



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCA NO. 12 OF 2017

(FORMERLY ELDORET HCCA NO. 80 OF 2013)

LAWRENCE MUSANGI MBITHI (Suing as legal representative/Administrator of the

Estate of STEPHEN MUTUA MBITHI.....APPELLANT

-VERSUS-

MARGARET NYANGARA MWANCHA.....1ST RESPONDENT

JACKLINE NGINA GICHUKI.....2ND RESPONDENT

ACTROSE VARSANI MERCHANTS LTD.....3RD RESPONDENT

(Being an appeal from the Judgment of the Resident Magistrate Court of Kenya at Eldama Ravine Hon. M. Kasera, Ag. SPM dated 4th June, 2013 in Eldama Ravine RMCC No. 47 of 2010)

RULING

1. Upon a Notice to Show Cause issued by this Court dated 7/11/17, the Registrar of the Court moved clearly pursuant to Order 42 Rule 35(2) of the Civil Procedure Rules. The Notice to Show Cause was in addition to a Notice of Motion dated 23/9/2016 under Order 42 Rule 35(1) of the Civil Procedure Rules, where the 3rd Respondent sought an order that the appeal herein be dismissed for want of prosecution on the ground that it was then three years since the appeal was filed with the appellant not taking any step to prosecute the appeal.

2. By a Replying Affidavit sworn on 18/6/18, the appellant sought to explain failure to prosecute the appeal on “various reasons beyond my control and that of my advocates.” which may be categorised as follows:

1. Failure to secure a hearing date before the High Court at Eldoret where the appeal was initially filed as HCCA No. 80 of 2013 because of an order for the transfer of matter to Kabarnet High Court which process took some time.

2. Upon transfer of the file to Kabarnet there was no sitting judge to preside over the matter as the Judge who had been posted did not take up the posting forcing the files to be returned to Eldoret, only to be brought back to Kabarnet in 2017 when this court started sitting.

3. The Motion of dismissal for want of prosecution was filed in 2016 at the time when the Eldoret High Court had already directed that the appeal be referred to Kabarnet High Court, and could not, therefore, hear the appeal.

3. I have considered the Notice to Show Cause together with the Notice of Motion dated 23/9/2016 and the Submissions by Counsel for the parties in the matter. From the Court Record, I have observed that the order for the transfer of the appeal by the High Court at Eldoret was made on 28/10/15 before the Motion for dismissal was made almost one year later on 23/9/16. The High Court at Kabarnet did not commence sitting until the 11/1/2017 when it was inaugurated, and the Appeal file was transferred to Eldoret by letter dated 31/1/2017 pursuant to the transfer order of 28/10/15.

4. In these circumstances, the appellant’s failure in prosecuting between the order of the High Court at Eldoret of 28/10/15 and 31/1/2017 is explained. The appellant does not however, explain the delay in fixing the appeal for hearing after the appeal file was transferred to the Kabarnet Court.

5. I have noted, however, that upon the Notice to Show Cause order of 2/11/17, Counsel for the appellant attended court on 15/2/18 when with Counsel for the Respondent the Notice of Motion of 23/9/16 was fixed for hearing.

6. I am not able to state as in *Protein and Fruits Processors Ltd & Anor. v. Diamond Trust Bank Kenya Ltd* (2015) eKLR that the appellant “went to a deep sleep” after the appeal file was transferred to this court on 31/1/2017. I have also considered the substance of the judgment sought to be appealed from, and find that substantial questions arise for presentation to the appellate Court, with great interest for the appellant and the Public at large.

7. In dismissing the suit for damages in negligence by the next of kin of the deceased victim of the traffic accident the subject of the suit, the trial court held as follows:

“I have carefully considered the full evidence on record, the law, the submission by the advocates for both parties and the law cited. I am unable to find the 2nd and 3rd Respondent liable given that ownership is not proved. I also make no orders against the first. In the light of my finding above and guided by *Kiema Muthuka v. Kenya Cargo Haulers Services Ltd* (1991) 2 KAR 258, where it was held:

“there is no liability without fault in the legal system in Kenya and, and the plaintiff must prove some negligence against the defendant where the claim is based on negligence.”

The Plaintiff’s case is hereby dismissed with [costs] to the 2nd and 3rd Defendant.”

8. In the interest of justice, I find that the appellant who has already filed his appeal on 17/6/2013 and Record of Appeal on 30/1/2014 should be heard on the appeal which as I have said above raises questions of great public importance and interest over and above the private interest of the appellant.

9. It is clear from the record that the advocate for the appellant did not pursue the hearing of the appeal after the notification by the High Court at Eldoret that this file had been transferred to Kabarnet by letter of 31/1/17 until he was served with a Notice to Show Cause of 2/11/17.

10. For their default in taking up steps to fix appeal for hearing after due notice, counsel for the appellant shall personally pay the costs of the Notice of Motion of 23/9/2016 and costs associated with the Notice to Show Cause dated 2/11/17.

Orders

11. For the reasons set out above, the court declines the Notice of Motion dated 23/9/16 and directs that the appeal be fixed for hearing on a date convenient to the parties and the court before the end of the current term of the court.

12. The counsel for the appellant M/S Mburu Okara & Co. Advocates shall personally pay costs of the Notice of Motion of 23/9/16 and the Notice to Show Cause dated 2/11/17.

13. As agreed between the Counsel for the parties on the 26/7/18, the order herein, save with regard to Notice of Motion of 23/9/16, which was only filed in this appeal, shall apply to the Civil Appeal No. 11 of 2017 also pending before this court.

Order accordingly.

DATED AND DELIVERED THIS 30TH DAY OF OCTOBER 2018.

EDWARD M. MURIITHI

JUDGE

Appearances: -

M/S Mburu Okara & Co. Advocates for the Appellant.

M/S Nyairo & Co. Advocates for the 3rd Respondent.