

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

ELC APPEAL NO. 3 OF 2018

MUNGANIA TEA FACTORY CO. LTD(In trust for

Kirwiro Tea Buying Centre).....APPELLANT

VERSUS

KIRIAMBURI NJAMIU.....RESPONDENT

RULING

1. By a notice of motion dated 8th November 2020 brought under the provisions of **Sections 1A, 1B & 3A** of the **Civil Procedure Act (Cap. 21)**, **Order 17 Rule 2 (1) (3), (4)** and **Order 51 Rule 1** of the **Civil Procedure Rules (the Rules)**, and **all other enabling provisions of the law** the Respondent sought dismissal of the appeal for want of prosecution. The Respondent also sought an order that costs of the application be provided for.

2. The said application was based on the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Respondent on 8th November 2019 and the annexures thereto. It was contended that the Appellant had delayed for over 3 years in taking steps to prosecute the appeal. In particular, it was contended that the Appellant had failed to file a record of appeal and to fix the appeal for directions as directed by the court on 21st March 2019.

3. The Appellant filed a replying affidavit sworn by Angelica Igandu Njoka on 29th June 2020 in opposition to the said application. It was contended that the Appellant was unable to file its record of appeal because of the delay on the part of the Magistrates' court in supplying it with copies of the proceedings. The Appellant, therefore, sought the indulgence of the court as it awaited typed copies of the proceedings.

4. When the said application was listed for hearing on 1st July 2020 it was directed that it shall be canvassed through written submissions. The Respondent was given 21 days within which to file and serve his submissions whereas the Appellant was granted 21 days upon the lapse of the Appellant's period to do the needful. The record shows that the Respondent filed his submissions on 22nd July 2020, whereas the Appellant filed its submissions on 25th September 2020.

5. The court has considered the Respondent's said application, the Appellant's replying affidavit in opposition thereto, the submissions and the material on record. The main question for determination is whether the Respondent has made out a case for dismissal of the appeal for want of prosecution. Although the application was grounded upon the provisions of **Order 17 Rule 2** instead of **Order 42 Rule 35** of the **Rules**, the court is of the opinion that such defect is curable under **Section 19 (1)** of the **Environment and Land Act, 2011** and **Article 159 2(d)** of the **Constitution of Kenya, 2010**. Accordingly, the court shall consider the Respondent's said application on merit.

6. The test to be applied in an application for dismissal of a suit or appeal for want of prosecution were succinctly articulated by Chesoni J (as he then was) in the case of **Kyumbu v Ivita [1984] KLR 441** at page 449 as follows:

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. 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 will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if 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.”

7. The court has considered the explanation for the delay rendered by the Appellant. Although the period of delay of about 3 years is prolonged, the fact that there was delay on the part of the magistrate's court in providing typed copies of proceedings for purposes of appeal is a plausible explanation for the delay. It was not contended by the Respondent that the Appellant's explanation was a sham. In fact, the Respondent did not file any further affidavit to controvert or discount the Appellant's explanation for the delay. Accordingly, the court finds the Appellant's explanation for the delay satisfactory hence the delay was not inexcusable.

8. The court has further noted from the material on record that the Appellant has now filed its record of Appeal. The record was filed on 28th September 2020 obviously after the Appellant had been supplied with typed copies of proceedings. In the circumstances, the court is not inclined to allow the Respondent's application for dismissal of the appeal. However, the court shall direct the Appellant to list the appeal for directions within a limited period in default of which the same shall stand dismissed.

9. In the premises, the court is not satisfied that the Respondent's notice of motion dated 8th November 2019 is merited. Accordingly, the same is hereby declined with costs in the appeal. Since the Appellant has already filed a record appeal, it shall take steps to prosecute the appeal within six (6) months in default of which the same shall stand dismissed without further order. It is so ordered.

RULING DATED and **SIGNED** in Chambers at **EMBU** this **15TH DAY** of **OCTOBER 2020** and delivered via Microsoft Teams platform in the presence of Ms. Rose Njeru for the Appellant and in the absence of A.P. Kariuki & Co. Advocates for the Respondent.

Y.M. ANGIMA

JUDGE

15.10.2020