



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO.18 OF 2011**

**BUDS AND BLOOMS LTD .....APPELLANT/APPLICANT**

**-VERSUS-**

**NOREKA LITAVA SHIMBOLE .....RESPONDENT**

**RULING**

1. This is a ruling on **application dated 6th May 2019**. It seeks the following orders

**i. Spent.**

**ii. Spent.**

**iii. To set aside exparte proceedings of 27th February 2019 dismissing the Appellant's civil appeal No.18 of 2011 and reinstate the same for hearing and determination on merit.**

2. Grounds on the face of the application are that the appeal was filed by the firm of **Mukite Musangi & Co. Advocates** having received instructions from **Jubilee Insurance Company Limited** who were insurers of the applicant and at some point the said law firm ceased to act for **Jubilee Insurance Company Limited** in all its matters and the firm of **M/s. Murimi, Ndumia, Mbago & Muchela Advocates** to take over the said matters.

3. That the firm of **Mukite Musangi** failed to hand over the file to the firm of **M/s. Murimi, Ndumia, Mbago & Muchele Advocates** and that they learnt of this matter on 8th February 2019 when the firm of **Mukite Musangi Advocates** told them the matter was coming up for notice to show cause why it should not be dismissed on 13th February 2019; that the firm of **Murimi, Ndumia, Mbago & Muchela Advocates** filed notice of change of Advocates on 13th February 2019.

4. That unknown to them the notice to show cause was on 27th March 2019 and on 18th April 2019 when they tried to fix the appeal for directions, they learnt that the appeal was dismissed on 27th March 2019; that the applicant is desirous in prosecuting the appeal to conclusion and record of appeal was filed on 21st June 2019. That the appellant is not responsible for lack of prosecution of this appeal and the respondent will not suffer any prejudice if the appeal is reinstated.

5. The application is supported by affidavit sworn by **Kiongo P.Murimi Advocates**. He restated grounds on the face of application as captured above.

6. In response, the respondent filed replying affidavit sworn on 23rd May 2019. He averred that the appeal arose from a civil case filed on 25th May 2004 filed 15 years ago. He stated that the appellant filed this appeal in the year 2011 but lost interest in prosecuting it. He averred that the firm of **Murimi, Ndumia, Mbago & Muchela Advocates** took over this matter from the firm of **Mukite Musangi & Co. Advocates** on 13th March 2015. He attached Notice of Change of Advocates filed.

7. He averred that his Advocates implored upon the Advocate on record to prosecute this matter to no avail. He attached a letter to confirm that.

8. He also averred that the Advocate on record received all documents they required from the previous Advocate on record and attached a letter dated 12th October 2016 to confirm that.

9. He further averred that when this matter came up for notice to show cause was ably represented by counsel who asked for time to file a replying affidavit to the said notice.

10. He averred that even if the applicant learnt of the dismissal on 18th April 2019, they still took 3 weeks to come to court with this application; that no explanation has been given as to why this appeal should be reinstated; that litigation should come to an end and reinstating this appeal will be self-defeating and unfair to him.

11. Parties agreed to proceed by way of written submissions

12. Applicant urged court to look at the case of **simon Wachira Nyaga Vs Patricia Wamwira [2018] eKLR Civil Appeal No.211 of 2013** where the court held that for court to reinstate the appeal or not, is an exercise of discretion and discretion must be exercised fairly and judiciously; that the applicant's application gives sufficient reasons to court on which the appeal should be reinstated.

13. The applicant restated ground of appeal and averments in the supporting affidavit. Applicant submitted that failure to attend court on 27th February 2019 was an excusable mistake that this honorable court ought to consider. Among authorities cited include the case of **Philip Chemwolo & Another Vs Augustine Kubede [1982-88]KAR 103** where the court held as follows:-

“

**Blunders will continue to be made from time to time and it does not follow that because a mistake has been made, a party should suffer the penalty of not having his case heard on merit, I think the broad equity approach to this matter is that unless there is fraud or intention to over reach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of parties and not the purpose of imposing discipline.”**

14. The applicant submitted that contrary to allegation by the respondent's Advocate's allegation that the firm of **Ndumia, Murimi, Mbago & Muchela Advocates** that were appointed on 13th March 2015, the notice of change marked as **NLS1** show that it is dated 8th February 2019 and was filed on 13th February 2019 and it was served on the respondent's Advocate; further the applicant's current were not on record on 20th May 2015 when the alleged letter that implored the applicant's Advocates to prosecute the matter was alleged to have been written to them by respondents Advocates. Further there is nothing to show it was delivered to the applicants current Advocates; further the letter indicating the applicants current Advocates received all documents required is not accompanied by certificate of postage, receipt of courier nor affidavit of service.

15. Applicant submitted that failure to reinstate this appeal to be heard on merit shall rob the appellant its constitutional right of appeal as envisioned in the constitution. He cited the case of **Pan African Paper Mills Limited vs Silvester Nyarango Obwocha [2018]eKLR Civil Appeal No.118 of 2002** where the court held that **Article 159(2) (d)** of the **Constitution of Kenya 2010** implores the courts to administer justice without undue regard to procedural technicalities. The delay in prosecuting this appeal was premised on procedural technicality which has been sufficiently explained by the appellant in the application and submissions.

16. Lastly the applicant urged the court to be guided by the case of **Richard Ncharpi Leiyagu Vs IEBC & 2 others Court of Appeal No. 18/2013** where the Court of Appeal held as follows:-

“

**The right to a hearing has always been well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.”**

17. The respondent submitted that the court's discretion must be exercised fairly and judiciously; it must be based on good reasons. He cited the case of **John Nahashon Mwangi Vs Finance Bank Ltd[2015]** where the court set out principles which may be taken into account in setting aside orders as follows:-

“

**The test a court should consider is whether there are reasonable grounds to reinstate such suit –of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the plaintiff will suffer if the suit is not reinstated.”**

18. And in the case of **Cecilia Wanja Waweru Vs Jackson Wainaina Muiruri & another [2014] eKLR** where the court held as follows:-

“

**There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case. We are of considered view that the learned judge in considering the application should have looked at the appellant's conduct from the time the appeal was filed up to the date the application for reinstatement was filed...**

**We have to ask ourselves whether the failure by the appellant to prosecute the appeal in the High Court and/or the delay in**

**filing the application for reinstatement constitute an excusable mistake or was it meant to deliberately delay the cause of justice...why didn't she set the appeal down for hearing for almost 14 years? The reasonable explanation would be that the appellant had been indolent and had slept on her rights, she was only awakened from her slumber by the dismissal of the appeal."**

19. Respondent submitted that this is an old matter filed on 25th May 2004 and appeal filed on 18th March 2011; that the same was never prosecuted 15 years later; that since June 2012 when the record of appeal was filed the appellant did not take any step to prosecute the appeal; that the appellant/applicant started taking action after dismissal. That nothing has been placed before court to show that the applicant had difficulty with the firm of **Mukite Musangi & Co. Advocates** handing over the file to current Advocates.

20. The respondent submitted that the deputy registrar issued notice to show cause why the appeal should not be dismissed for want of prosecution and the applicant has not given reasons for inordinate delay; that reinstating this appeal will be entertaining a frivolous suit which has been in court for a long time.

**ANALYSIS AND DETERMINATION**

21. I have considered averments by parties and submissions filed through their Advocates. I have also perused the court file and annexures to affidavits filed.

22. I agree with counsel for the applicant that the notice of appointment of the current Advocates is dated 8th February 2019 and was filed on 13th February 2013. It was served on the respondent's Advocates on 22nd February 2019. I also note that the respondent's Advocates wrote to the applicant's Advocates to list this matter for direction is dated 20th May 2019. It is not therefore true that the current advocates for the applicant came on record in the year 2015.

23. However, even if they were instructed in 2009, the applicant was aware that the case was pending in court. Cases belong to parties not Advocates, the applicant had a duty to enquire progress of the case and prompt the Advocate to prosecute it. It is unfair on the part of the respondent to be delayed in enjoying success of litigation by a party who is not keen in ensuring the matter is brought to conclusion.

24. Respondent has further argued that the current Advocates for the applicant delayed in moving the court after learning of the dismissal. I note that this appeal was dismissed on 27th March 2019 and applicant's Advocates indicated that they realized it was dismissed on 18th April 2019. This application was filed on 13th May 2019 about 3 weeks after. In my few 3 weeks is not inordinately delay.

25. From the foregoing, I find that the applicant's failure to prosecute this appeal since 2012 has denied the respondent opportunity to enjoy fruits of successful litigation. I am aware of the view that the applicant having now engaged a different law firm and expressed the desire to prosecute this matter, it would be in interest of justice to allow a last a chance to prosecute the appeal. I however allow with conditions.

**26. FINAL ORDER**

- 1. The appeal herein is reinstated.**
- 2. The applicant to pay Respondent thrown away costs of kshs.30,000 to be paid within 30 days from the date of this ruling.**
- 3. The appeal to be set down for hearing within 30 days from the date of this ruling.**
- 4. Failure to comply with orders 2 and 3 above the appeal to stand dismissed.**

**Ruling dated, signed and delivered via email at Nakuru This 30th day of April 2020.**

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**RACHEL NGETICH**

**JUDGE**

**TO:**

Murimi, Ndumia, Mbago & Muchela Advocates – Counsel for Applicant

Mboga G.G. Advocates – Counsel for Respondent