



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 125 OF 2009

WOCHE IMALA.....APPELLANT

VERSUS

ADAN CHULA SODE.....RESPONDENT

RULING

1. The appellant, *Woche Imala* filed a Notice of Motion dated 9th October 2017 seeking that his appeal which was dismissed on 18th July 2015 be reinstated and that costs of the application be provided for.

2. The application is supported by grounds stated on its face and the affidavits sworn by the appellant on 9th October 2017 and 13th November 2017 as well as the supplementary affidavit sworn on 15th December 2017 by his learned counsel *Mr. Bernard Muriithi*.

The applicant contends that his failure to attend the court to show cause why his appeal should not have been dismissed for want of prosecution was not deliberate; that he was not aware of the hearing date as he was not served with the notice to show cause; that prior to the issuance of the notice to show cause, his advocate had made numerous efforts to fix the appeal for hearing but was unable to do so since the original record of the lower court was not available despite communication from the Senior Resident Magistrate's Court Moyale in a letter dated 3rd June 2013 that the lower court's file had been forwarded to this court way back in the year 2008. He averred that he has a good appeal which should be heard on merit.

3. The application is opposed through grounds of opposition dated 7th November 2017. The main points taken in the grounds of opposition are that the applicant is guilty of inordinate delay in the prosecution of his appeal and that he has not explained why he failed to act on the notice to show cause before the appeal was dismissed; that the application should be dismissed as further delay in the determination of the appeal will occasion prejudice to the respondent; that the application lacks merit and amounts to an abuse of the court process. The respondent urged the court to dismiss the application with costs.

4. The application was argued orally before me on 26th March 2019. Learned counsel *Ms Kibunja* held brief for *Ms Muriithi* for the appellant while learned counsel *Mr. Mocha* held brief for *Mr. Ocharo* for the respondent. *Ms kibunja* in her submissions reiterated the depositions made by the appellant in his affidavits sworn on 9th October 2017 and 13th November 2017 and emphasized that the delay in the prosecution of the appeal was occasioned by factors beyond the appellant's control as it was occasioned by the unavailability of the original record of the lower court and that the appellant or his advocates could not have attended the court on 18th June 2015 when the notice to show cause was scheduled for hearing since none of them was served with the notice to show cause. She asserted that the appellant has a good appeal and will be highly prejudiced if it was not heard on merit.

5. *Mr. Mocha* on the other hand urged the court to find that there was inordinate delay in the prosecution of the appeal which had not been explained. He invited the court to note that the decision appealed against was concluded in the year 2008 and between 2013 and 2017, the appellant did not take any step towards prosecuting the appeal. His submission was that the application lacked merit and ought to be dismissed.

6. I have considered the application, the affidavits on record together with their annexures and the rival submissions made by counsel on record. I have also perused the court record. Having done so, I find that it is true that the decision appealed against was made in the year 2008 and that this appeal was filed on 16th March 2009 which is about ten years ago. There is therefore no doubt that the delay in prosecuting the appeal is prolonged and inordinate. The applicant has explained this long delay by asserting that his effort to set down the appeal for hearing was thwarted many times by the unavailability of the original record of the lower court. He has annexed several correspondences addressed to the lower court following up on the request to have the file forwarded to this court. Though I have seen a letter dated 3rd June 2015 in which the lower court indicated that it had forwarded its original file to this court in the year 2008, I have gone through the court record and has noted that the said file is not part of the court record. There is nothing in the court record to confirm whether or not the file was actually received by this court from the lower court.

7. In the absence of the lower court's file, I agree with the appellant that he was completely handicapped as he could not have taken any step towards progressing the hearing of the appeal. I therefore concur with the appellant's explanation that the delay in the prosecution of the appeal though prolonged was occasioned by circumstances beyond his control.

8. My perusal of the court record also confirms that the appellant was not served with a notice to show cause why his appeal should not be dismissed for want of prosecution before the appeal was dismissed on 18th June 2015.

Order 42 Rule 35 (2) of the Civil Procedure Rules provides 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.” (Emphasis added)

The dismissal of the appeal without notice to the appellant was therefore irregular.

9. In view of the foregoing, I find merit in the motion dated 9th October 2017 and it is hereby allowed. The appeal is consequently reinstated but in view of its age and the fact that it is not clear from the court record whether the original record of the lower court was received by this court, I direct that the appeal be fixed for mention on 7th May 2019 before the Hon. Deputy Registrar for her to ascertain whether or not the lower court's original record was actually forwarded to this court and thereafter, take appropriate action.

10. Having found that the applicant was not to blame for the delay in the prosecution of the appeal and that his failure to attend the court on the date the dismissal order was made was not deliberate, I will not make any order on costs.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 29th day of April, 2019.

C. W. GITHUA

JUDGE

In the presence of:

No appearance for the appellant

No appearance for the respondent

Mr. Salach: Court Assistant