



REPUBLIC OF KENYA
IN EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

APPEAL NO. 3 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

PATCO INDUSTRIES LIMITED.....APPLICANT

VERSUS

DANIEL MULI MUSAU.....RESPONDENT

(Being an Appeal from the Judgment of Hon. A. N. Makau

Principal Magistrate delivered on 17th January 2020 in CMCC

No. 482 of 2018 – Daniel Muli Musau v Patco Industries Limited)

RULING

1. Vide an application by way of a Notice of Motion made under Rule 16 and 8(3) & 8(4) of the Employment and Labour Relations Court (Procedure) Rules 2016, Order 42 Rules 35 of the Civil Procedure Rules, and Section 1A, 1B & 3A of the Civil Procedure Act. The Applicant seeks the follows orders:

(i) Spent.

(ii) ***THAT*** this honourable Court be pleased to dismiss the Appeal herein for want of prosecution and the Appeal be deemed to have been abandoned.

(iii) ***THAT*** costs of this Application and Appeal be provided for.

2. The application is supported by the grounds set out on the face thereof and the supporting affidavit of **DANIEL MULI MUSAU** the applicant who is the Respondent in the appeal.

3. He seeks dismissal of the appeal on grounds that more than 15 months have lapsed since the appeal was filed and it has not been set down for hearing.

4. The application is opposed by the Respondent, who however, did not file a replying affidavit or grounds of objection although it was granted leave to do so within 7 days on 27th September, 2021.

5. The application was disposed of by way of written submissions. The parties filed and exchanged submissions.

6. The appeal herein arises from the decision in **Milimani Chief Magistrate’s Court at Nairobi Cause No. 482 of 2018**. Judgement in the suit was delivered on 17th January 2020 by Hon. A.N. Makau, Principal Magistrate, in favour of the Respondent herein who was the Claimant in the suit at the lower Court.

7. The Applicant avers that the Appellant herein filed an application for stay of execution pending appeal which was granted unopposed in circumstances that the Applicant refers to as “sharp practice”. That since the appeal was filed on 22nd January 2020 no action has been taken to prosecute the same.

8. It is the Applicant's contention that the Appellant's delay in prosecuting the appeal is deliberate, inordinate and inexcusable thereby occasioning injustice to him. Further, that there is no security for stay of execution.

9. That in the premises, it is only fair and just that this application be granted on the terms of Rule 16, 8(3) and 8(4) of the Employment and Labour Relations Court (Procedure) Rules, Order 42 Rules 6, 7 and 35 of the Civil Procedure Rules.

10. In the submissions filed on 4th December 2021 the Applicant submits that unlike the Civil Procedure Rules, the Employment and Labour Relations (Procedures) Court Rules do not provide that an appeal has to be admitted before an application for dismissal is filed. That there is no evidence that the Appellant has ever sought proceedings as the only letter sent to the lower Court by the Appellant was seeking to be supplied with "submissions" and not proceedings. That the letter has never been responded to date.

11. The Applicant states that the delay in prosecuting the appeal is prejudicial to him. He explains that he was involved in a life threatening accident that totally crippled him. That the Appellant inhumanly abandoned and summarily dismissed him after the accident.

12. The Applicant submits that the right of appeal is not absolute, and is dependant on the rights of the other parties and compliance with the rules.

13. For the Appellant it is submitted that in the Replying Affidavit of counsel in conduct of the suit explained that the reason the appeal had not been prosecuted was because it has not been supplied with "submissions".

14. The Appellant submits that the Court in **South Nyanza Sugar Co. Limited v Autolith Limited [2017] eKLR** held that;

"It is my understanding of this rule is that before the Appeal can be dismissed, the same should have been set down for directions and such directions issued in the first instance."

15. That this position was taken by the Court in the case of **Suresh Ruginath Raniga & Another v Sagar Mohan S. M. Ram Civil Appeal No. 433 of 2012**, where the Court agreed with the submissions made by the Appellants Counsel that until and unless directions are issued, an Appeal cannot be dismissed for want of prosecution. Where directions have not been taken, the above quoted Order 42 rule 35(1) provides for the Respondent setting down the matter for hearing.

