



**Botto Solar Limited v Diamond Trust Bank (K) Ltd (Civil Appeal  
126 of 2016) [2024] KEHC 4419 (KLR) (26 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 4419 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL 126 OF 2016  
SM MOHOCHI, J  
JANUARY 26, 2024**

**BETWEEN**

**BOTTO SOLAR LIMITED ..... APPELLANT**

**AND**

**DIAMOND TRUST BANK (K) LTD ..... RESPONDENT**

**RULING**

1. Before me is a Notice of Motion filed on the 16<sup>th</sup> September 2022, under Order 42 Rule 35, Order 51 Rule 1 of the [Civil Procedure Rules 2010](#) and Sections 1A, 1B and 3A of the [Civil Procedure Act](#) and all enabling provisions of the law, an application for the following three (3) Orders:
  - i. That this Honourable Court be pleased to dismiss the Appeal herein for want of prosecution.
  - ii. That the order of stay of execution granted on 29 March 2018 be vacated and the sum of Kshs. 1,755,482/= deposited by the Appellant in a joint interest earning account to with Absa Bank Kenya Plc (Formerly Barclays Bank of Kenya Limited) Account No. 203xxxxxx in the name of Kimatta & Mohamed Madhani & Company Advocates be released forthwith to the Respondent's advocates.
  - iii. That the costs of the suit and this application and of the Appeal be borne by the Appellant.
2. The Application is supported by the annexed Affidavit of Joram Kilwanda and is based inter alia on the nine (9) grounds that:
  - i. The Appellants lodged a Memorandum of Appeal in the year 2016 challenging the judgment of the magistrate Court in Nakuru CMCC No. 1130 of 2011.
  - ii. Since the filing of the Appeal, the Appellant has failed to take any steps to prosecute the Appeal and up to date the same has not been set down for directions and hearing



- iii. The Respondent had in a letter dated 7<sup>th</sup> December 2018 requested the Deputy Registrar to list the Appeal for directions but to date the Appeal has never been listed for directions.
  - iv. The Appeal has been pending determination for over six (6) years which delay is inordinate and inexcusable on the part of the Appellant.
  - v. It is apparent that the Appellant is no longer interested in getting the Appeal heard and determined and the same only remains an unnecessary burden on the Respondent.
  - vi. The continued pendency of this Appeal is not only an affront to the principles of justice but also highly prejudicial to the Respondent who has been unable to enjoy the fruits of its judgment since 2016.
  - vii. It is in the interest of justice that litigation once commenced should come to an end within reasonable time.
  - viii. The hesitance to expedite the matter as portrayed by the Appellant has amounted to wasteful use of Court resources and time for the parties involved in the matter.
  - ix. Other grounds and reasons to be adduced at the hearing hereof.
3. That, the Respondent/Appellant lodged a Memorandum of Appeal in the year 2016 challenging the judgment of the magistrate Court in Nakuru CMCC No. 1130 of 2011 and since the filing of the Appeal, the Respondent/Appellant has failed to take any steps to prosecute the Appeal and up to date the same has not been set down for directions and hearing.
  4. That, the Applicant/Respondent had in a letter dated 7<sup>th</sup> December 2018 requested the Deputy Registrar to list the Appeal for directions but to date the Appeal has never been listed for directions.
  5. That, the Appeal has been pending determination for over six (6) years which delay is inordinate and inexcusable on the part of the Respondent/Appellant and that, it is apparent that the Respondent/Appellant is no longer interested in getting the Appeal heard and determined and the same only remains an unnecessary burden on the Applicant/Respondent.
  6. That, the continued pendency of this Appeal is not only an affront to the principles of justice but also highly prejudicial to the Applicant/Respondent who has been unable to enjoy the fruits of its judgment since 2016.
  7. That, it is the Respondent/Appellant's responsibility to prosecute the Appeal by ensuring that the same is listed before a Judge for directions but the Respondent/Appellant has failed to do so which omission is an abuse of the Court process.

### **Respondent's Case**

8. The Respondent in opposition filed a Replying Affidavit dated 28<sup>th</sup> July 2023 and filed on 2<sup>nd</sup> August 2023 sworn by Edith Wathuti Muchiri. She stated that it is true that they instituted this appeal in 2016 upon being dissatisfied with the findings in the trial Court's judgment.
9. That, shortly after instituting this appeal, their erstwhile advocates filed an application before the Lower Court for stay of execution pending appeal and a substantial period of time was spent whilst prosecuting that application.
10. That, a determination was made vide the Court's Ruling delivered on 20<sup>th</sup> September, 2017 dismissing that application.



11. That, her advocates filed a similar application for determination before this Court due to the fact that the Applicant/Respondent had prompted execution of the Trial Courts judgment through an attachment of their properties.
12. That, a determination of the application dated 25<sup>th</sup> September, 2017 was made herein vide the Court's ruling delivered on 29<sup>th</sup> March, 2018 and this Court granted stay of execution orders on a condition that the entire decretal sum was to be deposited in a joint interest earning account of the Advocates on record. And that they complied with the orders of the Court by depositing the decretal sum in Barclays Bank Nakuru.
13. That, having complied as aforesaid, they realized that the company's name had been listed negatively with the CRB and could not obtain a loan facility from any financial institution. And their advocates engaged the Applicant/ Respondent's advocates in an effort to have the name removed from the negative listing but in vain
14. That, this prompted their Advocates to file another application dated 28<sup>th</sup> February, 2019 urging this Court to have the name removed from negative listing with the Credit Reference Bureau (CRB)
15. That, all these applications were made in good faith but the Applicant/Respondent always objected to the same as a result of all this, considerable period of time was spent which consequently delayed prosecuting this appeal.
16. That, the delay occasioned herein is not deliberate nor has it been done to deny the Applicant/ Respondent in the appeal an opportunity to enjoy the fruits of the judgment.
17. That, after Covid-19 Pandemic, this matter was adjourned generally and in 2021, their Advocate Mr. Kimata passed on and thereafter they received information in 2022 that their file had been taken over by the Law Society of Kenya with instruction given to M/s Gatu Magana, an advocate of the High Court of Kenya, to institute proceedings to wind-up the firm.
18. That, they were unfortunately served with the application on 21<sup>st</sup> September, 2022 whilst the winding-up cause was going on and as such, they had not been granted their file from the late Kimata's law firm.
19. That, they were constrained to appoint their advocates on record in order to represent them and he duly advised them that there was need to notify the said Advocates in order to have their file released to him.
20. That, they are still desirous of prosecuting the Appeal and we truly believe that it is meritorious and with high chances of success and she beseech this Court to grant them a chance to prosecute the appeal now that they have proper representation.
21. That, the decretal sum deposited in the joint account continues to gain interest and she has reasonable grounds to believe that any party succeeding the Appeal shall not be exposed to any prejudice.
22. That, they urge the Court to disallow the application to dismiss this appeal and pray that the Court do direct that they proceed to dispose the appeal urgently and on a priority basis.
23. The Court on 14<sup>th</sup> July, 2023 directed that the Application be disposed by way of written submissions, the Applicant filed submissions dated 29<sup>th</sup> August, 2023 while the Respondent/Appellant did not file any submissions.



## Analysis and Determination.

24. After careful analysis, the main issue for determination is whether the appeal ought to be dismissed for want of prosecution.

## The Law

### Whether the Appeal ought to be dismissed for want of prosecution?

25. Order 42 Rule 35 (1) & (2) of the [Civil Procedure Rules](#) provides: -
- i. Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.
  - ii. 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
26. Therefore, Order 42 Rule 35 envisages two scenarios for the dismissal of an appeal for want of prosecution. The first scenario is when an Appellant fails to cause the matter to be listed for directions under Section 79B of the [Civil Procedure Act](#) as is envisaged in Order 42 Rule 11 of the [Civil Procedure Rules](#). The second scenario is that if after service of the memorandum of appeal the appeal would not have been set down for hearing, the registrar shall on notice of the parties list the appeal before the judge for dismissal.
27. This principle has been enunciated in the case of [Pinpoint Solutions Limited & Another v Lucy Waithegeni Wanderi \(as the legal administrator of the Estate of James Nyanga Muchangi\)](#) [2020] eKLR where the Court elaborated on the procedure relating to dismissal of appeals for want of prosecution, saying: -
- i. “The provisions of the law relating to dismissal cannot be read in isolation. 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 Rule 13 of the [Civil Procedure Rules, 2010](#).
  - ii. This Court took the view that an appeal cannot be dismissed before directions had been given. As there was no indication that directions had been given herein, the Appeal herein could not be dismissed under Order 42 Rule 35(1) of the [Civil Procedure Rules](#). In any event, there was also no evidence that the Registrar had issued a notice under Order 42 Rule 12 of the [Civil Procedure Rules](#). There was also no indication that the lower Court file and proceedings had been forwarded to the High Court for the Registrar to proceed as aforesaid.”
28. Similarly, on the principles governing dismissal for want of prosecution, the Court in *Mwangi S. Kimenyi v Attorney General & Another*, Civil Suit Misc. No. 720 of 2009 held that: -
- i. “When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the Court may in its discretion dismiss the act straight away. However, it should be understood that prolonged delay alone should not prevent the Court from doing justice to all parties- the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties. Invariably, what should matter to the Court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues;



