Order 45 Rules 1 and 2 of the Civil Procedure Rules 2010.

In the application the Appellant/Applicant seeks the following orders:-

1. The Honourable Court be pleased to vary/review the ruling delivered by Hon. Justice Mabeya in this Appeal on the 23<sup>rd</sup> January, 2015 directing that the appeal be heard within 90 days of the said date failure of which the Appeal shall stand dismissed.
2. The Honourable Court be pleased to set aside the order/directions issued by the Hon. Justice Mabeya on 23<sup>rd</sup> January, 2015 directing that the Appeal be heard within 90 days.
3. The Honourable court be pleased to extend time within which the Appeal herein is to be heard.
4. This Honourable Court be pleased to order a stay of any impending execution pursuant to the orders of the court issued on 23<sup>rd</sup> January, 2015 and subsequently confirmed on the 8<sup>th</sup> June, 2015, pending the hearing of this application.
5. This Honourable court be pleased to stay any impending process of execution that may be carried out by the Respondents pending the hearing and determination of the Appeal.

The Appellants/Applicants relied on the grounds on the face of the application and the supporting affidavit of **FELIX MUTUA** Advocate sworn on 16<sup>th</sup> June, 2015 and annexed to the Application.

In the said Affidavit Mr. Mutua Advocate contends that on the 23<sup>rd</sup> January, 2015, Honourable Justice Mabeya made a ruling pursuant to an Application by the Respondent wherein the Honourable Judge

issued directions on the hearing of the Appeal and specifically that: -

***“Highlighting on a date to be fixed at the registry. That date to be within 90 days of the date hereof in default whereof the Appeal shall stand dismissed.”***

The Appellants pursuant to the said Order filed their submissions on the 25<sup>th</sup> February, 2015 while the Respondents filed theirs on the 27<sup>th</sup> March, 2015. The Appellants' Advocates thereafter attended the registry to fix a hearing date as per the directions of the court but he could not get an early date as there were no early dates available for hearing and for that reason he was given 8<sup>th</sup> June, 2015 which according to the staff at the registry was the earliest available date.

On the 8<sup>th</sup> June, 2015 when the matter came up for hearing, the court noticed that its earlier orders given on 23<sup>rd</sup> January, 2015 had not been complied with and/or varied because going by the orders of 23<sup>rd</sup> January, 2015 the appeal stood dismissed as at 23<sup>rd</sup> April, 2015. The court stood the matter over generally.

It is on that basis that the Appellants have approached this court seeking review and/or setting aside of the orders of the court made on 23<sup>rd</sup> January, 2015.

Following the dismissal of the Appeal, the stay of execution which had been issued could not stand on its own and the Appellants fears that the Respondent may proceed to execute to the detriment of the Appellants who in the supporting Affidavit alleges that he did not have the control of the court diary. The Appellants deposes that they stands to suffer substantial loss and damage in the event that the Respondent proceeds with execution. They seek orders of stay pending the hearing of the application and the appeal.

The Appellants further avers that the delay in having the matter heard within 90 days as ordered by the court was not intentional as the registry indicated that there were no earlier dates than 8<sup>th</sup> June, 2015. He contends that the Appellants are keen on prosecuting the Appeal which in his view raises serious issues of law and facts and as such he prays not to be shut out of the seat of justice. They pray that the application be allowed.

On his part, the Respondent in opposition to the Application filed a Replying affidavit sworn by Orare Jared Nchore on 19<sup>th</sup> September, 2015. In his replying affidavit he avers that the Appellants invited the Respondent for fixing of the Appeal just once on the 27<sup>th</sup> March, 2015 but failed to explain to the registry the urgency of having the appeal heard within the timeline ordered by Honourable Justice Mabeya in his orders given on the 23<sup>rd</sup> January, 2015.

He further avers that the counsel for the Appellants ought to have taken up the matter with the Deputy Registrar so that he could be given a date on priority basis which he failed to do. He depones that the Appellants are no longer interested in having the appeal determined and they have trying very hard to frustrate the Respondent and deny him the fruits of his judgment. Mr. Orare referred the court to the Respondent's application dated 5<sup>th</sup> March, 2014 wherein he had sought the dismissal of the Appeal for want of prosecution for failure by the Appellants to prosecute the appeal for a period of 3 years and 3 months by then. The said application by the Respondent was heard by Justice Mabeya who issued orders that the Appellants failed to comply with as a consequence of which the Appeal stood dismissed.

I have read the ruling by Justice Mabeya dated the 23<sup>rd</sup> January, 2015 wherein the Honourable Judge set out, the chronology of events since the Appeal was filed. The Judge in that ruling noted that he could not dismiss the Appeal at that point because directions had not been given as required under Order 42 Rule 34(1) of the Civil Procedure Rules and for that reason his hands were tied by the law. He was, however, of the opinion that the court could still exercise its discretion considering the special circumstances of the case and invoke the provisions of Order 42 Rule 35(2) which he declined to invoke but exercised his discretion in favour of the Appellants and dismissed the Respondent's application.

