REPUBLIC OF KENYA

THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 34 OF 2015

JAVERSON NJUGUNA……APPELLANT

-VERSUS-

ESTHER NJAMBI KANYIRI…….....RESPONDENT

RULING

1. The respondent in this appeal (hereinafter applicant) has vide Notice of Motion dated 22nd October, 2016 asked the court to dismiss the appeal for want of prosecution. It is brought on the grounds that the appellant had lost conceivable interest in the appeal having not taken any step since filing the appeal on 27th March, 2015 and that a period of 1 year 7 months had elapsed. The supporting affidavit of **Esther Njambi Kanyiri** sworn on 7th November 2016, the applicant states that she has been prejudiced by the pendency of the appeal.

2. The appellant (hereinafter respondent) opposed the application. Their counsel **Kairu & Mc Court** filed grounds of opposition dated 19th January, 2017. They state that the application was premature, bad in law and ought to be struck out. They state that **Section 79B of the Civil Procedure Act** demands that the appeal must first be admitted before the appellant can comply with **Order 42 Rule 12** to take any further and necessary steps in the appeal.

3. The respondents also filed a Replying Affidavit sworn by **Allan Odongo** advocate. His averments are to the effect that the delay in preparing and filing the record of appeal has been occasioned by the lower court registry which has not availed the certified typed proceedings, judgment and decree. Secondly his averments challenge the basis of the application by asserting that **Order 17 Rule 2 (3)** of the **Civil Procedure Rules** does not provide for dismissal for want of prosecution and that there are mandatory steps under **Order 42** to be taken before one can take the step of seeking dismissal and it is only after the appeal has been admitted. That it is only the Deputy Registrar who can issue a notice for dismissal under **Order 42 Rule 35 (2).**

4. In oral submissions before court **Mr. Gekonga** for the applicant limited his arguments to the delay. His position was that it was almost 3 years since the appeal was filed and that other than one letter written by the appellants in 2015 requesting for proceedings no tangible step had been take to move the appeal forward. He took issue with the respondent's replying affidavit and grounds of opposition saying that they dwelt only on technical issues and not the substance of the application. He prayed that the appeal be dismissed and drew the attention of the court that the deceased in the case was the bread winner of

the family.

5. **Mr. Wanjau** for the respondent relied on the replying affidavit and grounds of opposition filed. He submitted that the application was defective for reason that it was brought under the wrong provisions of law and that it was only the registrar who could issue the notice to show cause. He submitted that the application for dismissal was premature and asked for 60 days within which to file the record of appeal.

6. In a rejoinder, **Mr. Gekonga** urged the court to look at the substance of the application. He underscored that no effort had been made by the respondents and that asking for 60 more days demonstrated lack of interest in the appeal.

7. It is not disputed that the present application has been brought under the wrong provision of law. **Order 17 Rule 2 (3**) is directed at suits specifically while **Order 42 Rule 35** is directed at appeals. I would not however be quick to strike out the application on account of that technicality. Both **Order 17 Rule 2 (3)** and **Order 42 Rule 35 (2)** in my view give effect to the overriding objective which is the just, expeditious, proportionate and affordable resolution of civil disputes. They provide avenues though which idle litigation is weeded out of the court system. Their import is to ensure that parties either keep their litigation alive or get them removed. While **Order 17** places the responsibility of flagging out such cases on the parties, **Order 42 Rule 35 (2)** places the responsibility on the court through its duly appointed Registrars. With respect to procedural technicality, the court of appeal in **Nicholas Kiptoo Arap Korir Salat –Vs- Independent Electoral and Boundaries Commission & 6 Others (2013) eKLR** stated that, **"……..in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hard ship and unfairness."** I will therefore consider the present application under the ambit of overriding principle in litigation under Section 1A of the Civil Procedure Act.

8. The substance of the application is that the appeal has been left dormant since it was filed on 27th March, 2015. The only substantive issue for my consideration then is whether that delay is inordinate and prejudicial to the respondent in the appeal. Other than hiding behind the technicality of the wrong provisions of the law the respondent to the application has barely attempted to explain the delay only stating that they wrote to the Deputy Registrar sometimes in 2015 to avail the lower court proceedings and that the said proceedings had not been availed to date.

9. It is true that the lower court proceedings have not been availed to this court. However, while it is the administrative responsibility of the Deputy Registrar and Executive Officers to ensure that proceedings are typed and files are availed for appeal purposes, a party cannot perpetually hide behind the inaction of the court officials. The appellant has the responsibility to be vigilant and ensure that their appeal does not remain dormant after filing of the memorandum. They must take action. One feeble attempt to get proceedings two years ago, in my view suggests indolence. That notwithstanding however, I consider that the appellant should be given an opportunity to ventilate the appeal and not be driven away from the seat of justice on account of omissions compensable by costs.

10. In the premises, I decline to dismiss the appeal and direct that the appellant shall file the record of appeal within 45 days failing which the appeal shall stand dismissed. The present application is thus dismissed with no costs to the respondent.

Ruling delivered, dated and signed in open court this 30th day of November 2017

R. LAGAT KORIR

JUDGE

In the presence of:

C/A Emojong

N/A for appellant

N/A for respondent