



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 26 OF 2013

PAGAMWA TULUGA LIMITED.....APPELLANT/APPLICANT

- V E R S U S -

FRANCIS KIMANI MUTURI.....RESPONDENT/RESPONDENT

RULING

1. On 26th day of October 2015, Lady Justice R. E. Aburili dismissed this appeal for want of prosecution. The appellant/applicant had been served with a Notice To Show Cause (NTSC) why the appeal should not be dismissed for want of prosecution but its advocate did not turn up in court when the notice to show cause came up for hearing. The appellant has now taken up the motion dated 6th October 2016 in which it seeks for the following orders:

- 1. THAT this application be certified urgent, service be dispensed with thereof and the same be heard ex parte in the first instance.***
- 2. THAT the order of Justice R. E. Aburili, made on the 26th day of October 2015 dismissing this appeal for want of prosecution be set aside.***
- 3. THAT this appeal (HCCA no. 26 of 2013) be reinstated and same be heard on merit.***
- 4. THAT this honourable court be pleased to stay the execution of the judgement/decree obtained in CMCC 316 of 2010 Limuru pending the full determination of this appeal.***
- 5. THAT pending the hearing and determination of this application there be an order of stay of execution of the decree passed on the 17th December 2012.***
- 6. THAT this application be heard inter-partes on such date and time as this honourable court may direct.***
- 7. THAT this honourable court be pleased to issue any other orders as it may deem just, appropriate and expedient in the interest of justice.***
- 8. THAT costs of this application be provided for.***

2. The motion is supported by the affidavit of Joan Oburu. When served, the respondent filed a replying affidavit he swore to oppose the same.

3. When the motion came up for interpartes hearing, learned counsels recorded a consent order to have

the application disposed of by written submissions. I have considered the grounds stated on the face of the motion plus the facts deponed in the affidavit filed in support and against the application. I have further taken into account the rival written submissions. It is the submission of the appellant that on 17.12.2012 judgement was entered against it. Being dissatisfied, the appellant filed this appeal. The appellant further obtained a conditional order for stay of execution of the decree. The appellant did not meet the terms of the order for stay on the basis that the respondent's advocate had failed to cooperate in executing the joint account forms. It is also argued that there was also a failure on the part of the appellant's/applicant advocate in personal conduct of the matter, to take up appropriate steps to remedy the same. The appellant further argued that on 26.10.2015 the appellant's advocate assigned to handle the matter inadvertently proceeded to Limuru instead of the High Court, Milimani, due to an error on that day's diary. In the circumstances the appellant argued, the client should not be punished for the advocates mistake. The appellant has also stated that it is ready and willing to deposit the decretal sum as security for the due performance of the decree.

4. The respondent vehemently opposed the appellant's application.

It was pointed out that the appellant's advocate walked out of court in sheer arrogance when the offer to settle the matter out of court was rejected. The respondent also pointed out that the appellant had not filed a response by way of an affidavit to controvert what transpired in court on 26.10.2015. This court was beseeched to find that this application is an afterthought. It is also pointed out that the appellant had not filed a response to the Notice To Show Cause as to why the appeal should not be dismissed for want of prosecution.

5. The court record shows that the appellant and the respondent's counsels were served with a notice to show cause as to why the appeal should not be dismissed for want of prosecution filed for 26.10.2015. On the aforesaid date, the record shows that the respondent's advocate attended court while the appellant and its counsel were absent.

6. In the ruling of Lady Justice R. E. Aburili, the learned judge noted that the notice to show cause was served but the appellant did not deem it fit to attend court. There is also no evidence that the appellant filed a response to answer the notice to show cause. On my part, I doubt whether it would have made any difference if the appellant's advocate was present at the time of hearing the notice to show cause. The allegation that the appellant's advocate walked out in protest is not supported by the recorded proceedings of 26.10.2015. Though the averments were made to bring out what happened in court by way of affidavit evidence which averments were not controverted, I prefer to go as per the record. It has been argued that the appellant's advocate had put in the diary of 26.10.2015 that a visit would be made to Limuru Law Courts instead of the High Court, Milimani. I am unable to believe this story. If it was true that the appellant's advocate visited Limuru Law Courts, there would have been an affidavit from the learned advocate explaining what happened when he/she arrived in Limuru Law Courts. I expected the advocate to come forward and state whether or not the matter was listed before the Limuru Law Courts or to explain whether or not he/she perused the lower court file. If indeed, the learned advocate made a mistake, then, why did it take almost a year for the appellant to file the current motion. After a careful consideration of the arguments presented to this court, I find no plausible ground to disturb the decision of Lady Justice R. E. Aburili. The motion is based on grounds which are in my view not genuine. There was no answer to the notice to show cause. The motion was in any case, filed after an inordinate delay.

7. In the end the motion dated 6th October 2016 is found to be without merit.

8. It is dismissed with costs to the respondent.

Dated, Signed and Delivered in open court this 24th day of March, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent