



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 166 OF 2012

FEISAL YASSIN.....APPLICANT

VERSUS

NARESH RATHOD.....1ST RESPONDENT

FASTRACK LOGISTICS LIMITED.....2ND RESPONDENT

(Being an application for leave to file Notice of Appeal and Record of Appeal out of time

from the JUDGMENT of Chief Magistrate's Court of Kenya at Mombasa

delivered by HON. ODENYO PM on 12th September 2012 at Mombasa

in CMCC NO. 4350 of 2003)

RULING

Outline of facts

1. The Notice of Motion dated 9/4/2019 seeks in the main an order that the appeal be reinstated to hearing having been dismissed on account of failure by the appellant to file a record of appeal as ordered on the 21/2/2017. On that day leave was granted and time extended for the appellant to file and serve a record of Appeal within 30 days and in default the appeal would stand dismissed.
2. There was no compliance by filing of the Record of Appeal and the consequences then followed on the 21/3/2017. About one year later on the 06/02/2018, an application was filed seeking the extension and time to file and serve the record of Appeal but the said motion was dismissed on 5/4/2019 on the basis that there was no meaningful purposes to be served by filing a record of while the appeal stood dismissed.
3. With very admirable speed, the appellant on the 9/4/2019 this time round seeking to have the dismissed order set aside and the appeal reinstated for purposes of being heard on the merits.
4. The gravamen of the application is that there was indeed failure to comply with directions by the court regarding filing the Record of Appeal which was wholly occasioned by the failure to obtain the typed and certified proceedings due to illegibility of the handwritten proceedings and that even if the same was out of lack of diligence on the advocate, the same ought not to be visited upon the client to deny it its day in court. The Affidavit by counsel sworn in support of the application then sought to underscore the fact that disputes should be determined on the merits and not summarily terminated on the basis of a default by counsel.
5. The application was opposed by the respondent by the Notice of preliminary objection dated 17/9/2019 which contended that the motion was an abuse of the process of the court for requesting the court to sit on an appeal over its own decision; that the only available avenue to challenge dismissed was by an appeal and that no materials had been availed to enable the court exercise its discretion in the appellant's favour.

Submissions by parties

6. On 17/9/2019, the court gave parties the liberty to file and exchange written submissions pursuant to which order the appellant filed submissions dated 01/10/2019 on 25/10/2019 while respondent did so on the 13/11/2019. When the submissions were to be highlighted on the 6/10/2020, Mrs. Momanyi, counsel for the appellant was reported to be in Kisii without proper internet connection wherefore the parties

requested the court to determine the application on the basis of the written submission without the need to highlight.

7. In the submissions, the appellant takes the position that mistake even by counsel should be excused and not made the only basis to deny a litigant its day in court and cited to court the decisions in **Bank of Africa Kenya Ltd VS Port Sarajero [2018] eKLR**, **Belinda Mural vs Amos Wainanina [1978] KLR**, **Philip Chemwolo vs Augustine Kubende[1982-1988] eKLR 103** and **Elija Chepkwony vs Joel Kipngeino [2019] eKLR** in underscoring the need to pardon excusable mistake for the sake of preserving and safeguarding the right to be heard on the merits. To the appellant/Applicant the reason for the delay was not only plausible but also reasonable.

8. For the respondent submissions were offered to the effect that the provision of the rules cited to anchor the application did not avail to the Appellant the orders sought and cited to court the deems in **John Njauthi vs Njauthi Njoroge [2005] eKLR** for the proposition that an appeal dismissed for want of prosecution cannot be reinstated but can only be readmitted.

9. On the merits, it was contended by the respondent that the reason advanced for delay was both summary and oxymoronic in that while the gist is illegible handwriting, there is the other reason which essentially concedes but attribute the delay to blunder or mistake of counsel. The decision in **Cleophas Wasike vs Mucha Swala CACA No. 2 of 1982** for the proposition that the default by counsel to lodge the appeal in time is not a reason to extend time. The decision in **Onesmus Mutua Leva vs Kenya Power & Lighting Company Ltd CACA No. 102 OF 1997** was cited for the proposition that without evidentiary material availed to court, the court cannot properly exercise its discretion. This was to buttress the point that there is no evidence that the handwritten proceedings were illegible.

10. On whether to exercise the available judicial discretion in appellants favour, the respondent cited to court the decision in **Simon Wachira Nyaga vs Patricia Wamwirwa [2018] eKLR** for the proposition that where there exist undue and inordinate delay the, court will not exercise the discretion to extend time and that the appellants remedy lies on an appeal and not otherwise. On such submissions the respondent urged the court be dismiss the application with costs.

Analysis and Rendition

11. Having read the Notice of Motion and the Affidavit filed in support thereof, it is clear that what is before me is an application to set aside the order which deemed the appeal dismissed after there was failure to comply with the court orders to file and serve a Record of Appeal. The law on setting aside orders made on account of default is now settled that the courts discretion is wide and unfettered and that courts should try to be an enabler of the disputes being heard and determined on the merits rather than summarily on account of default[1].

12. In this matter the applicant contend that the reason the record was not filed in time was the difficulty to read the handwritten proceedings by the copy typists so that the same could be certified. That assertion was said to be in the general knowledge of practitioners in Mombasa. To that assertion no rebuttal was made by the Respondent. There is the other argument advanced that default or lack of diligent by counsel should not be the only reason to shut out the appellant for urging his appeal to which the respondent was responded by citing decisions which I consider to be more relevant to applications for extension of time rather than setting aside.

13. I have considered the rival arguments by both sides and I do find that in the absence of a rebuttal that the handwritten record was illegible, a plausible reason has been advanced for the delay. I have also been unable to discern any deliberate design by the appellant to obstruct or just frustrate the just and fair determination of the appeal. For those reasons I am minded to exercise the discretion vested in the court to set aside and I do set aside the dismissal order and in its place substitute an order reinstating the appeal but not without conditions. I set aside on terms that the record of appeal be now filed within 30 days from today and on default the appeal will, on that day of default, the 21/11/2020, stand dismissed for failure to comply with discretion by the court.

14. There was a position taken by the respondent that the only remedy available to the appellant was an appeal. That position, with due respect has no merit. For every order made on account of default, the remedy is to set aside not in appeal. In fact that position is not supported by the authority cited in that regard. The decision in **Nyanthi vs Nyauthis (supra)** was a matter regarding dismissal for want of prosecution and not dismissed for failure to file and serve a record of appeal as in this case. To this court that decision was cited out of context and it never comes to the aid of the respondent's case at all.

15. Having set aside and the application having been necessitated by a default of the appellant, the explanation notwithstanding, it would be unjust and an act toward rewarding a party in default, to award the costs thereby occasioned to the appellant.

16. Having so said, I award the costs of the application to the respondent in all events.

Dated, signed and delivered at Mombasa this 21st day of October, 2020.

P.J.O. OTIENO

JUDGE

[1] Shah vs Mbugo[1967] E.A 116; Patel vs E.A. Cargo Handling Services Ltd [1975] E.A. 75; Chemwolo vs Kubende [1986] KR 492 and James Nderitu vs Marious Philotas [2016] eKLR