REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL NO. 8 OF 2015

LUCY MUTHONI MACHARIA ……..…..…APPELLANT/ RESPONDENT

VERSUS

PATRICK TARZAN MATU …...…….....…….RESPONDENT/APPLICANT

RULING

[1] By a Notice of Motion on **1st February, 2021,** the applicant filed a seeking the following principal order:

1. *That the Honourable Court be pleased to dismiss the appeal herein for want of prosecution with costs.*

[2] The application is based on the grounds on the face of the application and the supporting affidavit of the applicant setting out the applicant's case is that the Appellant/respondent filed the appeal herein on 12th May, 2016 and served it upon counsel for the respondent/applicant on 26th July, 2016. The counsel for the Appellant served counsel for the Respondent with a Mention Notice dated 3rd May, 2017 indicating that the matter would be mentioned on 22nd June, 2017 case was stood over generally. Lastly, the applicant avers that more than 12 months have lapsed since the parties appeared in Court.

[3] The Respondent deposed to a Replying Affidavit opposing he application and she avers that she intends to prosecute the matter fully and has appointed the firm of M/S KARANJA KANG'IRI & COMPANY ADVOCATES to act for her, and further that she is willing to adhere to any rules set by this honourable court including but not limited to setting a time frame for the disposal of this Appeal. Lastly, the respondent avers that the mistake of counsel should not be visited on the client/litigant.

[4] **Applicant submissions**

[5] Under Order 42 Rule 35 (1) of the Civil Procedure Rules 2010 states that: "Unless **within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution."**

[6] The instant Application is brought under the provisions of Order 42 Rule 35 of the Civil Procedure Rules 2010 and Section 1A, 1B and 3A of the Civil Procedure Act.

[7] It is urged that under Order 42 Rule 35 (2) of the Civil Procedure Rules 2010 States that**: "if within one year after the service of the memorandums of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal."**

[8] It is pointed out that the Appellant/Respondent filed the appeal herein on 12th May 2016 and served it upon the counsel for the Respondent/Applicant on 26th July, 2016 and the counsel for the Appellant served counsel for the Respondent with a Mention Notice dated 3rd May 2017 indicating that the matter would be mentioned on 22nd June, 2017.

[9] On 22nd June, 2017, counsel for the Appellant did not appear in Court and the case was stood over generally and more than 12 good months have lapsed since the parties appeared in Court and it is in the interest of justice and for expeditious disposal of the proceedings before court for the application herein be allowed.

[10] ***Peter Kipkurui Chemoiwo v Richard Chepsergon*** [2021] KECA 979 (KLR) and ***Ivita –v- Kyumba*** [1984] KLR 441 were cited as to the test to be applied by the courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether the delay could be excused and justice can be done despite the delay.

Respondent submissions

[11] The Applicant has not demonstrated that he stands to lose anything or suffer any prejudice if the Appeal proceeds to its logical conclusion. The Respondent has however shown that she had given instructions to her advocate to prosecute the matter but the Advocate negligently abandoned his professional duty.

[12] In the case of **Belinda Murai & Others Vs Amoi Wainaina (1978),** the court set out the following approach to be adopted when dealing with the question as to

whether or not a party should be completely locked out of the seat of justice on account of a mistake:

i. ***"The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary.to rectify it if the interests of justice so dictate ....."***

[13] The respondent seeks to have the Appeal set down for hearing even if the court will impose timelines as to compliance and determination of the matter. The Appeal raises triable issues and if not allowed to proceed the Respondent will be condemned unheard which is contrary to the rules of Natural Justice. It was urged that the non-attendance of the Advocate in the present matter was merely a technical oversight and does not go to the root of the matter. Substantive justice should not be sacrificed at the expense of procedural technicalities and hence the present suit ought to be sustained to be determined on merits. Further, despite the Applicant filing its motion in 2021, he only recently revived the motion after the Respondent decided to change advocates.

Issue

[14] Whether the appeal herein should be dismissed for want of prosecution with costs.

Analysis

[15] Order 42 Rule 35(1) allows a respondent to apply for dismissal where an appellant fail to set down the appeal for hearing within three months after directions have been given.

[16] Order 42 Rule 35(2) **provides that where an appeal is not set down for hearing within one year after service of the memorandum of appeal, the Registrar shall list the matter before a judge for dismissal.**

[17] The Court of Appeal in ***Utalii Transport Company Limited & 3 Others v NIC Bank Limited & Another*** [2014] eKLR emphasized that prolonged inactivity in litigation amounts to an abuse of the court process. Similarly, in ***Peter Kipkurui Chemoiwo v Richard Chepsergon*** [2021] KECA 979 (KLR), the Court of Appeal reiterated that where an appellant fails to take steps to prosecute an appeal for a

prolonged period, the court is entitled to dismiss the appeal so as to uphold the principle of expeditious justic**e.**

[18] In the present case, the Applicant has been kept away from the enjoyment of the judgment delivered in the lower court for several years due to the Appellant's inaction. The Appellant/respondent blames counsel for the delay in the prosecution of the appeal.

