



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCA NO. 32 OF 2019

KEY FREIGHT KENYA LIMITED.....APPELLANT/APPLICANT

-VERSUS-

MOHAMMED ABDI.....RESPONDENT

RULING

1. Before me is an application by way of Notice of Motion dated 16th July 2019 filed by the appellant through counsel M/s E.M Wachira & Co.

2. The application has been brought under Order 12 Rule 7, Order 17, and Order 51 Rule 1 and Rule 15 of the Civil Procedure Rules, and seeks two orders –

1) That this court be pleased to set aside the order issued on 8th July 2021 dismissing the appellant/applicant appeal hereof and reinstate the same for hearing.

2) That the costs of the application be provided for.

3. The application has grounds on the face of the Notice of Motion that on the date set for hearing of the Notice for dismissal for want of prosecution of appeal by the court, the applicant's counsel thought that due to the Covid-19 pandemic the matter would proceed virtually – only to discover that virtual link was not set, that the applicant's counsel only learnt later that the court had proceeded with hearing of the Notice to show cause **physically** and that the appellant/applicant still wanted to pursue the appeal.

4. The application was filed with a supporting affidavit sworn on 16th July 2021 by Evans Wachira advocate for the appellant/applicant which amplifies the grounds of the application.

5. The application has been opposed through grounds of opposition dated 24th September 2021, which are in the following terms –

1) The application has been served on the respondent without the annexures thus denying the respondent a fair chance to interrogate the same and substantively respond to the same.

2) The application as presented is fatally defective.

3) There is inordinate delay in prosecuting the appeal which is not explained.

4) The appellant has not shown cause why the appeal ought not to have been dismissed for want of prosecution.

5) The application is not merited and is an abuse of court process.

6. The application was canvassed through the filing of written submissions. In this regard, I have perused and considered the submissions filed by E.M Wachira & company for the appellant/applicant and those filed by S.O Madialo & company for the respondent. Both counsel relied on decided court cases.

7. This application is governed by the provisions of Order 12 Rule 7 of the Civil Procedure rules which states as follows –

“7. Where under this order judgment has been entered or the suit has been dismissed the court, an application, may set aside the judgment or order upon such terms as may be just”

8. Indeed, both the dismissal of this appeal for want of prosecution and its reinstatement is an act of the exercise of this court’s discretionary power. Thus the principles in the case of **Mbogo & Anor –vs- Shah (1968)E.A 93** apply.

9. I note that the dismissal of the appeal herein was on 8th July 2021 and this application was filed on 16/7/2021, just 8 days later. Thus it cannot be said there was inordinate delay in bringing the application.

10. I have taken into consideration that the respondent has strongly opposed the reinstatement of the appeal herein for various reasons. I however, find that the application is not fatally defective, and in my view, by applying the legal requirements of fair trial under Article 50 of the Constitution and requirements for dispensation of substantive justice under Article 159(2) (b) of the constitution, this application should be allowed to give parties a chance to argue the substantive appeal. I also find that the respondent will not suffer prejudice if the appeal is reinstated.

11. I will thus allow the application but will not award any costs of the application now, as none of the parties attended court for hearing of the Notice for dismissal of the appeal for want of prosecution on 8/7/2021.

12. Consequently, and for the above reasons, I allow the application and grant prayer (1) herein. Costs will follow the results of the appeal. The appellant will however fix, the appeal for hearing within the current year 2022, otherwise the appeal will stand dismissed for want of prosecution by 31/12/2022, with costs to respondent.

DELIVERED, SIGNED & DATED THIS 29TH DAY OF MARCH, 2022, IN OPEN COURT AT MAKUENI.

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George Dulu

Judge