



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CIVIL CASE NO. 320 OF 2010

REAL MANAGEMENT (2002) LIMITED.....
....APPELLANT

VERSUS

LAXMI ENTERPRISES LIMITED 1ST
RESPONDENT

MERCANTILE LIFE & GENERAL ASSURANCE COMPANY LIMITED.....2ND
RESPONDENT

R U L I N G

Before me is a Notice of Motion dated the 28/5/2013. The application is brought under Order 42 rule 13, 17 and 35 and order 51 rule 1 of the Civil Procedure Rule and section 1A and 1B of the Civil Procedure Act. The applicant is seeking the following orders that;

- (1) The appeal be dismissed for want of prosecution
- (2) The costs of this application of the application be borne by the appellant.

The applicant argues that the appellant has not sought directions from the appellate Judge and the appellant have not filed their record of appeal and has not taken any effort to schedule the appeal for hearing nor taken any steps to prosecute it's appeal for over 2 years since the same was filed . The applicant argues further that the continued existence and uncertainty of the suit is prejudicial to the 2nd respondent who can't benefit from its judgment.

The respondent opposed the application and filed a replying affidavit sworn by Mrs. Ramila Chouhan the manager of the appellant company.

She argues as follows; that the Court file has been missing from the registry for purposes of obtaining copies of proceedings and that the appellant's advocate has just obtained instructions from its director recently; that there is no wrong doing on the appellant's part and he should not be punished for the same; that they are keen on prosecuting the appeal and have already deposited security for cost in Court and re-emphasize that the delay is not inordinate to be considered inexcusable and it would be in the interest of justice that the appellants are granted the chance to prosecute its appeal.

The applicant in his submissions reiterated the grounds on the face of the application and his replying affidavit and relied on the following cases; *Fitzpatrick v Batger & Co. Ltd (1967) 2 All E.R. 657* where it was held "*there had been inordinate delay without excuse that the action would be dismissed for want of*

prosecution, *Nilani –v- Patel and another (1969) E.A. 340* where it was held that; the Court dismissed the suit as there was inordinate delay by the plaintiff which was ***inexcusable, and the case of Saldanha and others v. Bhailal & Company and Others (1968) E.A*** where the Court dismissed a cause of action for want of prosecution , for failure on the part of the plaintiffs to set it down for hearing for a period of over twenty seven months after close of proceedings.

I have carefully read and considered the parties affidavits and applicant’s written submissions and make the following findings; A perusal of the court file reveals that there is a letter dated 5/1/12 from the respondent requesting for certified proceedings and subsequently there is a letter dated 29/8/12 to the Chief Executive Officer informing him that the said file had been missing from the registry and seeking his assistance in locating the same. From the said date no follow up had been made by the appellant in obtaining proceedings to compile their record of appeal.

However in the interest of justice I will give the appellant the benefit of doubt on his claim that the lower court file was missing this I believe would be a circumstance beyond his control. I however order the appellant to exercise due diligence in following up, obtaining the lower courts proceedings and compiling and filing his record of appeal and have the matter is listed before the Judge for directions within sixty days from the date of this ruling, failure to which the appellant’s suit shall stand dismissed with costs to the Respondent. Costs of the applications shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 12th day of **September 2014**.

R.E. OUGO

JUDGE

In the presence of:-

.....**For the Applicant/2nd Respondent**

.....**For the 1st Respondent**

.....**For the Appellant/Respondent**

.....**Court Clerk**