- 1) whether the delay has been intentional and contumelious;
- 2) whether the delay or the conduct of the plaintiff amounts to an abuse of the Court;
- 3) whether the delay is inordinate and inexcusable;
- 4) whether delay is one that gives rise to a substantial risk to a fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the defendant; and
- 5) what prejudice will the dismissal cause to the plaintiff. By this test, the Court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.”

29. The Respondent’s/Appellants did not also follow-up with the Court to set down the Appeal for Admission and directions owing to constraints that included the unfortunate demise of Mr. Kimatta Advocate, the Covid-19 Pandemic and interlocutory Applications made to delist the Appellant from a credit rating bureau as a defaulter.

30. Further, as discussed above, it would appear that an appeal cannot be dismissed for want of prosecution before directions are taken. However, a party is not allowed to file an appeal and then go to sleep. The Court is persuaded by the case of *Abraham Mukhola Asitsa v Silver Style Investment Company Limited* [2020] eKLR where the Court stated:

“However, I am not persuaded that there is any justification for the party to file an appeal, and thereafter go to sleep. An appeal is not filed for the sake of it. It should not be left parked at the appeals registry for times on end, without any action being taken. I believe a party who files an appeal and goes to sleep and takes no action on it for a long time, cannot hide above the provisions and argue that since directions had not been taken then the appeal cannot be dismissed. An appeal should not be left to hang over the head of a respondent endlessly, where the appellant is unwilling to act on it. Justice demands that the same be resolved one way or the other. I believe dismissal of such stale appeals is one of the resolutions. There is no point of populating appeals registries with appeals that are not being prosecuted, yet the Courts are being told that they cannot dismiss them before directions are taken. This creates unnecessary backlog. If parties are not moving their cases, the Courts should dismiss them. There is no reason for them to clog the system. It is an untenable position. I believe there is inherent power to dismiss such appeals.”

31. This application for dismissal was filed in Court on 16<sup>th</sup> September 2022 and served on the Respondent’s/Appellants on 11<sup>th</sup> January, 2023 but no replying affidavit was filed until over (6) months later. The reason offered for the delays is plausible.

32. In the case of *Stephen Boro Gitiba v Family Finance Building Society & 3 others* [2009] eKLR this Court emphasized that:

“... both the *Civil Procedure Act* and the *Appellate Jurisdiction Act* were amended to incorporate sections 1A and 1B in the *Civil Procedure Act* and sections 3A and 3B in the case of the *Appellate Jurisdiction Act*. These provisions incorporate into the civil process an overriding objective which has also been defined... the Courts are now on the driving seat of justice and ... have a new call to use the overriding objective to remove all the cobwebs hitherto experienced in the civil process and to weed out as far as is practicable the scourge



of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and expeditious manner”.

33. Section 3A of the *Civil Procedure Act* enjoins the Court to issue orders that are necessary for the ends of justice to be met and to further prevent abuse of the Court process.
34. The explanations made under oath by Edith Wathuti Muchiri in her affidavit dated 28<sup>th</sup> July 2023 are satisfactory to the Court that the delay in prosecuting the appeal has not been deliberate on the Respondents part.
35. Consequently, I find that the Application dated 12<sup>th</sup> September 2022 is disallowed and the Court shall however direct that:
  - a. The Respondent/Appellant shall Set-Down the Appeal for Admission, directions and hearing within the next sixty (60) days from the date hereof.
  - b. Default and/or failure to comply with a) above by the Respondent/Appellant shall automatically result to the dismissal of the Appeal and any other consequential order(s);
  - c. Costs assessed at kshs 40,000/- awarded to the Applicant/Respondent;Orders accordingly.

**SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 26<sup>TH</sup> DAY OF JANUARY 2024.**

**MOHOCHI S. M.**

**JUDGE**

