



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 132 OF 2011

PETER MWANTHI.....APPELLANT

VERSUS

CMC MOTORS GROUP LIMITED.....1ST RESPONDENT

CMC HOLDING LIMITED.....2ND RESPONDENT

RULING

This matter came up in court on the 3rd February, 2017 for notice to show cause why it should not be dismissed for want of prosecution. The notice had been issued under order 35 Rule 2 of the Civil Procedure Code.

In response to the notice, the appellant filed an affidavit sworn by Joseph Nzyoki Mwanthi on 2nd February, 2017. In the said affidavit, it is averred that counsel for the appellant has made concerted efforts to have the Lower Court file in CMCC no EJ.692 of 2001 forwarded to the High Court to pave way for the admission of the appeal and directions under order 42 rule 13 of the Civil Procedure Rules. He has annexed copies of the letters written to the Deputy Registrar to that effect marked "JNM1"

That in addition to the said letters, counsel avers that he has personally visited the registry to enquire as to the reasons for the delay in forwarding the file to the High Court to no avail. That on the 11th November, 2016 he visited the executive officer in his office who enquired about the file but still it could not be traced. That the executive officer introduced him to a court clerk namely Gichohi to personally see to it that the file was traced but to-date its yet to be traced. He has urged the court not to dismiss the appeal as it would be grossly unfair to do so, in the circumstances.

On their part, the respondents have asked the court to dismiss the appeal. Counsel for the respondents submitted that vide a letter dated 15th February, 2016 she sought to have the matter listed for dismissal as the appellant had not taken any action for three years prior to that. She told the court that the laxity in prosecuting the appeal has not been adequately explained save for stating that the lower court file has been missing. She argued that the counsel for the appellant ought to have sought for reconstruction of the court file now that the record of appeal had already been filed.

In reply, it was submitted that under order 42 Rule 12 the requirement to serve a memorandum of appeal is only after the appeal has been admitted under section 79B of the CPA which could not have been done as the lower court file has not been forwarded to the High Court. That the filing of the record of appeal was done on a without prejudice basis because it was done before the appeal was admitted.

That it is the duty of the court to call for the court file from the lower court and not the appellant's. Though the appellant has been accused of failing to apply for the reconstruction of the lower court file they could not have done so without a letter from the court confirming that the court file could not be traced.

The court has perused through the court record. The appeal herein was filed on the 22nd March, 2011 and following which the Deputy wrote a letter dated 1st September, 2011 to the principal Magistrate Milimani commercial Court Requesting for the Lower Court file. On 10th April, 2013 another letter was done by the Deputy Registrar still requesting for file, Thereafter counsel for the appellant wrote a number of letters both to the Deputy registrar and the Chief Magistrate Milimani enquiring if the Lower court file has been forwarded to the High Court

The court has considered the reasons given by the appellant why the appeal has not been prosecuted to date. I note that indeed, the lower court file has not been forwarded to the High Court.

The court cannot admit the appeal under section 79B before the lower court file has been received. Though it is the duty of the court to call for the lower court, the Civil Procedure Act 2010, also places a duty on the counsel for the appellant to be pro active and cause the appeal to be placed before a judge for admission within 30 days after filing of the memorandum of appeal.

This court concurs with the counsel for the appellant that before the appeal has been admitted the appellant cannot file a record of appeal. It should, however, be noted that the discretion of the court under section 3A is wide and the court if called upon by the counsel for the respondent or on its own motion can still dismiss the appeal for want of prosecution if good cause is not shown why the appellant has not prosecuted the appeal. In this case, I note that the appellant has already filed a record of appeal and has made some efforts to follow up the position of the lower court file and vide a letter dated 12th November, 2016 had requested the court to be favoured with notification under order 42 Rule 12 of the Civil Procedure Rules.

In those circumstances and considering that the appellant made an effort to file the record of appeal, the court will give him a chance to prosecute the appeal.

The Executive Officer in-charge of Milimani Commercial court to appear before the court on 4/4/2017 and explain why the Lower Court has not been forwarded to the High Court. The order to be extracted and served by the counsel for the appellant.

Orders accordingly.

Dated, Delivered and Signed at Nairobi this 23rd day of March, 2017.

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L. NJUGUNA

JUDGE

In the presence of

..... ***For the Appellant***

..... ***For the 1st Respondent***

..... ***For the 2nd Respondent***