



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

APPEAL NO. 1121 OF 2018

(Formerly Milimani HCCA No. 273 of 2010)

Before Hon. Lady Justice Maureen Onyango

KENYA NUT COMPANY LIMITED.....APPELLANT/RESPONDENT

VERSUS

JUSTINE MUSYOKA NKABI.....RESPONDENT/APPLICANT

RULING

The Respondent/Applicant herein filed the Application by way of Notice of Motion dated 4th April 2018 and filed in Court on 10th April 2018. The application is anchored upon made under **Order 42 Rule 35 (2)** of the Civil Procedure Rules, 2010 and Section 3A of the Civil Procedure Act, laws of Kenya. The Application seeks the following Orders:

1. That this appeal be listed before a Judge and that it be dismissed for want of prosecution
2. That the costs of this application and of the appeal be awarded to the respondent.

Which Application is based on the following grounds:-

- (a) That the appeal was filed on 15th July 2010
- (b) That the appeal has never been set down for hearing
- (c) That there has been inordinate delay in setting down the appeal for hearing.

The application is not supported by any affidavit.

The Appellant/Respondent opposed the Application and filed a Replying Affidavit sworn by Christine Otieno and filed in Court on 19th June 2018 in which reply the appellant seeks to explain the delay to move the Court.

At paragraph 3 of the Replying Affidavit Counsel for the Appellant/Respondent indicates that she had been away from the office for a long period of time during the political period. She goes on to admit that her personnel at the office overlooked this matter during this period thus the delay in prosecuting the Appeal.

At Paragraph 5 and 6 Counsel goes on to indicate attempts taken to fix the Appeal for hearing. The correspondences attached are dated 17th July 2013, 10th March 2014, 23rd July 2015 and 5th November 2015 all attached to the Replying Affidavit and marked AO 1.

At Paragraph 7 Counsel states that the delay was further occasioned by a fire that gutted the Gatundu Law Courts (where the lower Court matter (**CMCC No. 414 of 2006**) was heard and determined leaving the correspondences to the lower court unresponded to. The appeal seeks the setting aside of judgment delivered on 22nd June 2010 in favour of the Plaintiff for Kshs.191,500 being both General and Special Damages.

At Paragraph 9 to 12 Counsel urges the Court not to penalize the Client for the delay and dismiss the Application thus giving the

Appellant/Respondent a chance to prosecute the Appeal.

The Application did by consent of the parties proceeded by way of written submissions.

Respondent/Applicant's Submissions

In submissions filed on behalf of the Respondent/Applicant Messrs. Kibunja Nyambura and Company Advocates, it is submitted that the Appeal was filed on 15th July 2010 and the Record of Appeal filed on 30th May 2013 after a period of 34 months had lapsed.

It is further submitted that under Order 42 Rule 35 (2) of the Civil Procedure Rules, 2010 provides that

“..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 of the parties list the Appeal before a Judge in chambers for dismissal.”

It is further submitted that since then a period of over four years have lapsed and still no action has been taken to prosecute the Appeal.

It is further submitted that since the fire at the Gatundu Law Courts, the said Courts have been re-built.

The Respondent/Applicant goes on to urge the Court not to allow the matter (Appeal) to pend any longer as it is now going to 9 years without concluding the same.

The Respondent/Applicant prays that the Appeal be dismissed with costs.

The Respondent/Applicant explains that the records speak loudly for themselves and that the applicant is of the opinion that it should not bother the Court with a supporting affidavit or authorities.

Appellant/Respondent's Submissions

In submissions filed on behalf of the Appellant/Respondent by Messrs Otieno, Maangi and Company Advocates, it is submitted that the Application dated 4th April 2018 is premature and lacks merit and the same ought to be dismissed with costs to the Appellant/Respondent.

It is further submitted that in considering an Application for dismissal of an Appeal the Court should consider the reason(s) for the delay, the possible prejudice if any that each party stands to suffer depending on how the court exercises its direction, the conduct of the parties, the need to balance the interest of a party with a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of Appeal, the need to protect a party's opportunity to fully agitate its dispute against the need to ensure timely resolution of disputes: the public interest or issues implicated in the Appeal or whether prima facie the Appeal has chances of success or is a mere frivolity.

It is further submitted that the Appellant/Respondent has demonstrated that they have employed a lot of effort to have the Appeal fixed for directions but the efforts bore no fruit.

Further under Order 42 Rule 35, the Applicant/Respondent has equal responsibility to set the Appeal for directions, which seems to have been overlooked by the Applicant/Respondent.

Additionally the Appellant/Respondent submits that they have written numerous letters to the Deputy Registrar seeking directions and to date there has not been any positive response.

The Appellant/Respondent relies of the following Authorities –

a) Elem Investment Limited –vs- John Mokora Lwama (2015) eKLR

b) Morris Njagi and Another –vs- Mary Wanjiku kiuna (2017) eKLR

Finally, it is submitted that the Application before Court be dismissed and the Court do order the giving of direction for the Appeal herein.

Determination

It is not in dispute that the appeal herein was filed on 15th July 2010 and the

record of appeal filed on 30th May 2013. It is further on record that the last attempt to fix the appeal for hearing was by letter dated 5th November 2015. The letter is addressed to the Deputy Registrar and seeks directions. It is not copied to the applicant who is the respondent in the appeal. By the time the application herein was filed on 10th April 2018 no action had been taken by the appellant to set down the appeal for hearing for more than two years and five months. The endorsement on the letter dated 5th November 2015 is that the lower court file was received on 28th August 2015 and appeal was admitted on 12th October 2015. The endorsement further states “*invite for direction dates*”. The endorsement is signed on 12th November 2015.

Christine Otieno does not state how long she was away from office. Her deposition, that advocates mistakes should not be visited on the claimant is inappropriate as this was not a mistake but sheer negligence on the part of both the advocate and the client. A client interested in his/her case cannot go to slumber for more than two years without making an inquiry about the position of the file.

This case has been in court for more than 12 years, the plaint having been filed on 19th September 2006. The appeal has also been pending in court for more than eight years having been file on 15th July 2010.

The appellant/respondent is guilty of lack of interest in prosecuting the appeal. The reasons for the delay cited in the supporting affidavit of counsel are not excusable. There is no indication that the appellant has any interest in the appeal as it is counsel and not the appellant, who has sworn the replying affidavit.

I find no reason why the appeal should continue to lie in the shelves of the court any longer. The applicant cannot be kept in court for more than 8 years by a litigant who for all indications has lost interest, in his case, and be denied the fruits of her judgment indefinitely.

For these reasons, I allow the application with the result that the appeal is dismissed for want of prosecution. The appellants shall pay respondent's costs of the application and appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF NOVEMBER 2018

MAUREEN ONYANGO

JUDGE