



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO.63 OF 2017

HEZRON MAGEIRA THAMBURA.....APPELLANT

VERSUS

WILLIAM KANAMPIU.....RESPONDENT

RULING

[1] The Motion dated 12th June 2018 seeks the following orders:

- 1. Stay the execution of the judgment of the court in TIGANIA CMCC NO. 63 of 2017 pending the hearing and determination of this application.***
- 2. Setting aside of the proceedings of 30th May 2018; discharge, vary or set aside the dismissal orders and re-instate the appeal for hearing.***
- 3. Directions on the appeal.***
- 4. Costs of this application be provided for.***

[2] The application is expressed to be brought under Order 51 Rule 1 and 15 of the Civil Procedure Rules, Section 1A and 1B of the Civil Procedure Act (revised), Article 159 (2) (d) (e) and all other enabling provisions of the law. The grounds upon which the motion is grounded are set out in the application and the supporting affidavit sworn by Simon Munene Wachira on 12th June 2018. It was argued that the applicant filed an appeal on 3rd August 2017 and no directions have been given. Yet, the appeal was dismissed on the strength of an affidavit of service of Notice of Mention dated 24th May 2018 which indicated that the matter was coming up for a mention on the 30th May 2018. They urged that the notice was not received or served on the applicant. The applicant took the view that this being the first time the matter was coming up for mention; the appeal ought not to have been dismissed. The dismissal of the appeal was therefore prejudicial to the applicant; the respondent has already moved court to have the money deposited in a joint interest earning account released to him. They stated that it would be in the interest of justice to set aside dismissal orders granted on 30th May 2018 so that the appeal should be heard on merit. The applicant does not see any prejudice being occasioned to the respondent if the judgment is set aside and matter is heard and determined on merits.

[3] The Respondent opposed the application through a replying affidavit sworn by Joash Ondieki Ontita on 4th July 2018. He deposed that the matter came up on several dates for mentions to wit, on 10th October 2017, 19th December 2017, 5th February 2018 and 7th March 2018 and on each occasion the applicant was called upon to file the record of appeal to no avail. On 24th May 2018 the matter was coming up for a hearing and not a mention as alleged by the applicant; and the respondent was ordered to serve and inform the appellant that the record of appeal to be filed and served lest the appeal should be dismissed. On 24th May 2018 the respondent issued a further notice informing the applicant of a mention on 30th May 2018. Counsel for the appellant did not appear and did not show cause why the appeal should not be dismissed.

[4] That on 19th December 2017 the appellant was given 14 days to have the whole decretal sum deposited in a joint interest earning account at Sidian Bank Meru Branch. Half of the sum was released to the respondent on 4th April 2018 and the balance was transmitted on 13th June 2018. Therefore, the application has already been overtaken by events and even the appeal has been rendered nugatory due to the indolence on the part of the appellant who was not kin to file the record of appeal as directed. That litigation should come to an end and he relied on the case of **Sum Model Industries Ltd v Industrial & Commercial Development Corporation & another Attorney General [210] eKLR.**

ANALYSIS AND DETERMINATION

[5] I have perused the record, application and affidavits. The question is; are there grounds to:

(1) *Stay execution of the judgment of the court in Tigania CMCC No. 63 of 2017* and

(2) *Set aside the proceedings of 30th May 2018 and re-instate the appeal to hearing?*

[6] I will invert the order and determine whether the appeal should be reinstated, for the outcome thereof will dictate whether I should consider the request for stay of execution.

[7] The record shows that there have been several directions made with regard to the appeal and on several occasions stated by the Respondent, the applicant's legal counsel was present. The conditional stay was breached. The court altered the conditional order and issued stay on conditions on 7.3.18 *inter alia* the Applicant was to file record of appeal. The court was categorical that in default of compliance with the conditions execution of the decree to proceed without resort to court. Notably, since the appeal was filed in 3rd August 2017 the applicant has not taken any initiative to file his record of appeal in spite of being given numerous opportunities to do so. I note also that the applicant is misleading the court that no directions have been taken on the appeal as the record shows otherwise. The Appellant was directed to file record of appeal on several occasions. What's more, the case belongs to the appellant who has the burden of prosecuting it failure of which may not be placed on the court or any other person. In addition, it is clear from the record that the applicant was served with the notices that he alleged were not served on him. It is clear that the applicant is relying on a notice which was served a day prior to the hearing date. However, this cannot be an excuse to seek reinstatement of appeal taking into a count that since August 2017 to May 2018 the applicant has done substantially nothing to prosecute his case. That led to the dismissal of the appeal.

[8] Article 159 of the Constitution demands delivery of justice without delay. Parties are expected to prosecute their cases expeditiously. And with the entry of the principle of overriding , Section 1A and 1B of the Civil Procedure Act commend for facilitation of just, expeditious and affordable resolution of disputes. This is to facilitate the end of litigation which is prudent. From the foregoing, the applicant has been given ample opportunity since 3rd August 2017 to 30th May 2018 to prosecute its case. However, in explaining his failure to prosecute he misled the court and did not provide substantive reason for this. Sometimes, it is apt to let the parties to carry their burden. And this is a perfect case to state what was stated in **Allen v Sir Alfred Mc Alpine** (supra):

“To put right this wrong, we will in this court do all in our power to enforce expedition; if need be we will strike out actions where there has been excessive delay. This is a stern measure, but it is within the inherent jurisdiction of the court, and the rules of the court expressly permit it. It is the only effective sanction that they contain.”

Accordingly, the only effective and justifiable action to take despite its unpleasant nature is to let the appeal remain dismissed. In the upshot, I dismiss the Motion dated 12th June 2018. In light of my decision, I will not consider the request for stay of execution.

[9] I am aware the pain such order inflicts upon the Applicant. Accordingly, I will not visit the applicant with the pain of costs. I make no orders as to costs. It is so ordered.

Dated signed and delivered in open court at Meru this 30th day of October, 2018

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F. GIKONYO

JUDGE

In presence of

Mungai for Ondieki for Respondent

Munene for appellants- absent

Court - Ruling delivered in open court. Matter finalized.

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F. GIKONYO

JUDGE