



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 328 OF 2016**

**FULGENCE MBELENGA SEMBUA.....APPELLANT**

**-VERSUS-**

**MWANANCHI CREDIT LTD.....RESPONDENT**

**RULING**

The application dated 21<sup>st</sup> October, 2020 seeks the following orders: -

2. **THAT** the Honourable court be pleased to set aside and vacate the Orders given on 16<sup>th</sup> October, 2020.
3. **THAT** the Honourable court be pleased to reinstate the Appeal and allow the same to be prosecuted to logical conclusion.
4. **THAT** costs of this Application herein be in the main cause.

The application is supported by the affidavit of Rose Grace Wandia Kariuki sworn on even date as well as on the grounds on the face of the application. The respondent filed a replying affidavit sworn by Dennis Mwangeka Mombo on 28<sup>th</sup> October, 2020.

Miss Kariuki, learned counsel for the applicant, submitted that the applicant had filed an application dated 22/9/2020 and directions were given on 13/10/2020 to the effect that a date for the hearing of that application was to be taken at the registry. There was no notice to dismiss the suit by 23/9/2020. Counsel saw the dismissal notice on the Judiciary platform to the effect that the matter was coming on 16<sup>th</sup> October, 2020. Counsel was unwell on 16/10/2020 and went to see a doctor. However, counsel sent a colleague, Caroline K. Kambi Advocate to hold her brief. The instructed counsel experienced challenges in logging in virtually.

It is the applicant's position that a notice of change of advocates was filed on 22<sup>nd</sup> September, 2020 and the record of appeal was equally filed. The appellant is keen on pursuing the appeal and have it determined. The respondent will not suffer any prejudice if the orders being sought are granted as it continues to hold onto the logbook to the applicant's motor vehicle registration number KBA 933C.

Mr. Kuloba, learned counsel for the respondent, opposed the application. Counsel contend that the appellant is notorious of changing advocates. There are no plausible reasons for the court to exercise its discretion. The medial document showing that counsel went to hospital is just a prescription. This is a casual approach to the matter and the application is an abuse of the court process. This is not the first time the appellant's pleadings have been struck off. There is no affidavit from the advocate who was requested to hold brief. The court should not entertain parties who are not vigilant.

The application basically is seeking the court's discretion to reinstate the suit that was dismissed on 16<sup>th</sup> October, 2020 for want of prosecution under Order 42 Rule 35(2) of the Civil Procedure Rule: Order 42 Rule 35 (1) and (2) states as follows: -

**(1) 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.**

**(2) 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 parties list the appeal before a Judge in chambers for dismissal.**

The record shows that on 12<sup>th</sup> October, 2020 the applicant filed an application dated 22<sup>nd</sup> September 2020 seeking to reinstate orders granted on 21<sup>st</sup> June, 2017 for preservation of the suit motor vehicle and for enlargement of time for taking directions for hearing of the appeal. The application was certified as urgent by Justice Thurairaja Jaden on 13<sup>th</sup> October, 2020 and a hearing date was to be taken at the registry.

The record further shows that three days later on 16<sup>th</sup> October, 2020 the matter came up before Justice Mbogholi Msagha and the suit was dismissed for want of prosecution under Order 42 Rule 35(2) of the Civil Procedure Rules.

The record further shows that on 9<sup>th</sup> April, 2019, the registry sent a notice to M/s Edwin Maina & Associates asking them to file a record of Appeal since the lower court file had been received at the High Court Registry. The said notice further indicate that the record of Appeal was to be filed within 21 days failing which the Appeal would have been placed before a Judge for dismissal. The notice was received by M/s A. S. Kuluba & Wangila Advocates for the respondent on 25<sup>th</sup> April, 2019 but there is no information indicating that M/s Edwin Maina Advocates received the notice. Another notice was sent on 17<sup>th</sup> December, 2019 indicating that the file was to be placed before a Judge on 7<sup>th</sup> February, 2020 for notice to show cause why it should not be dismissed. This second notice has the following remarks in relation to M/s Edwin Maina & Associates Advocates.

