



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 33 OF 2014

BHACHU INDUSTRIES LIMITED.....APPELLANT

-VERSUS-

MOSES KIMEU MUIA.....RESPONDENT

RULING

1. This ruling relates to the notice to show cause why the appeal should not be dismissed for want of prosecution.
2. In response thereto, the appellant filed a replying affidavit sworn by its advocate, ***Kaminza Charles Zakayo***. The deponent stated that the memorandum of appeal was filed on 14th February, 2014. Soon thereafter, the appellant through its advocate wrote to the Executive Officer of the lower court, requesting for certified copies of the proceedings and that further follow ups were undertaken but to no avail since it was indicated that the proceedings were not ready.
3. The deponent further averred that the appellant's advocate was never informed as and when the proceedings were ready for collection and it is for this reason that the appellant failed to file the record of appeal and that such failure resulted solely from the lower court registry that failed to inform them of the availability of the proceedings.
4. This court has considered the averments made in the reply filed by the appellant. The issue really is, whether this court should grant the appellant the opportunity of proceeding with the appeal.
5. It is well noted that judgment in the suit (***CMCC NO. 531 OF 2006***) was delivered on 15th January, 2015 in favour of the respondent and the appellant had 30 days within which to appeal. It is equally noted that the firm of J. Maluki & Co. Advocates sought leave of the court to come on record for the appellant, which leave was granted on 14th February, 2014. The memorandum of appeal was timeously filed on 14th February, 2014.
6. The appellant is yet to file the record of appeal. According to the appellant, this was due to the fact that the typed proceedings had not been availed. This court has looked at the letter dated 25th March, 2014 annexed to the replying affidavit and confirmed that indeed, a request was made for the typed proceedings. The deponent argued that follow ups were done thereafter. However, there is no evidence to indicate that the matter was pursued beyond that. In fact, this court has observed that the abovementioned letter was the only correspondence made to the court regarding the proceedings.
7. The record shows that the lower court file comprising the typed proceedings was forwarded to this court on 10th March, 2015 and the forwarding letter copied to the appellant's and respondent's advocates. However, it is not clear whether the same was actually served upon the appellant. In turn, there seems to be no further related correspondence from the lower court to the appellant, thereby leading this court to suppose that the appellant was possibly unaware of the fact that the proceedings were typed.
8. The deponent, ***Kaminza Charles Zakayo***, admitted that the failure to file the record of appeal was due to a genuine mistake on the part of the advocate. In this court's opinion, the appellant ought to have been persistent in following up on the progress of the appeal with its advocate. Be that as it may, regard is had, to the well-known principle that the mistake of an advocate should not be visited upon the client and since this is a 2014 appeal, it was ultimately the advocate's duty to proactively follow up on the proceedings, file the record of appeal and have the same expeditiously prosecuted. Under the circumstances, this court finds that it would be unreasonable to punish the client for the lack of conscientiousness of its advocates.
9. Having established the above, this court deems it worthwhile to restate that this is a fairly old appeal derived from an old suit. The appeal has been pending in court for close to five (5) years now with barely any progress.

It is hereby ordered that the Appeal be fixed for hearing within 15 days from the date of this ruling.

It is so ordered.

Dated, signed and delivered at NAIROBI this 20th day of December, 2018.

L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent