



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

HIGH COURT CIVIL APPEAL No. 8 OF 2018

Formerly High Court Civil Division Nairobi Appeal No 925 of 2005

BETWEEN:

AON MINET INSURANCE BROKERS LIMITED.....APPELLANT

and

GODFREY MWACHARI MWAMBURI.....RESPONDENT

*Being an appeal from the Judgment of HonSRM in **RMCC No. 47 OF 2005***

delivered in the RM's Court in Voi on 21st October 2005

RULING

1. The Court has before it an Application filed on behalf of the putative Appellant in this matter. The Application is bought under **Article 159(2)(d)** of the **Constitution of Kenya**, 2010, Sections 1A, Ab AND 3a OF THE Civil Procedure Act, Cap 21, Laws of Kenya, Order 12 Rule 7 and Order 51 Rule Rule 1 of the Civil Procedure Rules, and under ALL other enabling provisions of the law". The Application seeks the following prayers:

- “1. THAT this Motion Application be certified urgent and fit to be heard ex parte in the first instance
2. THAT the Order of the Honourable Court made on 6th December 2018 dismissing the Appeal herein for want of prosecution, together with all other consequential Orders be reviewed, varied and/or set aside.
3. THAT the Appeal herein be reinstated for hearing on its merits and a hearing date be granted by the Honourable Court.
4. THAT this Honourable Court be pleased to make such further Directions and/or Orders as are necessary for the ends of justice in any event.
5. THAT the costs of this Application be provided for in any event.

The Application was stamped as having been filed on 31st July 2018. It was listed for hearing by the Hon RM, who also gave the Applicant a date for hearing (26th September 2018) notwithstanding that the file had been marked as closed. The jurisdiction for that order is questionable. Nevertheless, this Court heard the Application.

3. The Application is based on the following grounds:

“1. **The Appeal herein was fixed for mention for directions on 6th December 2018 for purposes of confirming if a supplementary record of appeal had been filed. At that point, the sole document missing in the filed Record of Appeal was the Decree and Certificate of Costs; the List of Authorities had already been filed.**

2. **On the said 6th December 2018 when the Appeal came up for mention for directions the Honourable Court proceeded to dismiss the Appeal; it was the understanding of Counsel that since the Appeal had not been listed for hearing or notice to show cause why**

the Appeal should not be dismissed, the same was premature for a dismissal order.

3. The said Order of dismissal was not caused by any fault or wrongdoing on the part of the Appellant; indeed, the frustration in prosecuting the Appeals was caused by the difficulty in securing the Decree and Certificate of Costs from the Trial Court File.

4. The Appellant is keen on prosecuting its Appeal bearing in mind that the said Appeal has extremely high chances of success as it raises fundamental legal and factual questions.

5. The Appellant is not guilty of laches as it had on several occasions endeavoured to obtain the requisite documents that would form part of the supplementary record of appeal.

6. Unless the Appeal is reinstated, the Appellant will be driven away from the seat of justice unheard on its otherwise robust and meritorious Appeal and would form part of the supplementary record of appeal.

7. It is therefore in the interests of justice, the said dismissal order ought to be reviewed and the Appeal reinstated for hearing and determination on merit.

8. It is also in the interest of substantive justice, the Court should reinstate the Appeal, breathe life into it rather than interring its remains upon a permanent legal death.

9. The Honourable Court has unfettered jurisdiction to set aside the dismissal order, this is intended to avoid injustice or hardship resulting from an accident, inadvertence, mistake or error.”

3. The Application states that it is supported by the Affidavit of Mr Maruti A. Khamala and “*further grounds and reasons to be adduced at the hearing of this Application*”. Mr Maruti is Counsel with conduct of the litigation.

4. The date for the hearing of the Application was endorsed on the face of the Notice of Motion on 31st July 2018. On that date the Advocate with conduct did not attend Court. The Respondent did not attend Court. The Applicant has not filed a return of service. On the 26th September 2019, the Court re-iterated that the Appeal was dismissed for want of prosecution on 6th December 2018, in other words 7 months earlier. The Applicant therefore waited nearly 8 months after the dismissal to file its Application. Nevertheless the Court orders that “The Matter [be] adjourned to allow Counsel with conduct to argue the Application before the Court. On the next date, similarly Counsel did not attend. The Court was informed that “his child fell sick”. No further explanation was provided.

5. The Court must also enquire whether the Application was served on the Respondent. The Affidavit of Service filed on 26th September 2019 and sworn by a Noah Omondi Ongolo informs the Court that a copy of the application ... set **for inter parties hearing on 26th day of September 2019**” was served by leaving it with a secretary in the offices of M/s Ochanda Onguru & Co Advocates. Those Advocates are described as the Respondent’s Advocates, but there is nothing before the Court to demonstrate the truth of that assertion. Nearly 20 years after judgment was entered, it cannot be simply assumed that the said Advocates remained on the record of a file that had been closed for want of prosecution previously in Nairobi.

6. Interestingly, Counsel holding brief for Mr Maruti sought to argue that because the lower court had ordered summary judgment the Appellant did not have an opportunity to put forward its defence. That submission can be dealt with quite swiftly. The Court takes Judicial Notice of the fact that the **Rules of Procedure** applicable in 2005 differed from the **Civil Procedure Rules 2010**. The **Civil Procedure Rules 2010** conflate the concept of judgment in default with the concept of summary judgment in one order with identical procedure. Under the old **Order 39** the procedure was different. Summary Judgment was only given after the service of a Defence and on the basis that there was no merit in the Defence. Mr Asuma further expanded that the Defendant says they paid the Employer but Summary Judgment was entered so they did not have an opportunity to put that before the Court.

7. The Memorandum of Appeal was lodged on 24th November 2005 (several months after the Judgment). The Lower Court file was called for on 12th June 2006. On 8th February 2008, the Appellant was given notice that the Record of Appeal had not been filed. The Record of Appeal was filed on 21st November 2011, that is 6 years later. The Plaintiff attributes the delay to the Lower Court for failing to provide proceedings in time. On 24th September 2015, the Appellant sought to use the same excuse for delay, yet the Record of Appeal had been filed 4 years earlier. The Civil Appeal File shows that when the Judge was required on 21st July 2014 to admit the Appeal for Hearing it was noted that the Decree was not signed. At that stage the Lower Court File was in Nairobi.

8. On 25th June 2015, the Appeal was filed for Mention. There was no Appearance. The Appellant then took another date ex parte. On 11th November 2016, Hon Mr Justice Mbogholi recorded on the file that “*Appeal record is complete.*” It was also directed that the matter be heard in Nairobi. The Appellant was to take a hearing date at the Registry. The next time the matter came before the Court was nearly 6 years later on 10th March 2017. Hon Lady Justice Njuguna ordered that unless the Appeal is prosecuted within 60 days it shall stand dismissed.

9. A date was taken for hearing ex-parte. There is nothing on the File to show that the Appellant’s Advocates were acting in the Appeal. There was no Affidavit of Service showing that the Plaintiff/Respondent was served. On 11th May 2018 when the Matter came before Hon Lady Justice Kamau, she reversed the Order of 11th November 2016 and directed that the file be sent to the High Court in Voi for hearing of the Appeal. The Appeal was listed for Hearing on 11th June 2018. Ms Isika was holding brief for Mr Maruti for the Appellant. The Respondent was not served. Mrs Isika made an application to file a supplemental record of appeal notwithstanding the order of Hon Mr Justice Mbogholi. The Appellant’s prayer was granted. The Appellant was granted 30 days to comply. When the matter came before the Court on 25th July 2018, there was no appearance by either Party. This Court made the following Order:

"1. List for Directions on 18th October 2018

2. In the event that the Appellant does not attend on that day, they will be required to show cause why the Appeal should not be dismissed. Notice to Issue.