I have carefully read, understood and considered the application herein, the Affidavits on record and the oral submissions made by both counsels. I note that the Appeal was filed way back in the year 2008 almost eight years ago. From the record the Appeal was admitted way back in the year 2012. Justice Mabeya in his ruling also noted the reasons for delay in prosecuting the Appeal were not fully explained and the Appellant's letters to the Registrar requesting for the court file as rightly observed by Justice Mabeya are not in the court file as they are not stamped. The reason why I have brought this out is because counsel for the Respondent in his submissions, told the court that the Appellants have never been eager to have the Appeal prosecuted.

The court is now left to decide whether to vary/review the orders made by Justice Mabeya and whether to set aside the said orders. Depending on whether the court grants the above prayers, it will then decide whether to extend time within which the Appeal is to be heard and further whether to order a stay of execution pending the hearing and determination of the Appeal.

All considered, the court agrees with the counsel for the Respondent that the Appellants have not been eager to prosecute the appeal. Since the same was filed way back in the year 2008. Following the orders of Justice Mabeya made on the 23<sup>rd</sup> January, 2015. It was the duty of the Appellants' counsel to ensure that he got a date within the 90 days period ordered by Justice Mabeya. As the counsel for the Respondent submitted, the counsel ought to have gone a step further to argue his case for a nearer date before the Deputy Registrar but he seemed contented with the date that he was given at the Registry.

In the alternative, the counsel for the Appellants ought to have sought the intervention of the court by seeking to have the matter mentioned before Justice Mabeya to explain his predicament and for his intervention to ensure that the orders of the court were complied with which he failed to do. He only came back to court after the Appeal had been dismissed. Hon. Justice Mabeya was kind enough to accommodate the Appellants in his ruling dated 23<sup>rd</sup> January, 2015 but the Appellants failed to take that advantage.

In considering the application, I note that I cannot look at it in isolation without considering the principles governing the dismissal of suits for want of prosecution. These were well laid out in the case of **Agip (Kenya) Limited Vs Highlands Tyres Limited (2001) KLR 630** and they are

- i. The delay must be inordinate.
- ii. The inordinate delay is inexcusable.
- iii. The defendant is likely to be prejudiced.

Also in the case of **ET Monks & Co. Limited Vs Evans (1985) KLR 584**, Kneller J as he then was held, inter alia that: -

***“Whether an application for dismissal of the suit for want of prosecutions should be allowed or not is a matter for the discretion of the Judge who must exercise it judicially. The court shall among other things consider whether the delay was lengthy.”***

Whether it has rendered a fair trial impossible and whether it the delay was inexcusable. In the case of **Abdirahman Abdi Vs Safi Petroleum Products Limited & 6 Others (2011) eKLR** Civil Application No. Nai. 173 of 2010 where a Notice of Appeal was served on the Respondent out of time and without the leave of the court upon being asked to strike it out, the Court of Appeal observed that: -

***“The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense delay and to focus on substantive justice.....”***

In the days long gone the court never hesitated to strike out a Notice of Appeal or even an appeal if it was showing that it had been lodged out of time regardless of the length of the delay. The enactment of Sections 3A and 3B of the Appellant Jurisdiction Act, Cap 9 Laws of Kenya and later Article 159 (2) (a)

of the Constitution of Kenya, 2010 changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh the ruling against another for the benefit of the wider interest of justice before coming to a decision one way or the other. Article 159 (2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however, to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the offending party if the court strikes out the document. The court in that regard exercises judicial discretion.

Lastly in the case of **Ndya Nabo Vs The Attorney General** the court held: -

***“A person’s right of access of justice was one of the most important rights in a democratic society and in Tanzania just like is here in Kenya that right could only be limited by legislation that was not only clear but which was not, violative of the Constitution.”***

The fundamental right of access to justice is what links together the three pillars of the Constitution, that is; the rule of law, fundamental rights and an independent impartial and accessible judiciary.

Applying the principles cited in the case law that I have referred to, I will give the Appellant a chance to prosecute his appeal and make the following orders.

- 1. The orders made by Justice Mabeya on the 23<sup>rd</sup> March, 2015 be and are hereby set aside.***
- 2. Time within which to prosecute the appeal be and is hereby extended and the same to be prosecuted with in 60 days from the date hereof.***
- 3. There be a stay of execution of the decree pending the hearing and determination of the appeal.***
- 4. Costs of this application will abide the outcome of the appeal.***

Dated and delivered at Nairobi this 15<sup>th</sup> day of October, 2015.

.....

**LUCY NJUGUNA**

**JUDGE**