REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 15 OF 2004

HAMID ABDALLA MBARAK.....APPLICANT/APPELLANT

VERSUS

FRANCIS TSALWA.....RESPONDENT/RESPONDENT

RULING

[APPLICANT'S NOTICE OF MOTION DATED 17TH AUGUST, 2018]

1. Through the notice of motion dated 17th August, 2018 the Appellant, Hamid Abdalla Mbarak is asking this court to set aside its order of 16th July, 2018 dismissing his appeal for want of prosecution. The application is supported by the grounds on its face, an affidavit sworn by the Applicant on 17th August, 2018 and a further affidavit sworn by the Applicant on 25th October, 2018.

2. In summary, the Applicant's case is that through a memorandum of appeal dated 17th November, 2004 he sought to appeal against the judgement delivered in Kilifi SRMCC No. 19 of 2002. Upon filing the memorandum of appeal, his then advocate on record sought and obtained stay orders pending the hearing and determination of the appeal.

3. It is the Applicant's case that thereafter his advocates did not take any step to present the appeal leading to the issuance of a notice to show cause why the appeal should not be dismissed. He then withdrew instructions from his then advocate on record Timamy & Company Advocates and instructed Ameli Inyangu & Partners who filed a notice of change of advocates on 2nd December, 2017.

4. The Applicant avers that he swore an affidavit to show cause why his appeal should not be dismissed and on 14th December, 2017 the court directed him to take appropriate measures within 60 days failure to which his appeal would stand dismissed.

5. The Applicant avers that following the directions issued by this court, his counsel wrote several letters to the Executive Officer of Kilifi Law Courts asking to be supplied with copies of the pleadings and handwritten proceedings in the trial court's file. Those letters were not responded to and his advocate has been unable to obtain proceedings thereby making it impossible to proceed with the prosecution of his appeal.

6. The Applicant further avers that on 14th February, 2018 his advocate attended court to show cause why the matter should not be dismissed but he was informed by the clerks at the court registry that the file could not be traced. When the file was finally traced it was discovered that this court had on 16th July, 2018 issued an order dismissing the Applicant's appeal for want of prosecution.

7. It is the Applicant's case that the decision to dismiss the appeal was made in the absence of the parties and without notice to him and this contravened Order 42 Rule 35(2) of the Civil Procedure Rules, 2010 (CPR) which required that notice to show cause be issued. It is his case that as a result his right to be heard as guaranteed by Article 50(1) of the Constitution was violated.

8. The Applicant avers that it is in the interests of justice that his appeal be reinstated so that he can prosecute the same.

9. The Respondent, Francis Tsalwa opposed the application through a replying affidavit sworn on 19th September, 2018.

10. The application was urged through written submissions. Counsel for the Applicant identified three issues for determination namely:

a) Whether an appeal can be dismissed without service of a notice to show cause upon an appellant;

b) Whether the Applicant has disclosed sufficient and satisfactory reasons as to why the appeal should not be dismissed; and

c) Whether the right to a fair trial shall be infringed if the appeal is not reinstated.

11. On why an appeal should not be dismissed without notice to an appellant, counsel for the Applicant submitted that the appeal could not be dismissed under Order 42 Rule 35(1) CPR and a lawful dismissal could only have occurred under sub-rule (2) only if the Applicant had been issued with a notice. In support of this submission, the Applicant relied on the decision of this Court (H.A. Omondi, J) in **Akamba Public Road Services & another v Odhiambo Abner Brian Otieno [2014] eKLR**.

12. Submitting on his assertion that he had disclosed sufficient and satisfactory reasons as to why the appeal should not be dismissed, the Applicant urged that he had been frustrated by his former advocate and the trial court. His case is that the Executive Officer at Kilifi Law Courts had failed or refused to supply him with the court proceedings so that he can prepare and file a record of appeal and have his case heard. According to the Applicant, he cannot compel the Chief Executive Officer to provide proceedings and he had not been given any reason for the delay in the supply of the proceedings. The Applicant cites the decision in **Pyramid Hauliers Co. Limited v James Omingo Nyaaga & 3 others [2017] eKLR** in support of his assertion that he cannot be punished because of the failure of the trial court to supply him with certified copies of proceedings and judgement. According to the Applicant, rejecting the application to reinstate his appeal will amount to a denial of justice to him.

13. On the third issue, the Applicant submitted that the right of appeal is a cornerstone of the judicial system and a denial of this right will violate his right to fair hearing as protected by Article 50(1) of the Constitution. Further, that the Respondent will not suffer any prejudice if the appeal is heard on merit. Reliance is placed on the decision of the Court of Appeal in **Patriotic Guards Ltd v James Kipchirchir Sambu [2018] eKLR** in support of the principle that the right to be heard is a fundamental right which should be observed by tribunals and courts.

14. In response, the Respondent submitted that a perusal of the court record will show that it was the Respondent who moved the court by filing an application to dismiss the appeal. Further, that this court had given the Applicant sixty days to take action but he had failed to do so. It is also the Respondent's position that the Applicant has not offered any satisfactory reasons as to why he had not taken action to prosecute his appeal for over 14 years.

15. It is important to put the record straight before embarking on the determination of this matter. A perusal of the file shows that the Applicant filed his appeal on 17th November, 2004. Thereafter he went back to the trial court and through a ruling dated 17th February, 2005 he obtained stay of execution pending appeal. The stay of execution was granted on condition that he deposited in court Kshs. 100,000 as security. He did not deposit the money but instead moved this Court to have the order directing him to deposit Kshs. 100,000 set aside. He was successful as can be seen from the court proceedings of 18th March, 2005.

16. Thereafter, the Applicant did not take any further step until the Respondent reactivated the matter through an application dated 16th December, 2014 in which he prayed for reconstruction of the file and the issuance of notice to show cause why the appeal should not be dismissed. An order for reconstruction of the file was issued on 24th March, 2015 and the registry was directed to issue a notice to show cause to the Applicant.

17. When the notice to show cause came up for hearing on 14th December, 2017, counsel for the Applicant indicated that the Applicant had filed an affidavit stating the reasons why he had not prosecuted the appeal. Counsel for the Respondent indicated to the court that the Applicant could be given limited time to take action. The court then ordered that:

> **"The appellant is granted 60 days to take action in this matter. Failure to do so will lead to the automatic dismissal of the appeal for want of prosecution."**

18. On 16th July, 2015 the file was placed before the court and the court recorded that:

"No action having been taken within 60 days from 14/12/2017, this appeal stands dismissed with no order as to costs. File closed."

19. The court record therefore shows that the Applicant went to sleep immediately after filing a memorandum of appeal and obtaining an unconditional stay of execution.

20. The provision governing the dismissal of appeals is Order 42 Rule 35 of the CPR which states:

"42. Dismissal for want of prosecution [Order 42, rule 35.]

> 1. **Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.**
>
> 2. **If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal."**

21. An appeal can be dismissed at the instigation of the respondent if the appellant does not set down the appeal for hearing within three months from the date of issuance of directions by the court. Alternatively, if within one year the appeal has not been set down for hearing,

the court can issue dismissal notice to the parties and proceed to dismiss the matter.

22. Although the Respondent had asked the court, through his application dated 16th December, 2014 to have the matter placed before court so that the Applicant could show cause why the appeal should not be dismissed, the actual notice to show cause that triggered the dismissal of the appeal was the one issued by the Deputy Registrar of this court under Order 42 Rule 35(2) CPR on 20th November, 2017. The said notice was properly issued as the Applicant had not taken any step for over twelve (12) years from the time the memorandum of appeal was filed in 2004.

23. The Applicant claims that this court dismissed his appeal on 16th July, 2018. This submission is not correct for the appeal stood dismissed upon the expiry of 60 days from 14th December, 2017. The order issued on 14th December, 2107 required the Applicant to take action within 60 days from that date and if he failed to do so, his appeal would stand dismissed. There is no evidence that he took any action and he does not assert that he took any step in the matter. The Applicant has exhibited an affidavit sworn by his advocate Eliud Nyongesa Onyango on 17th August, 2018 in which the advocate averred that he attended court on 14th February, 2018 and found that the appeal was not listed for dismissal. The advocate also averred that the court file could not be traced. The file was indeed not correctly listed for mention on 14th February, 2018 as there was no order to mention the file on that date. If the Applicant felt that he needed an extension of the timeline given to him to take action then he was the one to approach the court. He did not do so.

24. The Applicant's claim that this court dismissed his appeal without notice to him has no basis. What the court did on 16th July, 2018 was simply to note that the appeal had been dismissed and mark the file closed. Even without the order of 16th July, 2018 the Applicant's case was already dismissed. The dismissal of the Applicant's case was therefore proper and within the law.

25. Should the appeal be reinstated? The Applicant blamed his first counsel on record for the delay in taking action from 2004 until 2014 when the Respondent moved the court to have the appeal dismissed. He wants the court to believe that for over ten years he kept checking on his case and his counsel kept telling him that everything was in order. It is hard to agree with him. The case belonged to him and not his counsel. He is the one who was supposed to have followed up on the matter. It is noted that he had no motivation to do so as he enjoyed an unconditional stay of the decree of the trial court.

26. The Applicant also blames the Chief Executive Officer at Kilifi Law Courts for failing to supply him with copies of pleadings, proceedings and judgement so that he could prepare the record of appeal. It is noted that the Applicant only started an active quest for the proceedings after the court gave him 60 days within which to act. The Applicant has not explained what action he took between 2005 and 2017. Indeed the record shows that the Applicant has never had the intention of prosecuting his appeal.

27. I agree with the Applicant that the right to be heard is indeed a fundamental right guaranteed by the Constitution. The right is however not absolute. Once a party has been given an opportunity to be heard and fails to utilize that chance, the party cannot turn around and claim that his right to be heard has been breached. The Applicant has slept on his rights for close to fourteen years and he cannot now turn around and blame other people for his failure to prosecute his appeal. He must live with the judgement that was delivered by the trial court. His right to be heard was not tampered with by the court or the Respondent. He has squandered the chance to have his appeal heard.

28. In short, the application dated 17th August, 2018 is without merit. The same is dismissed with costs to the Respondent.

Dated, signed and delivered at Malindi this 21st day of February, 2019.

W. KORIR,

JUDGE OF THE HIGH COURT