10. On 18th October 2018, neither Party attended. The Court ordered that the matter be listed for the "Show Cause on 25th October 2018. It was not listed however on 21st November 2018 the Hon DR endorsed on the file his Directions. They said, "This matter being more than 5 years old in Court and in line with the Chief Justice Directions that all matters 5 years old to be concluded by 31st December 2018. This matter is hereby fixed for mention for direction on 29th November, 2018. Notice to Issue". As the Court was not sitting on 29th November 2018, the matter was fixed for direction on 6th December 2018. Both sides were represented. The Parties were asked to show cause - per the Court's direction the previous July. The Court heard submissions and the Appeal was dismissed for want of prosecution. Notwithstanding that the Appellant was represented in Court, again nothing was done for more than 6 months. On 31st July 2019, an application was filed and listed for hearing (ex-parte) by Hon. Anne K. Njeru. The Appellant asks the Court to reinstate the Appeal.

11. At some point the Appellant decided that the reason for the delay was the fact that the Decree was not signed. However, that later mutated into an excuse that the Costs Certificate was not issued, however it later transpired that it was ready but had not been extracted. The Appellant, through his Advocates requested that the Lower Court File be returned to Voi. As a consequence, the Appeal too came before the High Court in Voi.

12. The Appeal came up for dismissal under **Oder 35 Rule (2)** on 15th February 2017 once already. It is clear from the history of this file that the Appeal was filed in 2005. That is now about 15 years ago. The Appellant did not file a Record of Appeal for a period of 7 years. During that time, the file was first in Voi and then in Nairobi. The Appellant chose to file the Appeal in Nairobi, notwithstanding that the correct - and most appropriate court was Mombasa. That was done for the convenience of the Appellant and his Advocates, the Court was told.

13. Even at this late stage, the Appellant has failed to comply with directions. Has failed to serve the Respondent, and has not presented a clear case. Given that the Plaintiff left employment - maybe to retire in 1999, there is a possibility that he is no longer alive. The Appellant has made no efforts to satisfy the Court that the Plaintiff can be located and has been conclusively served.

14. The Plaintiff was awarded summary judgment. Advocate for the Appellant told the Court that it was judgment in default. The two are fundamentally different. Thereafter, it was the responsibility of the Appellant to file the appropriate documents. That was not done.

15. It is instructive to look at the history of this litigation. The Plaintiff was filed on 21st June 2004. The Plaintiff was the employee of the first three defendants. The Appellant here was the fourth Defendant. The First, Second, and Third Defendants were also the trustees of the work pension scheme. The Plaintiff states that he made contributions towards a Retirement Benefits Scheme which the First to Third Defendants remitted to the Fourth Defendant. The Fourth Defendant then issued the Plaintiff with a membership number. The Plaintiff then pleaded that on 30th September 199 he was dismissed but with the promise that his retirement benefits would be paid to him immediately. He spent the next five years attempting to receive his pension. By the time he filed his Plaintiff he was not even aware of how much he was owed. The first prayer he sought was for the Defendants to disclose the amount payable to him. The Appellant herein entered appearance on 7th July 2004. The Appellant filed a Defence on 22nd July 2004. Although the Appellant sought to deny the claim, it did admit that (1) there was a scheme, secondly that what started as an insured scheme was later converted to a Deposit Administration Scheme. The Appellant denied that it had ever been called upon to disclose the amounts owing. The Appellant averred that it had paid the benefits to the First to 3rd Defendants. The Appellant herein threatened to make an application to strike out the suit. The First to Third Defendants did not enter an appearance. The Claim was for joint and several liability.

16. In the meantime without any assistance from his employers (1st – 3rd Defendants) nor withstanding the prayer in the suit, the Plaintiff obtained details of his entitlement under the scheme. As a consequence the Plaintiff was amended by consent to plead that the Plaintiff came to know that he was entitled to the sum of KShs.158,040.00(Para 8 Amended Plaintiff 24th March 2005). The Plaintiff's only prayer was for payment of that sum together with interest and costs.

