REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 159 OF 2012

AISHA MOTOR DEALERS LIMITED.....1ST APPELLANT/APPLICANT

GILBERT GALOGALO.....2ND APPELLANT/APPLICANT

-Versus-

WANZA KISULI & PETER NZANGI (Suing as a legal representatives of the

Estate of the NTHONY KISULI-Deceased).....RESPONDENT

RULING

1. This is the second time the Appellants/Applicants are seeking to reinstate this appeal. On 16th November, 2015 when the matter came up before **Nyamweya, J** the court was informed that the parties were at an advanced stage of negotiating the matter. The court therefore stood over the matter to 17th February, 2016 for directions on the mode of proceeding with the appeal. Nothing seems to have transpired on that day since the next minute on the file is on 17th February, 2017 when a date was fixed in the registry by consent for directions on 10th May, 2017. On that day however, the same was placed before the Deputy Registrar who directed that a fresh date be fixed in the registry. The next proceedings were those of 2nd May, 2017 when the matter was placed before the judge for dismissal and the same was duly dismissed.

2. By a Motion on Notice dated 5th March, 2018, the applicants sought an order that this appeal be reinstated and admitted to hearing in the normal way. In my ruling delivered on 14th day of June, 2019, I found that there was no evidence of any notice to the Appellants or their Counsel intimating that the matter would be dismissed. I set aside the order dismissing the appeal, reinstated the same to hearing but on condition that the appeal be listed for hearing within the next 60 days and in default the appeal would stand dismissed with costs. From my calculations the said 60 days lapsed on 13th August, 2019.

3. The present application is dated 30th September, 2019 and filed on the same day. It, in substance, seeks an order that this appeal be reinstated/re-admitted for hearing and determined in the normal way.

4. According to the Applicant, on 9th July, 2019 they fixed the matter for mention for directions on 25th September, 2019. It was their case that the failure to fix the matter for hearing was inadvertent and excusable in view of the fact that the registry officials declined to give a hearing date insisting that they could only issue a mention date for directions. Accordingly, the appeal was dismissed for failure to fix the matter for hearing as opposed to directions and that the Applicants are now exposed to execution, yet they have filed the record of appeal. It was their position that they stand to suffer irreparable loss and damage and their appeal will be rendered nugatory. They sought for extension of time within which to fix their appeal for hearing as the application will not occasion any prejudice to the respondents that cannot be compensated by costs if allowed. Their view was that the application was made without unreasonable/inordinate delay.

5. In opposing the application, the Respondents contended that the application raised issues which had been determined hence this court is *functus officio*.

6. It was averred that since the application does not seek to review the orders given herein the orders sought cannot be granted. In the Respondents' opinion the Applicants ought to have appealed instead. According to the Respondents although the record of appeal was filed on 16th October, 2014 no reasons were advanced as to why the same had never been fixed for hearing and determination.

Determination

7. Order 50 rule 6 of the ***Civil Procedure Rules*** provides that:

> **Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:**
>
> **Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.**

8. In this case the time for setting down the appeal for hearing was fixed by this court's order. Accordingly, this court has the discretion to grant the orders sought herein. However, the decision whether or not to do so is in the court's discretion. This being an exercise of judicial discretion, like any other judicial discretion must on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. One of those judicial principles expressly provided for in the above provision is that the applicant must satisfy the Court that he has a good cause for doing so, since as was held in **Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others [1964] EA 633**, there is no difference between the words "sufficient cause" and "good cause". It was therefore held in **Daphne Parry vs. Murray Alexander Carson [1963] EA 546** that though the provision for extension of time requiring "sufficient reason" should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of *bona fides*, is imputed to the appellant, its interpretation must be in accordance with judicial principles.

9. In this case, as I noted in my ruling of 14th June, 2019, the applicants were indolent in setting down the appeal for hearing. This appeal has been pending before this court since 2012, a period of 7 years. Although I have not seen the record of appeal, the Respondents have averred, which averment has not been challenged, that the record was filed on 16th October, 2014, some 5 years ago. No reason has been given why the appeal was never fixed for directions until this court issued its "unless order" of 14th June, 2019. Even after that order was issued, it was not until 9th July, 2019, some three weeks later, that the applicants fixed the matter for mention for directions on 25th September, 2019, long after the appeal had already been dismissed by effluxion of time. Again no step was taken in the matter to regularise the position till 25th September, 2019 when this court intimated to their counsel that the matter stood dismissed.

10. From the foregoing, it is clear that the applicants have not been diligent in having this admittedly old appeal heard and determined. They have been taking their sweet time at the expense of the Respondent even when the court puts them on notice that dire consequences would befall the appeal. Instead of taking a wrong step and sitting back, nothing prevented the applicants from coming back to court before the appeal ceased to exist to have the time extended. However, in **Savings and Loans Limited vs. Susan Wanjiru Muritu Nairobi (Milimani) HCCS NO. 397 of 2002 Kimaru, J** expressed himself as follows:

> **"Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate's failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgement that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant."**

11. In the case of **Sheikh vs. Gupta and Others [1969] EA 140 Trevelyan, J** stated as follows:

> **"In this matter the claim is now eight years, less four months, old and the plaintiff, so far as the court is concerned, has done nothing for more than three years to say the least. There is a prima facie negligence on the part of the lawyers or inexcusable delay on the part of the plaintiff or both, on his own say so. In deciding whether or not to dismiss a suit under rule 6 a court will be slow to make an order if it is satisfied that the hearing of the suit can proceed 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…In the instant case there has been both culpable and flagrant inactivity on the part of the plaintiff in respect of his smallish claim and he cannot bring himself within the set of circumstances as stated...It is the duty of the plaintiff's adviser to get on with the case. Public policy demands that the business of the courts should be conducted with expedition. It is of the greatest importance in the interest of justice that these actions should be brought to trial with reasonable expedition."**

12. In the case of **Et Monks & Company Ltd vs. Evans [1985] KLR 584, Kneller, J** (as he then was) stated as follows:

> **"Whether or not the application should be allowed is a matter for the discretion of the judge who must exercise it, of course, judicially. Each turns on its own facts and circumstances…If an action is dismissed for want of prosecution the plaintiff has certain options if it is not his fault. It may sue its advocate for negligence unless it has caused or consented to the delay which has resulted in the action being dismissed for want of prosecution. Advocates for the most part insure against the risk of liability for professional negligence. The plaintiff then has a remedy not against the defendants but against its own advocates…It is the duty of a plaintiff to bring his suit to early trial, and he cannot absolve himself of this duty by saying that the defendant consented to the position. A plaintiff who, for whatever reason, delays for over six years before bringing his**

suit for trial can expect little sympathy."

13. In this case, the matter is at appeal stage. The suit herein was filed in 2008, about 11 years ago. Due to lack of diligence on the part of the Appellants, the suit is still pending before this Court more than a decade after it was filed, more than half that period, on appeal. That state of affairs is unacceptable.

14. In the premises I find that it would be unjust to extend the life of this appeal any longer. Accordingly, this application fails and is hereby dismissed but as the parties did not comply with the court's directions to furnish soft copies, there will be no order as to costs.

15. It is so ordered.

Read, signed and delivered in open Court at Machakos this 29th day of January, 2020

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nthiwa for Mr Nzioka for the Respondent

CA Geoffrey