REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO 27 OF 2013

DANIEL MUSAU MBITHI.....APPELLANT/APPLICANT

VERSUS

RAEL KAVILI MUNYAO.....1ST RESPONDENT

NZISA MUNYAO.....2ND RESPONDENT

AND

TIMOTHY NGILA NZUKI.....3RD PARTY

PETER NZIOKI.....4TH PARTY

WILLIAM NYILU.....5TH PARTY

ANNA N KIOKO.....6TH PARTY

ESTHER MUNYAKA..... 7TH PARTY

TITUS KIVUVA MWILU.....8TH PARTY

BETH NZUKI.....9TH PARTY

RULING

1. On 4th September, 2018, this Court dismissed this appeal for want of prosecution.

2. By a Motion on Notice dated 12th July, 2019, the appellant/applicant herein seek, in the main, an order that the said order be set aside and this appeal be reinstated.

3. According to the applicant, he was unaware that the appeal had been dismissed till sometimes in January, 2019 when he visited his advocates' offices who had not informed him of the development. The applicant deposed that the said advocates informed him that efforts to proceed were hampered by the fact that the file could not be traced in the registry. It was therefore his case that the failure to prosecute the appeal was not intentional but was due to reasons beyond his control. He therefore prayed that the application be allowed to allow him be heard in the interest of justice.

4. In opposing the application, the 1st respondent averred that litigation must come to an end and that equity aids the vigilant and not the indolent. It was her case that the applicant has been sleeping for over six years without making any attempt to have the appeal set down for directions by the court. It was averred that the applicant has not placed any evidence before the court to support the allegations that the court file was missing and that the applicant did not even attend the court when the appeal was listed for dismissal.

5. It was further averred that the applicant has not explained the delay in bringing this application. According to her, from the applicant's conduct he has lost interest in the appeal.

Determination

6. I have considered the application herein, the affidavits in support thereof as well as in opposition to the application.

7. In this case, the record indicates that on 14th August, 2018 when the matter was placed before the Deputy Registrar, it was noted that despite service, the applicant made no appearance. Accordingly, the matter was listed for dismissal on 4th September, 2018 when the same was dismissed. However, there is no evidence that the applicant was notified that the matter would be dismissed on 4th September, 2018.

8. The Court of Appeal in **Murtaza Hussein Bandali T/A Shimoni Enterprises vs. P. A. Wills [1991] KLR 469; [1988-92]** held that there is inherent power to restore a case for hearing after it has been dismissed. However, the decision whether or not to reinstate a dismissed appeal is no doubt an exercise of discretion. This being an exercise of judicial discretion, like any other judicial discretion must be based 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. See **Gharib Mohamed Gharib vs. Zuleikha Mohamed Naaman Civil Application No. Nai. 4 of 1999.**

9. In this case, there is no evidence that the applicant was given an opportunity of being heard on the day the matter was dismissed. The general position was restated in ***Halsbury's Laws of England Fourth Edition Vol. 1 page 90 para 74*** as follows:

> **"The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice..."**

10. This was the position in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** where the Court of Appeal expressed itself as follows:

> **"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...** ***A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at ...Denial of the right to be heard renders any decision made null and void ab initio*****."** [Emphasis mine].

11. This was a restatement of **Lord Wright's** decision in **General Medical Council vs. Spackman [1943] 2 All ER 337** cited with approval in **R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007** that:

> **"If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision."**

12. In **Ridge vs. Baldwin [1963] 2 All ER 66** at 81, **Lord Reid** expressed himself as follows:

> **"Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void."**

13. However, in **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998** the Court of Appeal held that:

> **"Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."**

14. In this case, I have perused the Court file and I have not been able to find any notice to the Appellant or her Counsel intimating that the matter would be dismissed on 4th September, 2018. In the premises whereas I agree that the Appellant has been indolent in setting down the appeal for hearing, that did not relieve the Court from the obligation to notify the Appellant of its intention to terminate the appellate proceedings.

15. In the premises, I find merit in the application, set aside the order dismissing the appeal and reinstate the same to hearing on condition that the appeal is listed for hearing within the next 60 days and in default the appeal shall stand dismissed with costs.

16. It is so ordered.

Read, signed and delivered in open Court at Machakos this 11th day of March, 2020.

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

CA Geoffrey