



REPUBLIC OF KENYA



KENYA LAW
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**Gitonga v Matimbo (Appeal E076 of 2021)
[2023] KEELRC 376 (KLR) (14 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 376 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E076 OF 2021
JK GAKERI, J
FEBRUARY 14, 2023**

BETWEEN

KELLEN WANGARI GITONGA APPELLANT

AND

JUDITH MAJUMA MATIMBO RESPONDENT

RULING

1. Before the court for determination is a Notice of Motion Application by the Respondent dated 28th September, 2022 seeking Orders That:-
 1. The court be pleased to dismiss the appeal by the Appellant for want of prosecution.
 2. The court be pleased to order release of funds deposited in the Joint Account No. 0119264921900, Account Name: Kenneth Mwangi Mburu & Associates and Mokaya Omwoyo and Associates domiciled at Co-operative Bank, Moi Avenue Branch, Nairobi.
 3. The court be pleased to order that Sidian Bank, K-Rep Centre, Kilimani Wood Avenue, Nairobi to honour a bank guarantee issued to the Respondent on 27th April, 2022 and release to the Respondent the funds so guaranteed.
 4. The Respondent be granted costs of this application.
2. The Application is expressed under Order 17 (2) of the *Civil Procedure Rules* (wrongly stated as *Civil Procedure Act*) and all other enabling provisions and is premised on the grounds set forth on its face and supported by the Affidavit of Judith Majuma Matimbo sworn on 28th September, 2022.



3. The affiant states that although the lower court delivered its judgement on 6th July, 2021 and the current appeal was filed on 27th July, 2021, no action has been taken by the Appellant to prosecute the appeal and no document had been filed in furtherance of the appeal.
4. That the deliberate delay by the Appellant in prosecuting the appeal has subjected her to suffering and urged the court to dismiss the appeal and order the release of the funds deposited in the joint account and the guarantee held by Sidian Bank K-Rep Centre, Kilimani be honoured and release of funds to the Respondent.

Respondent's case

5. The Respondent's grounds of opposition dated 3rd October, 2022 state as follows;
 1. The Application offends the mandatory provisions of Order 17 Rule (2)(3).
 2. The motion is misconceived, scandalous, frivolous, vexatious and total abuse of this court's process.

Respondent/Applicant's submissions

6. The Applicant submitted that although the Memorandum of Appeal was filed on 27th July, 2021, and a Notice of Motion Application on 9th December, 2021 seeking a stay of execution pending the hearing and determination of the appeal, which the court granted on 21st February, 2022, no other action had been taken in furtherance of the appeal. The record of appeal had not been filed, a signification that the Appellant may have lost interest or was deliberately delaying the appeal contrary to Article 159(2) (b) of the Constitution of Kenya, 2010.
7. That the Appellant appeared complacent with the stay of execution orders to the detriment of the Applicant who has been denied the fruits of her judgement.
8. It was urged that the delay by the appellant was inexcusable since the Applicant was a house servant and continued to suffer financially.
9. It was further urged that the Appellant had nothing on record to explain the delay.
10. Reliance was made on the Court of Appeal decision in Peter Kipkurui Chemoiwo v Richard Chepsergon [2021] eKLR to reinforce the submission.
11. It was the Applicant's submission that Order 17 Rule 2(3) of the Civil Procedure Rules, 2010 empowered any party to the suit to apply for its dismissal where no action had been taken for one (1) year.
12. The court was urged to dismiss the appeal.
13. Finally, the applicant urged that Order 45 Rule 35(1) of the Civil Procedure Rules gave the Respondent liberty to apply for dismissal of an appeal for want of prosecution if no action had been taken within 3 months after directions to set the same for hearing.
14. The court was urged to allow the application.

Appellant/Respondent's submissions

15. The Appellant, in reliance on the provisions of Order 17 Rule 2 of the Civil Procedure Rules, 2010 submitted that the power of a court of law to dismiss a suit for want of prosecution under Order 17 was discretionary.



16. Counsel relied on the holding in *Ecobank Ghana Ltd v Triton Petroleum Co. Ltd & 5 others* [2018] eKLR to urge that the law on dismissal of a suit for want of prosecution was well settled that the court considers whether the delay was inordinate and if it was, whether the delay can be excused and whether either party is likely to be prejudiced as a result of the delay or that a fair trial was not possible as a result of the delay.
17. It was submitted that the last action taken was the extraction of the orders given on 7th April, 2022 from the ruling delivered on 21st February, 2022 for compliance.
18. The Appellant urged that the pendency of determination of the Application dated 15th December, 2021 could not be relied upon to argue that the Appellant had not taken steps to prosecute the appeal.
19. That the Appellant could not prosecute the appeal before delivery of the ruling on 21st February, 2022. That extraction of the orders on 7th April, 2022 was a step and an application in court.
20. It is the Appellant's case that the application before the court was misleading and intended to subvert justice as it was not premised on the one year threshold for the court to weigh the facts and evidence and the last step was taken less than 6 months ago.
21. The Appellant prayed for dismissal of the application with costs.