[19] The Court is aware of ***Belinda Murai & Others v Amos Wainaina*** [1978] KLR**,** where the court held that the door of justice should not be closed merely because a mistake has been made by counsel. While the court is mindful of the principle in ***Belinda Murai v Amos Wainaina*** **(supra**) that mistakes of counsel should not always be visited upon litigants, the court must equally uphold the overriding objectives under Sections 1A and 1B of the Civil Procedure Act, which require the just and expeditious disposal of disputes.

[20] In the case of ***IVITA vs. KYUMBU*** [1984] KLR 441 (Chesoni J, as he then was),held as follows:

> "***A defendant who has waived or acquiesced in delay is not entitled to a dismissal of the action for want of prosecution but mere inaction on the part of such defendant does not amount to a waiver or acquiescence.***
>
> ***The test applied by the courts is an application for the dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and, if it is, whether justice can be done despite the***
>
> ***delay. <u>Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time. It is a matter in the discretion of the court.</u>"***"

[21] The Court must seek to balance the right of the parties on the part of the successful litigant to enjoyment of the fruits of his judgment against the unsuccessful appellant's right to an appeal on the merits to a higher court, both against the overriding objective principle for expeditious disposal of disputes in accordance with section 1A and 1B of the Civil Procedure Act.

[22] The Appellant should have followed up the matter of his appeal with his Counsel to ensure that he discharged his instructions to appeal the trial court's decision in accordance with the rules of the Court. For his apparent failure to pursue the hearing and determination of the appeal with his Counsel, the appellant is the author of what befalls him.

[23] In not too dissimilar facts the Court of Appeal in said in judgment from an appeal from the trial Court's dismissal of suit for want of prosecution seeking to reinstate suit dismissed for want of prosecution that

> *"In the end, we find that there is nothing on record to show that the appellant offered any cogent explanation for the delay in prosecuting his appeal. In our view, the respondent who has been denied the fruits of his judgment for so many years is bound to suffer more prejudice than the appellant in the circumstances. The ends of justice will not be served in keeping the appeal alive when the appellant has not been interested in taking any action since filing his record of appeal on 5th* ***July, 2013*** *until he was prompted by the respondent's application."*

[24] It is not in dispute that the appeal was filed on **12th May, 2016** and served on **26th July, 2016.** The record shows that the matter was last scheduled for mention on **22nd June, 2017**, when counsel for the Appellant failed to attend court and the matter was stood over generally. Since that date, no meaningful step has been taken by the Appellant to progress the appeal. By the time the present application was filed in **February 2021,** a period of over **three (3) years** had elapsed without any action by the Appellant.

[25] Such delay, in the view of this court, is clearly inordinate and unexplained on any other justification other than the generalised mistake of Counsel. Although, the Appellant attributes the delay to the mistake of counsel, the court notes that litigants have a duty to follow up their cases with Counsel or the Court where they are self-representing.

[26] However, as pointed by the appellant, the Respondent himself had not prosecuted the application for dismissal for the appeal until the respondent changed advocates by application of 12/11/2024, although there is also evidence on record that the court was once unavailable to hear the application of 1/2/2021 when it was fixed.

[27] The preponderance of evidence, however, indicates that the applicant had failed to give instructions for her counsel to proceed with the matter, leading to the application for leave to cease acting by previous counsel by application of 3/7/2023.

[28] The Considers, however, that in terms of ***Ivita*** case, the Court may still do justice between the parties in this case by making an order for the expedited hearing of the appeal whose Record of Appeal is already filed within ninety (90) days and the payment of costs of this application to the Respondent.

ORDERS

[29] Accordingly, for the reasons set out above, the Court finds that that the delay in this matter is inordinate and unexplained and must be punished by an award of costs.

[30] The appeal shall be heard with three months and for that purpose, the Counsel for the parties shall file their submissions on the appeal within twenty-one (21) days each starting with the appellant.

[31] The appeal shall be mentioned for directions as to Judgment on **16th June 2026.**

[32] The appellant shall pay the costs of the application to the Respondent assessed at Ksh.100,000/- before the date set for direction as to Judgment in the appeal.

Order accordingly.

DATED AND DELIVERED THIS 12TH DAY OF MARCH 2026.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Mr. Njoroge for Mr. Karanja Kang’iri for the Appellant.

Ms. Kathigiu for Mr. Magee for the Respondent.