



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 243 OF 2006

ALEX KARIUKI.....APPELLANT

VERSUS

DAVID KIPSANG SIRIRIA.....RESPONDENT

RULING

1. The appellant, *Mr. Alex Kariuki* presented a Notice of Motion dated 17th May 2018 in which he applied for stay of execution of the ruling delivered on 21st March 2006 in *Nairobi RMCC No. 1584 of 2003* and all consequential orders arising therefrom and for reinstatement of his appeal which was dismissed by this court on 18th June 2015.

2. The application is premised on the grounds stated on its face and the supporting affidavit sworn by the appellant (applicant) on 17th May 2017.

3. It is important to note that the applicant lodged the application in person having sought and obtained leave to act in person on 9th April 2018.

In his oral submissions before the court and in his supporting affidavit, the applicant averred that the delay in prosecuting the appeal was occasioned by his former advocates, *Ms. Obura Mbeche & Company Advocate* failure to initiate steps to facilitate the hearing of the appeal despite his instructions that they should prosecute the appeal diligently and his constant follow up; that his former advocates misled him by their continued assurances that the hearing of his appeal was still on course as they were only waiting for the court to give it a hearing date; that due to his continued persistence to find out the status of the appeal, the advocates finally owned up and admitted that the appeal had been dismissed by the court for want of prosecution; that when they failed to abide by his instructions to apply for its reinstatement, he moved to court and obtained leave to act in person so that he could remedy the situation. He then filed the instant application. He implored the court to give him another chance to prosecute his appeal which in his view had high chances of success.

4. The application is opposed. There is a replying affidavit sworn on 12th June 2018 by the respondent, *Mr. David Kipsang Siria*. In his affidavit, the respondent deposed that the application is not merited and ought to be dismissed. In his view, the delay in prosecuting the appeal was prolonged and unexplained; that the delay was calculated to deny the respondent the fruits of his judgment and decree issued on 21st March 2006; that the applicant has been indolent and should not benefit from the exercise of the court's discretion considering that the appeal was dismissed about three years ago; that the delay has greatly prejudiced the respondent who should not continue to suffer prejudice due to the applicant's indolence or that of his former advocates; that the appeal is vexatious, frivolous and amounts to an abuse of the court process and should not be reinstated.

5. In her submissions, *Ms. Cherono* for the respondent reiterated the depositions made by the respondent in the replying affidavit. In addition, she submitted that the appeal was dismissed because the appellant failed to attend court to show cause why the same should not be dismissed; that the court should note that the last time the matter was in court was on 14th February 2007.

6. In his rejoinder, the applicant denied the allegation that he has been indolent and insisted that he had done his part by constantly visiting his advocate's offices to follow up on the appeal but he had been misled into believing that the appeal was ready for hearing and all that was remaining was a hearing date; that if the appeal was not reinstated, he will suffer great prejudice.

7. I have carefully considered the application and the rival submissions. I have also read the court record. I find that it is true that the last time the appeal was in court at the instance of the applicant was on 14th February 2017 when he obtained orders staying execution of the decree in the lower court. I therefore agree with the respondent that the delay in prosecuting of this appeal has been prolonged and I would have had no hesitation in holding that the delay was inordinate and inexcusable had the application been lodged by the appellant's former advocates. This is because I cannot fathom any possible reason they would have advanced to satisfactorily explain a delay of about ten years

in prosecuting a straight forward appeal like the present one.

8. The application has however been filed by the applicant in person. He is unable to explain why his former advocates failed to execute his instructions to prosecute his appeal expeditiously and in all fairness, this is expected since these are not matters that would be within his personal knowledge. The applicant explained in his oral submissions the many times he has visited his advocate's offices to follow up on the progress of his appeal which efforts did not bear the expected fruits. I saw the appellant during the hearing of the application and from his demeanour, I have no reason to doubt his assertions.

9. The decision of whether or not to reinstate a dismissed appeal is discretionary. In the exercise of that discretion, the court must bear in mind the length of the delay, the reasons for the delay, the competing interests of the parties and the principles that guide the exercise of judicial authority particularly the constitutional principles espoused in the Constitution of Kenya 2010 with regard to access and the administration of justice.

10. In this case, it is not disputed that the delay in question is inordinate. I am aware of emerging jurisprudence to the effect that litigants own their cases and cannot sit back and then blame their advocates for inaction when the suit is threatened with dismissal for want of prosecution without showing what steps they had taken to mitigate the delay in question. See for example the Court of Appeal's decision in *Rajesh Rughani V fifty Investments Limited & Another, (2016) eKLR*; *Habo Agencies Limited V Wilfred Odhiambo Musingo, (2015) eKLR*. In my view, though the delay is inordinate, the applicant has explained the efforts he had made to pursue the prosecution of his appeal through his former advocates and that he did not condone the delay.

11. Before exercising my discretion in deciding the instant application, I think it is important to consider the consequences of deciding the application one way or the other. If I reject the application, the doors of justice will be slammed on the applicant's face because he will be prevented from prosecuting his appeal yet he is still aggrieved by the lower court's decision. If on the other hand I allow the application, the respondent is not likely to suffer prejudice that cannot be compensated by an award of costs if hearing of the appeal is expedited.

12. It is also worth noting that under the new constitutional dispensation, courts are enjoined to administer substantive justice which requires that courts should strive to determine cases on merit if doing so would not cause irredeemable prejudice to the opposite party. I am also alive to the fact that the Constitution at *Article 159 (2) (b)* commands that cases including appeals should be heard and determined expeditiously.

13. Taking the foregoing into account, I have come to the conclusion that it would be in the best interest of justice to give the applicant another chance to prosecute his appeal now that the advocates who are blamed for the delay are out of the picture but give him a time frame within which to prosecute the appeal in order to facilitate its expeditious disposal.

14. I therefore find merit in the application and it is hereby allowed. The appeal is reinstated on condition that it shall be prosecuted within the next 120 days in default of which it shall stand dismissed with costs to the respondent.

15. Having reinstated the appeal, I find that the prayer seeking stay of execution of the decree appealed against is spent since the stay orders issued on 14th February 2007 are still in force. I will therefore not make any order with regard to prayer 2 of the application.

16. Costs of the application are awarded to the respondent.

It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI this 27th day of June 2018.

C. W. GITHUA

JUDGE

In the presence of:

Alex Kariuki: Appellant present in person

Ms Cheron: for the Respondent

Mr Fidel Salach: Court Clerk