



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 656 OF 2011

MAU WEST LIMITED.....APPELLANT

-VERSUS-

K.A.M COMPANY LIMITED.....RESPONDENT

RULING

1. The appellant has brought the Notice of Motion dated 5th August, 2016 under Section 3A of the Civil Procedure Act; Orders 42 and Order 51 of the Civil Procedure Rules. The aforesaid Motion is supported by the grounds set out on the body thereof and the facts deponed to, in the sworn affidavit of *Simon Kamere*. The appellant seeks the orders hereunder:

i) THAT the orders issued on 18th June, 2016 dismissing the appeal be set aside.

ii) THAT the appeal be reinstated for hearing.

iii) Any other reliefs that this Honourable Court may deem fit to grant.

2. Simon Kamere, advocate for the appellant, averred that a memorandum of appeal dated 20th December, 2011 was filed on behalf of the appellant and that subsequently, his office wrote to the deputy registrar regarding the admission of the appeal but there was no response. The deponent added that his office also urged the deputy registrar to ensure the lower court file was availed to the High Court for purposes of the appeal. That subsequently, the deputy registrar was requested to have the appeal listed for directions before a judge and it was not long after that the original file was said to have gone missing from the registry.

3. It was the deponent's contention that the Executive Officer later on confirmed that the lower court file had been sent to the High Court Civil Appeals Registry and it was not until his office wrote to the deputy registrar to inquire on whether the missing file had been traced that he discovered the appeal had been dismissed on 18th June, 2016 for want of prosecution. That his office was never served with a notice to show cause as to why the same should not be dismissed and the appeal has high chances of success.

4. In response to the said Motion, the respondent filed Grounds of Opposition on 19th September, 2016 to the effect that the Motion is frivolous, vexatious and an abuse of the court process; that the appeal was filed out of time and no steps were taken to have the same prosecuted; and that there is no arguable appeal.

5. The application was canvassed by way of written submissions, with only the appellant filing submissions on 13th December, 2018. The appellant in essence argued that the appeal could not be filed in good time for the reason that there was a delay in obtaining the certified copies of the proceedings, judgment and decree and that thereafter, active steps were taken towards prosecuting the appeal. As concerns the dismissal of the appeal, the appellant submitted that unless the same is reinstated, it stands to be condemned unheard and especially due to the fact that there was no service of the notice to show cause. That there was similarly no notification of the admission of the appeal as required in Order 42, Rule 12 of the Civil Procedure Rules and hence the appellant was not made aware as and when the appeal was admitted. Reference was made to judicial precedents.

6. The appellant added that no harm or prejudice will befall the respondent if the orders sought are granted. That sufficient cause has been shown as to why the dismissal order should be set aside and the appeal reinstated.

7. This court has considered the grounds set out in the Motion together with the affidavit in support thereof; the Grounds in opposition thereto and the appellant's filed submissions.

8. The record shows that the appeal was dismissed pursuant to *Order 42, Rule 35 (2)* of the Civil Procedure Rules. The provision stipulates that:

“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.”

9. From the above, it is evident that the registrar is responsible for ensuring the issuance notices to show cause to the parties though the form of issuance is not specified. That notwithstanding, I have perused the entire court record and noted that while the notice of dismissal was issued on 20th June, 2016, there appears to be no copy of the notice to show cause purported to have been issued, making it impossible for me to determine with certainty whether the same was in fact issued. It is therefore probable that no notice to show cause was issued to the parties.

10. That said, it is not in question that there has been a delay in the prosecution of the appeal since the memorandum and record of appeal were filed way back on 20th December, 2011 and 27th June, 2012 respectively. However, the record shows that the appellant made attempts to follow up on the admission of the appeal with the Deputy Registrar. In fact, the appellant’s advocate addressed several correspondences to the Registrar in this respect. The appellant’s advocate also sought to have the appeal listed for directions and yet this was not possible due to the delay in forwarding the lower court file to the High Court. To my mind, the delay has been sufficiently explained.

11. I must now weigh the prejudice that will be suffered by the respective parties under the circumstances. In doing so, I am persuaded by the court’s reasoning in *Pan African Paper Mills Limited v Silvester Nyarango Obwocha [2018] eKLR* hereunder:

“...the court must weigh the prejudice that is likely to be suffered if this appeal is not reinstated. The injustice of dismissing this Appeal is graver than the justice thereof. The court is conscious of the constitutional imperatives that the right of appeal and therefore the right to be heard on appeal as exercised by the Appellant herein is a constitutionally guaranteed right. That right should not be taken away by the strike of a pen, where sufficient cause has been shown...”

12. A clear reading of the above-cited authority shows that in instances where sufficient cause has been established, which is the case herein, the court would do more harm than good to take away the right to appeal. In the event that the appeal stands dismissed, the appellant herein will inevitably suffer a greater degree of prejudice in comparison to the respondent. To deny the appellant his right of appeal in such an instance would in essence be to defy the interests of justice. In any case, the respondent has not demonstrated that it has been prejudiced as a result of the aforementioned delay. I draw guidance from *Ivita v Kyumbu [1984] KLR 441* where the court judiciously held the following:

“...Thus, even if delay is prolonged if the court is satisfied with the plaintiff’s excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”

13. In reiterating that a party is entitled to substantive justice without fear or favour, I must again quote the wise words of Honourable Justice L.A. Achode in *Pan African Paper Mills Limited* (supra) that:

“Nonetheless, in the circumstances of this case, the Appellant is not wholly to blame for the delayed justice, which delay has been sufficiently explained. The court must therefore, not oust the Appellant from the seat of justice for no absolute fault of its own.”

14. In view of the foregoing, I wish to draw from the court’s rendition in *Britana Oils Limited v B.P. Kenya Limited [2006] eKLR* cited in one of my previously decided cases, namely *Intra Africa Assurance Co. Limited v Modyn Credit Limited [2018] eKLR*:

“Shutting out a litigant from the court should be the last indication of justice. Parties should be accorded all due opportunity to be heard and their matters determined on merits unless there are very good grounds to deny them this right.”

15. To sum it up, I find no reason to deny the appellant’s right of appeal.

16. In the end, prayers (i) and ii) of the motion are allowed. However, I have noted that this is a fairly old matter and for this reason, I make an order that the Applicant prosecutes the appeal within 90 days from today, failure to which the appeal shall stand dismissed. I also noted that no order for costs was sought and thus, I will make no such order.

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

L. NJUGUNA

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent