REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 33 OF 2016

MESHACK NYAGA MUTURI.....APPELLANT

VERSUS

NANCY WAKABARI KANAI.....RESPONDENT

R U L I N G

A. Introduction

1. This is a ruling for the application dated 18/07/2018 in which the appellant seeks for orders to set aside the orders for the dismissal of the appeal for want of prosecution issued on 22/08/2018. It further seeks for the reinstatement of the said appeal as well as the stay of taxation of the respondent's resultant Bill of Costs dated 24/06/2018.

2. It is the appellant's case that no notice was served upon him, by the respondent or by the court, requiring him to show cause why the matter should not be dismissed which he terms as unconstitutional and against the rules of natural justice.

3. The appellant further states that there is a pending appeal Embu HCCA No. 71 of 2017 between the same parties in which one of the prayers is the consolidation of the two appeals, a fact the respondent was aware of and yet proceeded ex-parte with the dismissal hearing.

4. The respondent filed a rejoinder in the form of a replying affidavit deposed on the 25/07/2018 in which he stated that the appellant had not demonstrated to court that he tried to fast track the appeal or that he had applied for consolidation with Embu HCCA 71 of 2017 and as such cannot fault the court for dismissing his appeal. The respondent further states that the two appeals, Embu HCCA 71 of 2017 and this appeal have no bearing with one another.

5. The respondent further states that there are no orders staying prosecution of this appeal and also that no orders of consolidation of the two appeals have been granted and as such the appellants application for reinstatement of the appeal should be dismissed with costs.

6. The parties disposed of the application by written submissions.

B. Appellant's Submissions

7. It is submitted that the appellant's appeal was dismissed exparte as there was no notice served on the appellant's advocate nor has there been any demonstration by the respondent that such notice was served. It is the appellant's submission that this is against the rule of natural justice. The appellant relies on the case of **Peter Kiboi Willie v Family Bank Ltd Nairobi HCCC No. 415 of 2012** wherein the court reinstated a similar dismissed matter to hearing.

8. The appellant further submits that the instant appeal is intertwined with Embu HCCA 71 of 2017 where they had already secured stay of execution.

C. Respondent's Submissions

9. The respondent submits that there is no mandatory requirement under Order 17 Rule 2 (1) of the Civil Procedure Rules that a notice must be given to a party before a suit which offends the order is dismissed for want of prosecution and that it is the appellant's primary duty to take steps to prosecute his appeal.

10. The respondent submits that the appellant's inertia to prosecute his appeal is contrary to the overriding objective of the court stipulated in Section 1A, 1B and 3A of the Civil Procedure Act.

11. The respondent further submits that the appellant has failed to explain the delay and how he is likely to suffer prejudice if the appeal is not reinstated and as such the instant application lacks merit and ought to be dismissed.

D. Analysis of Law

12. The major issue for determination is whether the Appellant/ Applicant has given good reasons on the basis of which this court can exercise its discretion in its favour, to set aside the orders dismissing this appeal.

13. It is within the general discretion of the Court to set aside any order issued by it ex parte, so long as sufficient cause has been shown for the exercise of such discretion. This was the holding of this court in the case of **Jim Rodgers Gitonga Njeru v Al-Husnain Motors Limited & 2 others [2018] eKLR**. prism of whether there has been inordinate delay; or whether the delay was inexcusable.

14. It is manifest from the record that the reason why the suit was dismissed in the first place was that the Court was satisfied there was inordinate delay of over one (1) year for which there was no explanation. I say so because in the case of **Ivita vs. Kyumbu [1984] KLR 441** the said principles were set out thus:

> ***"The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. 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***."(Emphasis supplied)

15. Thus, I find instructive the expressions of the Court in **CMC Holdings Limited -vs- Nzioki [2004] 1 KLR 173** that:

> ***"In law, the discretion that a Court of law has, in deciding whether or not to set aside ex-parte order… was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would ... not be proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle. We do not think the answer to that weighty issue was to advise the appellant of the recourse open to it, as the learned Magistrate did here... In doing so, she drove the Appellant out of the seat of justice empty handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate."***

16. Accordingly, the Court would be interested in finding out the appellant's explanation for not attending Court to defend the Notice to Show Cause; and whether any prejudice will be suffered by either the appellant or the respondent should the ex parte orders be set aside and the suit reinstated to hearing and disposal on the merits. To this end, the appellant averred, that the notice to show cause was not served on him or his counsel.

17. From the proceedings of 22nd June 2018, it is discernible that the Court moved *suo motu.* The respondent in their written submissions, urged the Court to reflect on the fact that the prosecution of an appeal rests on the appellant and that the appellant failed to undertake any steps to fast track the hearing of this appeal. It was further submitted by the respondent that the lawdoes not require service of notice thus, the Court was called upon to give effect to the Overriding Objective of the Civil Procedure Act as outlined under Sections 1A and 1B thereof.

18. I agree entirely with the foregoing submissions and would accordingly endorse the expressions of the Court in the case of **Fran Investments Limited vs. G4S Security Services Limited [2015] eKLR** in which the Court had occasion to consider the aforesaid provision and held the view that:

> ***"Order 17 Rule 2(1) of the Civil Procedure Rules does not require service of notice; it uses the word "give notice". The court may give notice of dismissal through its official website or through the cause list. And those mediums will constitute sufficient notice for purposes of Order 17 Rule 2(1) of the Civil Procedure Rules."***

19. However, there is no demonstration herein that notification herein was via the cause list or the website. It is my considered view that upon the denial of service by the appellant, the respondent was put on notice to demonstrate that service was indeed effected. This, in my considered view, is not a matter for judicial notice, given its primacy to the application at hand. The respondent opted not to rebut the appellant's averments in this regard and therefore is deemed to have admitted those averments.

20. More importantly, in the Court Order dated 22/6/2018, it is expressly stated that:

> ***"After the inordinate delay of 1 year since the last step was taken on 2/5/2017 with view to proceeding with the Suit, and service of Notice having been effected to show cause why this suit should not be dismissed and there being no satisfactory response, the Court in exercise of the powers conferred upon by the law hereby orders this suit dismissed."***

21. In view of the clear wording of the order, there ought to have been proof of such service; which does not appear to be on the court file. This may be attributed to lapses in the internal registry operations of the court, but it is nevertheless a mistake for which the Applicant should not be blamed. In this regard I would restate the words of Apaloo, JA in the case of **Philip Chemowolo & Another v Augustine Kubende, [1982-88] 1 KAR 103** that:

> ***"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit ... the broad equity approach to this matter is that unless there is fraud or intention to overreach, 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 the parties and not for the purpose of imposing discipline."***

22. Accordingly, I find that there is no evidence of service to resolve the question of service in favour of the notice to show cause on the appellant.

23. On the question of prejudice, I am of the view that in the circumstances hereof, no prejudice will be occasioned to the respondent that cannot be remedied by an award of costs; and that to the contrary, it is the appellant who would be greatly prejudiced by being driven from the seat of justice without a hearing, were his appeal not be reinstated.

24. For the foregoing reasons, I hereby allow the application by ordering that the suit be and is hereby reinstated. The taxation of the Bill of Costs is hereby stayed pending the determination of the appeal.

25. I hereby direct that the appeal be fixed for hearing within thirty (30) days.

26. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 31ST DAY OF OCTOBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Onyango for Wambugu Kariuki for Appellant/Applicant

Ms. Nzekele for Fatuma for Respondent