17. The correspondence filed by the Plaintiff demonstrates several facts namely; (1) That the Plaintiff's Employer was in fact Kenya United Steel Company Limited. (2) That the First, Second and Third Defendants were Trustees of the Scheme. Exhibit **GMM 2** is a letter dated 13th May 2004 from the 4th Defendant's Assistant Director to the Plaintiff's Advocate. It states that "*We confirm having forwarded withdrawal benefits in respect of Mr. Mwamburi amounting to Kshs. 158,040.00 to the Scheme's Sponsor, Kenya United Steel Company Ltd....*" There is no confirmation from the 1st, 2nd and 3rd Defendants (as trustees) that they had received the payment on behalf of the Plaintiff. However, the Plaintiff's Advocates respondent to the 4th Defendant reminding it that under law the payment should have been made to the retiring employee and not the employer. The Letter ended with a formal demand for payment to the Plaintiff together with interest and costs. Also in the bundle is a letter from the Retirement Benefits Authority Directors the First to Third Defendants to immediately pay the employees leaving the scheme. The Letter was dated 18th March 2004 and was received by the 4th Defendant on 22nd March 2004. Again there was no corresponding response stating that payment had been made.

18. The Fourth Defendant complained that the suit was defective, that the Application of 7th September 2005 (which asked for Judgment to be entered for the Plaintiff) was "**incompetent and unsustainable**". There were grounds of opposition filed as well as a Replying Affidavit of behalf of the 2nd Defendant.

19. The Learned Trial Magistrate considered the matter and ordered Summary Judgment in favour of the Plaintiff. That means the matter was fully adjudicated upon in accordance with the Rules of Procedure then applicable. The Defendants were fully aware that the Judgment was a Summary Judgment because on 3rd November 2005 the 4th Defendant/Appellant filed a Notice of Motion Application seeking orders inter alia "*THAT [the] Honourable court be pleased to order stay of execution of the orders for summary judgement issued on 21st October 2005 pending hearing and determination of this application...*". That was a stay pending appeal.

20. The Appeal was filed in Nairobi not Mombasa. At that time Voi was in the Coast Province and therefore the Appeal should properly have been filed in Mombasa. The First to Third Defendants were also based in Mombasa. The choice of Nairobi was surprising at the very least. The Appeal was filed as **Civil Appeal No. 925 of 2005**. Thereafter in 19th January 2006, the Appellant made an application for the Court to "enlarge time within which the decretal sum was to be deposited in court. It seems that the Advocates had agreed that there be a stay of execution provided the Appellant pay the decretal sum into Court. Notwithstanding the order made that was not done in time. On 13th July 2006 that money was released to the Plaintiff's Advocate "on trust"

21. In its pleaded Defence and correspondence, the Appellant claimed that the monies that were due to the Plaintiff had been paid to his former employers. That incorporates an admission that monies were due. If the payment was made by mistake or any deliberate circumvention of the law and/or regulations, as argued by the Plaintiff, the Appellant's relief lies in serving a third party notice or a contribution notice on the other Defendants. That was never done. The Plaintiff established his entitlement and he was awarded judgment. Against, that analysis there is absolutely no merit in this Appeal.

22. The Appellant's delay was willful and inordinate. A delay of almost 15 years is also an abuse of the process. Parties and/or witnesses may have passed away. Memories faded and evidence being lost. There is very little prospect of the Respondent - if he is found - of having kept his records for 20 years or so. Continuing would be unjust to him. There appears to be no reason put forward for failing to obtain the appropriate paperwork from the Lower Court. Simply blaming the Court is not enough. Applications must be made and fees must be paid.

23. For those reasons the Application for reinstatement is dismissed with costs. The Appeal stands dismissed and the File is Closed, again.

24. This Court regrets that this Judgment was not delivered on the date intended. That was due to problems with the Court's ICT equipment and network. Any inconvenience is regretted.

Order accordingly,

Farah S. M. Amin

JUDGE

Delivered signed and dated at Voi this the 25th day of February 2020

In the presence of:

Court Assistant: Josephat Mavu

Appellant: No Appearance – Notice Served by EMS

Respondent: No Appearance – Notice Served by EMS