**“No Associate by the address given above.”**

The above remarks were made on 20/1/2020 and there is a signature besides those remarks. A further similar notice addressed to both counsels was issued on 14<sup>th</sup> February, 2020 for notice to show cause on 20<sup>th</sup> March, 2020. Once again there are remarks on a copy & this notice dated 18<sup>th</sup> February, 2020 stating,

**“Moved without a forwarding address.”**

There is a further notice to show cause dated 20<sup>th</sup> July, 2020 addressed to the same advocates indicating that the matter was coming on 25<sup>th</sup> September, 2020. There is an e-mail delivery report dated Wednesday July, 2020 indicating that a message sent to M/s [edwinmainadv@yahoo.com](mailto:edwinmainadv@yahoo.com) was not delivered as the address could not be found. On 7<sup>th</sup> February, 2020 the matter came up before Justice Thurania Jaden. Both the appellant and the respondent were absent. The following remarks were made by the Judge.

**“No service on the appellant; Taken out.”**

The last time before 7/2/2020 when the matter was mentioned in court was 14/9/2017 when Jamleck, a staff from the firm of Edwin Maina & Associates Advocates fixed the matter for mention on 26/10/2017. There is no record for 26/10/2017 and the next record is that of 7/2/2020 and 16/10/2020 when the case was dismissed. It is evident from the record that the notices for dismissal of the appeal for want of prosecution sent to M/s Edwin Maina & Associates Advocates were not duly served on the said advocates.

It appears that the process server could not trace the advocate on the address given on the Memorandum of Appeal. Equally, the appellant himself was not served. The record also does not have a notice to show cause sent to either M/s Edwin Maina & Associate Advocates or M/s Kariuki-Owesi Advocates who had come on record for the appellant on 23<sup>rd</sup> September, 2020 by a consent signed by those two firms of advocates for the 16<sup>th</sup> October, 2020 when the suit was dismissed. There was no notice served upon advocates for the parties herein indicating that the matter was coming up for dismissal on 16<sup>th</sup> October, 2020. It appears that the last notice was posted online and that is how Miss Kariuki managed to see it. Mr. Kuloba did not attend court on 16/10/2020 and counsel does not contend that he was served with a notice seeking to dismiss the matter on 16/10/2020. The replying affidavit has not annexed such a notice.

In the case of **VICTORY CONSTRUCTION CO. –V- A. N. DUGGAL (1962) E.A; 697**, the court held inter alia: -

**(ii) Where parties to an action are called upon to show cause why an action should not be dismissed for want of prosecution, the court should be slow to make an order if satisfied that the suit can be heard without further delay, that the defendant will suffer no hardship and that there has been no flagrant and culpable inactivity on the part of the plaintiff.**

**(iii) The purpose of O. XVI, r. 6 is to provide the court with administrative machinery whereby to disencumber itself of case records in which the parties appear to have lost interest.**

**(iv) In the circumstances of the case the court would not exercise its discretion to dismiss the case but the parties would be ordered to set down the case for hearing within ten days.**

Given the record herein, I do find that the appellant or his counsel were not served with any notice to show cause why the suit should not be dismissed for want of prosecution. The overriding objective in litigation as provided under Section 1B of the Civil Procedure Act is for the court to endeavor and reach a just determination of the proceedings. It will be unjust for the appeal to stand dismissed yet the appellant was not served with the notice.

Further, the new counsel for the appellant had taken action and sought to have time for taking direction on the appeal enlarged. At times, this requirement becomes unnecessary as a party can simply fix the appeal directly for hearing. The respondent will not suffer any prejudice if the suit is reinstated. Counsel for the appellant had taken steps to have the appeal heard and determined. The suit was not one for dismissal as a date was to be taken at the registry to fix the pending application for directions.

I am satisfied that the application seeking to have the appeal reinstated is merited and the same is hereby allowed as prayed. Costs shall follow the outcome of the appeal.

**Dated and Signed at Nairobi this 21<sup>st</sup> day of January, 2021**

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**S. CHITEMBWE**

**JUDGE**