REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 198 OF 2001

COSMAS NDIRANGU NGAE.....APPELLANT/APPLICANT

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT/DEFENDANT

RULING

1. Before this court is the appellant's notice of motion dated 19th May, 2016. It is brought under ***Order 51 rule 1 of the Civil Procedure Rules and section 1B and 3A of the Civil Procedure Act***. The appellant seeks that the orders issued by Hon. K. Ndungu on 15th June, 2015 be set aside and the suit herein be reinstated.

2. The motion is supported by the grounds listed on the body therein and the supporting affidavit of Martin Njeru Nyaga who is the advocate in conduct of this matter on behalf of the appellant. The reasons advanced to have occasioned the dismissal were that the matter was set down for hearing on 26th November, 2013 but was not cause listed on the material day. He stated that upon enquiring why the matter was not listed, he found out that it was because the court cabinets were locked. He stated that he had made several attempts to fix the matter for hearing to no avail and he attached letters dated 30th March, 2016, 23rd November, 2015, 28th July, 2014 and 15th January, 2014 to that effect. That it was until the year 2016 that he found out that the matter was dismissed on 26th November, 2015. He stated that he further noted that there was no affidavit of service or hearing notice for the Notice to Show Cause. He submitted that the appellant should not be punished for the mistake by the registry of taking the file to court on a date it was not fixed for hearing.

3. In response thereto, the respondent filed grounds of opposition dated 12th August, 2016 as follows:

i. That the application is a gross abuse of the court process.

ii. That the application has been brought in bad faith due to the unreasonable, inordinate and inexcusable delay in the matter.

iii. That the applicant has not demonstrated any reasonable and/or justifiable cause to warrant issuance of the orders sought.

iv. That there is no requirement in the Civil Procedure Rules for the court to serve a hearing notice or notice to show cause why a case should not be dismissed for warrant of prosecution.

v. That the suit was properly dismissed and the appellant has not demonstrated that the court's discretion was improperly exercised.

vi. That equity aids the vigilant and not the indolent and consequently, the respondent will be greatly prejudiced if the orders sought are granted.

vii. That the application is frivolous and vexatious and is meant to unnecessarily escalate the costs of this matter.

viii. That accordingly, the application is baseless and lacks merit and as such ought to be dismissed forthwith with costs to the respondents.

4. The learned counsel for the appellant submitted that he was never served with the notice to show cause and that attempts to fix the matter for hearing were frustrated by the missing court file which was unavailable for a long time. He cited the case of ***MWANGI S. KIMENYI V ATTORNEY GENERAL & ANOTHER, [2014] eKLR*** in which the court highlighted the parameters to guide court in considering an application for reinstatement of a dismissed suit. The parameters were said to be as follows:

a. Whether there has been inordinate delay in prosecuting the case;

b. Whether the delay is an abuse of the court process;

c. Whether the delay even if inordinate can be excused; and

d. Whether the delay prejudices the respondent.

Counsel argued that no prejudice will be suffered by the respondent. He further stated that the respondent has not demonstrated how he will be prejudiced.

5. The learned counsel for the respondent urged the court to dismiss the motion. She pointed out to the court the age of the case and that there was undue delay in making an application to reinstate this appeal.

6. In rebuttal, counsel for the appellant submitted that the age of the case has nothing to do with the orders that the appellant is challenging. On the issue of throw away costs, it was submitted that the respondent has not incurred any costs.

7. I have considered the dispositions and submissions by both parties. In determining this motion, I am guided by the principles laid down by Chesoni, J. *[as he then was]* in ***IVITA V KYUMBU [1984] KLR, 441*** wherein he stated as follows:

"The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the Plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the Plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the Plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."

8. There is no doubt that this is an old appeal considering that it was filed in the year 2001. However, a perusal of the court record reveals that this appeal was on 25th June, 2013 fixed for hearing on 26th November, 2013 but it was not listed for hearing on that day. The next time the matter came up before court was on 15th June, 2015 when the same was dismissed for want of prosecution. It was further

contended that no notice to show cause was served on the appellant's advocate for 15th June, 2015.

9. The respondent has not denied the appellant's contention that notice to show cause was not served upon his advocate. There is also no evidence that the same was served and/or given as required under ***Order 42 rule 35 (2)***. The appellant has explained the delay which, he submitted, was caused by the disappearance of the court file when he wanted to fix the matter for hearing. As submitted by the appellant, the defendant has not shown by way of affidavit or otherwise that it is going to suffer any prejudice if the orders are granted.

10. In the premises aforegoing, I find and hold that the application dated 19th May, 2016 has merits and the same is allowed as prayed. The orders issued by Hon A.K. Ndungu on 15th June, 2015 are set aside. The appeal is hereby reinstated for hearing. The costs of the application shall abide the outcome of the appeal. In view of the age of the appeal, it is further ordered that the same should be prosecuted within 120 days from the date of this ruling failing which it shall stand dismissed.

Dated, signed and delivered at Nairobi this 20th day of April, 2017.

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L. NJUGUNA

JUDGE