REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC APPEAL NO 3 OF 2017

OL KALAOU WEST FARMERS

CO-OPERATIVE SOCIETIES LTD.....APPELLANT

VERSUS

DAVID KIBUE KINYANJUI.....RESPONDENT

RULING

1. By a Notice of Motion dated 5th July 2017 and filed on the 27th July 2017 pursuant to Order 42 Rule 21, Order 45 Rule 1(a) of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act and Article 159 of the Constitution where the Appellant/Applicant seek orders that:-

i. **Spent**

ii. **Spent**

iii. That this Honorable Court be pleased to review its orders of 22nd June 2017 by setting aside the said orders and reinstituting this Appeal for hearing on merit.

iv. That the costs of this application do abide the outcome of the Appeal.

2. The grounds upon which the Applicant rely in support of their application include that there exists a sufficient cause to warrant restitution of the Appeal to full hearing and determination. Further, that there was an error on record warranting the review of the orders of the 22 nd June 2017.

3. The Applicants further grounds are to the effect that after the said orders were issued, they moved the court with extreme speed to file the application for review and that if the appeal is not re-instated the Respondent would not suffer any prejudice as he shall have his day in court.

4. That the Respondent had threatened to evict the members of the Applicant from the subject suit and to demolish the buildings belonging to the said society and lastly that this court had inherent powers to restore the Appeal to hearing on such terms as are just, fair and expedient.

5. The said application is supported by the sworn affidavit of Mr. Joseph Karanja Mbugua, Advocate for the Applicant/Appellant dated the 5th July 2017.

6. At the hearing of the application, the applicant's submission while relying on their supporting affidavit, was to the effect that the said Appeal was not filed on time owing to the fact that despite his letter dated the 8th April 2014 to the Chief Magistrate at Nyahururu to send the typed copies of the proceedings as well as to have the entire file being Nyahururu SPMCCC No 116 of 2004 forwarded to the Nakuru High Court, the same was not forth coming.

7. That on the 5th April 2014 although the typed proceedings were sent yet the whole file was not sent which necessitated him to write another letter dated the 26th September 2016 to the Deputy Registrar Nakuru to issue him with the certified proceedings and judgment to enable him prepare a record of Appeal to which the same was still not forthcoming.

8. That despite Counsel's several letters requesting to be supplied with the typed proceedings and judgment to enable him file his record of Appeal, the same were futile to the effect that on the 4th November 2017 when he again wrote to the deputy Registrar Nakuru pursuing the same issue, he was informed that the file could not be traced.

9. That from the chronology of issues the record of appeal could not be prepared on time and that the same was only prepared when the matter was transferred in the Nyahururu Registry.

10. That he had since filed and served their record of Appeal.

11. On her part the Respondents' Counsel vehemently opposed the application and urged the court to dismiss it. Learned Counsel for the Respondent argued inter alia that on the first prayer the applicant was precluded from seeking for injunctive orders for reasons that the injunction could not be issued in a non-existent Appeal, secondly, that the Applicant had not established the principles for grant of review order as was provided for under Order 45(1)(b) of the Civil Procedure Rules in that the Applicant had not established a new matter or evidence that was not within their knowledge. She relied on the case of **Kamahuha Ltd vs. Standard Chartered Bank of Kenya Ltd & 2 others [2013] eKLR.**

12. The Respondent further submitted that the Court shoul uphold the order for dismissal being that the this Appeal was lodged on the 24th November 2011 at the Nakuru High Court vide Nakuru Civil Appeal No. 208 of 2011 and served on the 5th December 2011 but no steps were put in place to have the same prosecuted thereafter.

13. That on the 26th November 2011 when judgment was passed, the Applicants had been given a 60 days stay period, which period lapsed when they had not taken any steps.

14. That at the time, the Applicants had a different Counsel on record to whom they wrote to on the 28th June 2013 informing him of the availability of the subordinate court's original file at the Nakuru Registry, the same having been forwarded on the 6th March 2013, thereby asking him to take steps and prepare the record of Appeal so that the Appeal could be set down for hearing.

15. That they had received a response on the 31st July 2013 to the effect that that Counsel was no longer on record but that the Applicants had instructed the firm of Karanja Mbugua and Company Advocates to represent them.

16. That no steps were taken to prosecute the Appeal by the new Counsel to the effect that the High Court sitting in Nakuru issued a Notice to Show Cause on the 4th April 2014 wherein Counsel for the Applicant had applied for more time to file his record, to which he was given 60 days to set down the Appeal for hearing.

17. On the 9th June 2014 when the matter came up for Mention, the Applicants had still not filed their Appeal and prayed for more time to which they were granted and the matter fixed for mention on the 8th July 2014 on which day, there had been no steps taken to set the Appeal down for hearing. On the 23rd September 2014 the Applicants informed the court that the record was not ready and a mention date was set for the 10th November 2014 when Counsel for the Applicant/Appellant informed the court that they were in the process of preparing the record.

18. That on the subsequent dates namely the 29th January 2016, 14th April 2016, and 28th June 2016, when the matter was fixed for mention, it had been the Applicant/Appellant's submission that they had not prepared the record of appeal to the effect that on the 22nd June 2017, when they gave the same reason to the court, and upon the court finding that they had not complied to the previous orders, directing them to have the Appeal set down for hearing and they having given no explanation in terms of the difficulties they had faced that precluded them to have the appeal heard, the court dismissed the intended appeal.

19. The Respondent submitted that despite the appeal not having been re-instated, the Applicant/Appellants had now sneaked in a record of appeal which is not properly on record.