Determination

22. The only issue for determination is whether the applicant's application is merited.
23. Order 17 Rule 2 of the *Civil Procedure Rules*, 2010 provides that;
 - (1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.
 - (2) If cause is shown to the satisfaction of the court, it may make such orders as it thinks fit to obtain expeditious hearing of the suit.
 - (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.
 - (4) The court may dismiss the suit for non-compliance with any direction given under this order.
24. Regulation 16 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 contain similar provisions on dismissal of suits where no action has been taken within one year.
25. Dismissal of a suit for want of prosecution under the foregoing provisions is a matter of judicial discretion.
26. In *Argan Wekesa Okumu v Dima College Ltd and 2 others* [2015] eKLR, the court stated as follows;

“The principles governing application for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay. As such, the 3rd Defendant in this case must meet the burden of proof in seeking the dismissal of the Plaintiff's case for want of prosecution. See the case of *Ivita v Kyumbu* [1984] KLR 441. Further to this, the decision of whether or not to dismiss a suit is discretionary and this court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that



a court should strive to sustain a suit where possible rather than pre-maturely terminating the same.”

27. In addition, *Nilesh Premchand Mulji Shah & another t/a Ketan Emporium v M.D Popat and others and another* [2016] eKLR, the court stated as follows;

“ . . . That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it or whether the delay in prosecuting the suit is inordinate, unreasonable and likely to cause serious prejudice to the defendant on account of that delay. This is what the case of *Ivita v Kyumbu* [1984] KLR 441 espoused . . . ”

28. Finally, in *Naftali Opondo Onyango v National Bank of Kenya Ltd* [2005] eKLR, the court observed that the court should exercise restraint in dismissing a suit for want of prosecution.

29. The court held that;

“ However, in deciding whether or not to dismiss a suit under Rule 6, it is my view that a court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the Defendant will suffer no hardship and that there has been no fragrant and culpable inactivity on the part of the plaintiff.”

30. I will now proceed to apply the foregoing principles and provisions of law to the facts of the instant case.

31. From the evidence on record, the judgement, the subject matter of the proposed appeal was delivered on 6th July, 2021 and the Memorandum of Appeal was filed on 27th July, 2021.

32. It is common ground that the Appellant took no other step in furtherance of the appeal until 15th December, 2021 when a Notice of Motion seeking stay of execution of the judgement of the lower court was made under certificate of urgency and stay pending the hearing and determination of the appeal was granted on 21st February, 2022 and no action has been taken since then in furtherance of the appeal.

33. Although the Appellant took no tangible step to prosecute the appeal from 27th July, 2021 to the filing of the current application by the Claimant/Respondent, she filed the application for stay on 15th December, 2021 and obtained the orders sought subject to provision of security. While the orders ought to have incentivised the Appellant to pursue the appeal more vigorously, the Appellant took no step in furtherance of the appeal.

34. Puzzlingly, in her grounds of opposition, the Appellant/Respondent did not tender any explanation for the delay.

35. Neither the allegation that the application offends the mandatory provisions of Order 17 Rule 2(3) nor the allegation that it was misconceived, scandalous, frivolous, vexatious and abuse of court process was explained.

36. In light of the foregoing, the court is satisfied that the delay in taking action was long but not inordinate.

37. Relatedly, the fact that the Appellant made an application on 15th December, 2021 would appear to suggest that the Appellant was actively pursuing a matter related to the judgement to be appealed against by way of maintenance of the status quo pending appeal and the one (1) year threshold of inactivity was not met for the dismissal order to issue.



38. However, granted that the Appellant had not taken any tangible step since July 2021 to demonstrate its desire to prosecute the appeal, and there is no indication that the appeal will proceed without further delay, coupled with the reality that a court should be slow to dismiss a suit for want of prosecution, the court is disinclined to allow the application.
39. Consequently, the court orders that:-
- a. The Notice of Motion dated 28th September, 2021 is disallowed.
 - b. The Appellant/Respondent shall file the record of appeal within 30 days from the date hereof failing which the appeal shall be deemed dismissed.
 - c. Parties to bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 14TH DAY OF FEBRUARY 2023

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

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