



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT

AT MOMBASA

CIVIL APPEAL NUMBER 7 OF 2017

BETWEEN

HANTEX GARMENTS [EPZ] LTDAPPELLANT

AND

EVANS MAKORI IBENCHO.....RESPONDENT

RULING

1. Judgment in a Claim for work injury was delivered in favour of the Respondent at the Chief Magistrate's Court Mombasa, Civil Case No. 112 of 2014, on 30th November 2016.
2. The Appellant lodged Civil Appeal No. 11 of 2017 against the Judgment, through a Memorandum of Appeal dated 16th January 2017.
3. By consent of the Parties given on 6th March 2017, the Appeal was transferred to the E&LRC and assigned the current registration number.
4. The Respondent filed an Application on 12th June 2018, seeking to have the Appeal dismissed for want of prosecution. The Application is supported by the Affidavit of the Respondent, filed on the same date. It is not clear from the copy filed in Court the exact date, when the Affidavit was sworn.
5. The Respondent states that the Appeal was filed on 17th January 2017, a period of over 1 year and 4 months from the date the Application was filed. The Appellant had not taken active steps to prosecute the Appeal in this period. The Appellant obtained an order for stay of execution and went to bed. The Respondent argues that the Appellant has lost interest in prosecuting the Appeal. He is prejudiced in that in issue is work injury, over which he was granted damages, which he has not been able to access.
6. The Appellant is opposed to the Application. Appellant's Advocate, Peter Omwenga filed a Replying Affidavit sworn on 3rd October 2018. He concedes that the Appellant filed Appeal on 17th January 2017. The Appeal was initially filed at the High Court, then transferred to the E&LRC. The Appellant applied for typed and certified copies of Proceedings and Judgment, on 24th May 2017. The request was not met for over 1 year. The Appellant renewed its request for the trial record on 15th August 2018. Delay in preparation of the Record of Appeal was not of the Appellant's making. The decretal amount was sent to the Respondent's Advocates on 19th April 2017, with instructions to prepare the requisite forms for opening of joint account. The Respondent's Advocates did not act on this request. The Appellant opposes the Application for dismissal of the Appeal on these grounds.
7. The Parties agreed on 21st February 2019, to have the Application determined on the strength of their Written Submissions.

The Court Finds:-

8. There is adequate explanation by the Appellant on why the Appeal has not been prosecuted. The Appeal was filed on 17th January 2017, Judgment having been delivered on 30th November of the previous year. Parties appeared before the High Court on 6th March 2017, 2 months after the Appeal was filed. They agreed to have the Appeal transferred to the E&LRC. They similarly agreed to have an order of stay of execution put in place, on the condition that the decretal amount is held in the joint account of the Advocates. The Respondent's Advocates did not facilitate the process of account –opening. Subsequently the Appellant applied twice, to the Trial Court, for certified

copies of the Proceedings and Judgment. There is no indication from the Respondent that these were supplied and not acted upon by the Appellant. The conduct of the Appellant is not shown to be that of an indolent Appellant who prefers an Appeal, and goes to bed, while the Respondent is delayed in the enjoyment of his Judgment. There is no justification in dismissing the Appeal at this stage, for want of prosecution.

IT IS ORDERED:-

a. The Application filed by the Respondent on 12th June 2018, seeking dismissal of the Appeal for want of prosecution is declined.

b. No order on the costs.

Dated and delivered at Mombasa this 20th day of June, 2019.

James Rika

Judge