20. That the Appellants have since been enjoying the fruits of the Respondent's judgment by their continued stay on the Respondent's one acre of land despite the lapse of stay of 60 days a long ago. The Respondent prayed that this application be dismissed and the Appeal to remain dismissed.

Determination

21. I have considered the application, the affidavit on record, and submissions by counsel and the law. The law concerning dismissal of an appeal for want of prosecution is contained in Order **42** Rule **35 (1) & (2)** which provides as follows:-

> *1. Unless within three months after the giving of directions under rule 13 the appeal shall be set down for hearing, the Respondent shall be at liberty to either set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.*
>
> *2. If, within one year after service of the memorandum 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.*

22. As noted herein above, judgment in the subordinate court was delivered on the 26th October 2011 wherein a 60 days stay of execution was granted on the same day. Thereafter, the applicant filed the present Memorandum of Appeal in Nakuru High Court being No. 208 of 2011 on the 24th November 2011 wherein no steps were taken thereafter to have the matter set down for hearing.

23. That when the original lower court file was forwarded to the Nakuru High Court registry on the 6th March 2013, the Respondent's counsel took the initiative to inform counsel for the Applicant (at the time) of the same, but were instead informed that the Applicant had

engaged counsel presently on record.

24. That following this turn of events, the Applicant did not move to set the Appeal down for hearing despite the various mention dates fixed and a Notice to Show Cause having been issued for parties to appear in court on the 4th April 2014 to show cause why the Appeal should not be dismissed for want of prosecution pursuant to Order 42 Rule 35(2) of the Civil procedure Rules. On the 4th April 2014 parties went before court wherein Applicant/Appellants were given another extended 60 days to file their appeal and in default, to show cause why the same should not be dismissed.

25. Thereafter the Applicant/Appellants instructed Counsel presently on record who filed his Notice of Change on the 7th July 2014 but who took no steps to set the matter down for hearing.

26. On 9th June 2014 when the matter came up in court for mention, the court was informed that the record of Appeal had not yet been filed, and so the situation remained like that on subsequent dates being, 8th July 2014, 23rd September 2014, 10th November 2014, 14th April 2016, 24th February 2017. 13th March 2017.

27. Consequently counsel for the Applicant Appellants vide the Notice dated the 19th April 2017 invited parties to attend the High Court and 22nd June 2017 to mention the matter for Directions. On that day however it was discovered that this was a matter that fell within the jurisdiction of this court to which the file was forwarded and Counsel for both parties appeared before me. Counsel for the Respondent prayed for the appeal to be dismissed for want of prosecution, the same having had been filed in the year 2011 and not having been set down for hearing since then.

28. The court after having studied the development of this matter, was in agreement with counsel for the Respondent that the Appellant were not desirous of prosecuting this matter wherein on its own motion, having found that the Appellants had failed to comply with the orders issued on the 4th April 2014, 8th July 2014 and 14th April 2016, dismissed the Appeal suo motu which gave rise to the present Application to have the same re-instated.

29. The order for the dismissal of the suit was at the instance of the court. In other words, the court was not moved by any application, when it dismissed the Appeal as the continued pendency of the appeal is not only against the principles of justice but also prejudicial to the respondent

30. *Order 42 Rule (35) (2)* in my view is meant to take care of dormant appeals which are simply abandoned after they are filed such that no interest is demonstrated by the Appellants in taking any single step towards progressing it for admission, directions or hearing for a minimum period of one year.

31. The Constitution demands under Article 159, that cases should be disposed of expeditiously. Indeed justice delayed is justice denied. Here I am reminded that justice is to all the parties and not only the appellant.

32. I have considered the submissions of counsel for the Appellants and the application herein, I have also considered the provisions of *Order 45 Rule 1* of the *Civil Procedure Rules* where the court has jurisdiction to review and set aside its orders if the conditions stipulated under the rule are satisfied.

33. I am satisfied that when the impugned order was made, the Appellants filed the application for review without unreasonable delay.

34. Granted, there appears to have been some lack of diligence on the Applicant's part and or its advocates in following up the matter, yet it cannot be said that the appellant have totally lost interest in prosecuting the appeal given their efforts to have the same re-instated so that it can be admitted and heard.

35. See the case of ***Ivita vs Kyumbu, [1984] KLR 441***, Chesoni, J *[as he then was]* stated thus:

> ***"****The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite the delay. Justice is justice to both the plaintiff and the defendant; so both parties to a 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 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."*

36. A party should always take steps to progress its case to a logical conclusion, dismissal of a case is a draconian judicial act and should be done sparing and in cases where dismissal is the feasible and just thing to do. Courts should strive to sustain rather than dismiss suits especially where justice would still be done in a fair trial despite the delay. The respondent herein has not shown any prejudice that it is likely to suffer if the appeal is reinstated.

37. For the foregoing reasons and considering that the court is enjoined to administer substantive justice to parties before it, I find that there is sufficient reason in this case to warrant a review of the dismissal order made on the 22nd *June 2017*.

38. In the premise thereof;

i. The order made on *22nd June 2017* dismissing the appeal for want of prosecution is herein set-aside and the Civil Appeal No. 208 of 2011 is hereby reinstated.

ii. The Appellant's record of appeal is herein admitted as being properly on record.

iii. The appellant shall cause the record to be served upon then Respondent (if it has not been served already) 14 days from today.

iv. The Appeal shall be disposed of by way of written submission wherein, the Appellant shall file and serve its written submissions to the Appeal within 14 days of the date hereof and the Respondent shall file his written submissions to the appeal within 14 days of service.

v. Costs of the application shall be borne by the applicant.

Dated and delivered at Nyahururu this 18th day of April 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE