



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

ELRC APPEAL NO. 15 OF 2020

RUIRU FEEDS LIMITED.....APPELLANT

VERSUS

PETER WANYOIKE NJUGUNA.....RESPONDENT

(Being an appeal from the judgment of the Senior Principal Magistrate (C.A. Otieno Omondi) sitting at Ruiru Law Courts dated 24th September, 2019 in ELRC case No. 3 of 2019).

RULING

1. The applicant filed a notice of motion application dated 14/4/2021 praying that the Appellant's Appeal herein be dismissed for want of prosecution on grounds set out on the face of the Notice of Motion and the supporting affidavit of the applicant the nub of which is that there has been unreasonable delay in filing the record of appeal which amounts to negligence. That the applicants have not taken any step towards prosecution of the appeal from 23/10/2019 when they filed the Memorandum of Appeal. That the appeal is meant to deny the respondent the fruits of his judgment.
2. That no record of appeal has been filed to date which is a clear evidence of indolence on the party of the applicant.
3. The application is opposed vide a replying affidavit of **Harish Patel** sworn to on 11/6/2021 in which he states *inter alia* that since the respondent filed a notice of Appeal, the respondent wrote to the lower Court requesting for certified copies of proceedings and judgment.
4. That the lower Court has not supplied the respondent with the physical copies of certified proceedings and judgment to enable the respondent file the record of appeal.
5. That the respondent is not responsible for the delay in prosecuting the Appeal.
6. That there is no inordinate delay to prosecute the appeal, considering that the Courts had halted operations after the COVID 19 pandemic broke out.
7. That the respondent would be greatly prejudiced if the notice of appeal was dismissed.
8. The applicant herein relied on Nairobi HCCA No. 1 of 2007 – **Protein and Fruits Processors Limited and Another – vs- Diamond Trust Bank Kenya Limited** in which D.A. Onyancha J. held:-

“An appeal can be dismissed for want of prosecution on two instances. Firstly where there has been failure to list the appeal for hearing for three months after directions have been made under Order 42, Rule 13 or; secondly, if after one year of service of Memorandum of Appeal the appeal has not been lifted for hearing.”

9. The applicant submits that in the present case, the Appellant's memorandum of Appeal was filed and served on 23/10/2019. That Order 42(35) 2 cited above provides that a appeal can be dismissed if one year of

service of the Memorandum of Appeal has lapsed and the appeal has not been set down for hearing.

10. That it has been exactly 19 months since the memorandum of Appeal was served on the respondent/Applicants and exactly 15 months since the matter herein was transferred from Kiambu High Court to Employment and Labour Relations Court. That the matter is ripe for dismissal.

11. The Court was referred to HCCC at Nairobi No. 513 of 2016 – K. Ventures Limited –vs- Peter Olumati in which Mbogholi Msaghah J. held:-

“It is the duty of the appellant to move the Court towards admission of an appeal in order to pave way for the issuance of directions.”

12. That one of the overriding objective in Section 1A (1) of the Civil Procedure Act, is the facilitation of expeditious resolution of Civil matters and parties have a duty to assist the Court in furtherance of that objective.

13. In Nairobi CAA No. 339 of 2013 – Job Mwangi Mulwa and 3 Others -vs- The Director of Criminal Prosecution and 5 Others a three (3) judge bench held:-

“In this matter, the appellant’s have not explained the delay in prosecuting the petition before the High Court and this leads us to make a finding that no sufficient basis has been laid before us to justify our interference with the discretion of the trial Court to dismiss the petition for want of prosecution.....”

14. The applicant urges the Court to follow aforesaid case and dismiss the appeal in that the appellant has not provided sufficient justification why the Appeal has not been prosecuted to date.

15. The appellant submits that they have been unable to comply with Order 42, Rule 13 (4) of the Civil Procedure Rules to date on account of failure by the lower Court to provide them with certified proceedings for them to file a record of appeal and that commencement of COVID 19 may have played a part in the inability of the lower Court to expeditiously provide the Appellant with the Appeal record.

16. The Court was referred by the respondent to the decision of Kamau, J. in HCCC at Nairobi, Civil Appeal No. 441 of 2018 in which the judge dismissed an application on account of delayed prosecution of the same.

17. The judge relied on the provisions of Order 42, Rule 35 (2) of the Civil Procedure Rules which provides:-

“If within one year after the 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 judge in Chambers for dismissal.”

18. The judge stated:-

“ The bottom line is that directions must have been given before an appeal can be dismissed for want of prosecution. Indeed, there does not appear to be any penalty where an appellant fails to proceed as per Order 42, Rule 11 and Order 42, Rule 13 of the Civil Procedure Rules, 2010.”

19. The judge also relied on Article 50(1) of the Constitution of Kenya, 2010 which provides:-

“Every person has the right to have any dispute that can be resolved by the application of the law be decided in a fair and public hearing before a Court or if appropriate another independent and impartial tribunal or body.”

20. This Court notes that the Rules of Court are a maiden that helps the Court to hear and determine matters in a fair, just and expeditious Manner. Such disposal of the case, includes considering applications for dismissal for delayed prosecution such as this one which if granted on good grounds do not constitute a denial of justice under Article 50(1) of the Constitution.

21. In the present matter, there has been about 19 months delay in prosecuting the Appeal. However, there has been no notice issued by the Registrar of Employment and Labour Relations Court under Order 42 Rule 12 of Civil Procedure Rules prior to the filing of this application. Accordingly, this application was filed prematurely and stand to fail for that reason alone.

22. In the final analysis, the Court directs the Appellant to:-

(i) File and serve the record of Appeal within 60 days of this Ruling. In the event the proceedings of the lower Court and the lower Court file will have not been placed in the file herein, and the Appellant shall have failed to file their Record of Appeal as aforesaid, the Appeal herein will stand as automatically dismissed and since the Appellant does not have control of typing of proceedings and placing of the lower Court file, the Registrar of Employment and Labour Relations Court, Nairobi, is hereby directed to facilitate the typing of the said proceedings and placing of the said lower Court file within 30 days from the date of this Ruling

(ii) Orders accordingly.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 28TH DAY OF OCTOBER, 2021.

MATHEWS N. NDUMA

JUDGE

Appearances

Mr. Kiugu for Respondent/Applicant

Mr. Kimani for Appellant/Respondent

Ekale- Court Assistant

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