16. The Appellant also relied on the case of **Kirinyaga General Machinery v Hezekiel Mureithi Ileri HCC No. 98 of 2008** where the Court while interpreting Order XLI rule 31 (now order 42 rule 35), observed: -

"It is clearly seen from that rule that before the Respondent can move the Court either to set the Appeal down for hearing or to apply for dismissal for want of prosecution, directions ought to have been given as provided under rule 8B. Directions have never been given in this matter. The directions having not been given the orders sought by the respondent cannot be entertained."

17. The Appellant submits that it has demonstrated that typed proceedings were requested for but the same were never issued. To buttress this point the Appellant relies on the decision in **Allan Otieno Osula v Gurdev Engineering & Construction Ltd [2015] eKLR** in which the Court held:

"It is therefore on the above grounds that I decline to strike out the Appeal as prayed. I employ the principle that the right of Appeal is constitutional right and in as much as there has been delay which has not been satisfactorily explained by the appellant, this Court has to weigh the cost and the prejudice that is likely to be occasioned to the appellant as well as the respondent, if the Appeal is struck out at this stage without according the appellant an opportunity to be heard on the merits of the Appeal."

18. Having considered the grounds in support of the application and the submissions on record, the issue for determination is whether there has been inordinate and unexplained delay in the prosecution of the appeal that justify dismissal of the appeal for what of prosecution.

19. The record of the Court shows that since filing the appeal on 22nd January 2020, the Appellant has taken absolutely no action at all to set down the Appeal for hearing. In fact, the record of appeal has not been filed.

20. The Respondent, as already observed above, did not file a replying affidavit or grounds of opposition to the application. The replying affidavit referred to in the Appellant's submission is not on record and the Respondent Applicant has indicated that he was never served with any. The letter written to the trial Court seeking "submissions" has not been placed on record herein.

21. The Court is thus not aware of the date of such letter, whether it was filed before or after the Memorandum of Appeal herein was filed. This means that there is no explanation for the delay from 22nd January 2020 when the appeal was filed to date, a period of more than two years, which by all standards, is inordinate.

22. Rule 8(4) of the Employment and Labour Relations Court (Procedure) Rules provides for filing of appeals as follows:

(4) A memorandum of appeal shall be accompanied by copies of the proceedings, all documentary evidence relied on and a copy of the judgment from the proceedings of the matter being appealed against.

Provided that where copies of proceedings are not filed with the memorandum of appeal, the appellant shall file the such copies as soon as possible and within a reasonable time.

23. Further, Rule 16 of the Rules provides for dismissal for want of prosecution as follows:

16. Notice to show cause why suit should not be dismissed

(1) In any suit in which no application has been made in accordance with Rule 15 or no action has been taken by either party within one year from the date of its filing, the Court may give notice in writing to the parties to show cause why the suit should not be dismissed and if no reasonable cause is shown to its satisfaction, may dismiss the suit.

(2) If reasonable cause is given to the satisfaction of the Court, it may make such orders as it thinks fit to obtain the expeditious hearing and determination of the suit.

(3) Any party to the suit may apply for dismissal

as provided in paragraph (1).

(4) The Court may dismiss the suit for non-compliance with any direction given under this rule.

24. A suit is defined in the Civil Procedure Act as:

“suit” means all civil proceedings commenced in any manner prescribed.

25. An appeal is therefore a suit and may be dismissed for want of prosecution under Rule 16.

26. In the proceedings before me, there is no explanation, reasonable or otherwise, for the delay in filing the Record of Appeal. Indeed, there is no evidence on record that the Appellant has ever applied for typed proceedings for purposes of appeal. It would appear as if the Appellant filed the Memorandum of Appeal herein as an end in itself. This is a classical case of abuse of Court process.

27. For these reasons I find merit in the application by the Respondent/Applicant and accordingly dismiss the appeal for want of prosecution.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF FEBRUARY 2022

MAUREEN ONYANGO

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.

MAUREEN ONYANGO

JUDGE