REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 114 OF 2010

NANDI TEA ESTATES CO. LTD ..…… APPLICANT/APPELLANT

VERSUS

JAMES MAKHUGA OSUMO …….....……. RESPONDENT

RULING

1. The appellant (hereinafter the applicant) moved this court by way of a Notice of Motion dated 7th October, 2016 seeking that the order made on 7th July, 2015 dismissing its appeal for want of prosecution be reviewed and set aside; that upon grant of that prayer, the court admits the appeal and gives directions on its hearing and lastly, that there be provision for costs of the application.

2. The application is expressed to be made under *Section 1A; 1B, 3,3 A* and *80* of the *Civil Procedure Act* and *Order 42 Rule 8(b), Order 45 Rule 1* and *Order 51 Rule 15* of the *Civil Procedure Rules*. It is premised on grounds stated on its face and depositions in the supporting affidavit sworn on 7th October, 2016 by learned counsel *Ms. Abigael Lusinde Khayo.*

3. The applicant contends that there is sufficient cause to warrant a review of the dismissal order and its setting aside. It is the applicant's case that no formal notice to show cause why the appeal should not be dismissed was issued; that there is an error apparent on the face of the record as at the time of the dismissal, the appeal was not ripe for hearing as it had not been admitted and directions had not been taken.

4. The applicant further avers that the delay in the prosecution of the appeal was caused by circumstances beyond its control which included unavailability of dates at the court registry; misplacement of the court file and the lower court's failure to forward its original record to this court.

5. The application is contested by the respondent. There is a replying affidavit sworn on 13th March, 2017 by *Ms. Susan Nabifo*, learned counsel for the respondent.

6. The respondent urged the court to uphold the impugned orders on grounds that at the time of the dismissal, the applicant had not taken any action to progress hearing of the appeal since it was filed on 13th June, 2011; that the applicant should not be allowed to benefit fromits indolence; that allowing the application would cause further prejudice to the respondent who was yet to enjoy fruits of his judgment obtained about seven 7 years ago.

7. On 11th April, 2017, I heard counsels for the applicant and the respondent. Learned counsel *Mr. Isiji* appeared for the applicant while learned counsel *Ms Nabifo* represented the respondent. Both counsels made oral submissions advancing their client's respective positions.

8. I have considered the application, the depositions made on behalf of the parties and the rival submissions. I take the following view of the matter:

Order 42 Rule 35 of the *Civil Procedure Rules* empowers the court to dismiss dormant appeals. *Rule 35 (1)* provides for the dismissal of appeals where no hearing date had been taken within three months after the taking of directions. *Rule 35(2)* which is most relevant to the instant application is in the following terms;

> ***"If within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal".***

9. The law setting out the parameters for review of court orders is set out under *Section 80* of the *Civil Procedure Act* and *Order 45 Rule I* of the *Civil Procedure Rules. Section 80* gives the court general power and discretion to review its orders where no appeal had been filed on terms it deemed just. Needless to say, just like any other judicial discretion, this discretion must be exercised in accordance with established legal principals and the law.

10. Order 45 Rule I of the *Civil Procedure Rules* provides the court with beacons it should follow in exercising its discretion in determining whether or not to allow an application for review. It requires an applicant to fulfill certain conditions before becoming entitled to a review. The applicant must demonstrate that there are new and important matters which were not within his knowledge when the order sought to be reviewed was made or that there is a mistake or error on the face of the record or for other sufficient reason. The court must also be satisfied that the application was filed timeously.

11. Applying the above principles to the present case, the applicant contends there is an error on the face of the record for two reasons;

First, that no notice of the intended dismissal was ever issued before the order was made as required by the law; and, secondly, the dismissal order was based on the mistaken premise that the appeal was ripe for hearing but that no action had been taken to set it down for hearing for a minimum period of one year.

12. I wish to start by pointing out that the dismissal was initiated by the Deputy Registrar of this court during an initiative of the Judiciary styled *Justice@last*. Though the applicant claims that no notice was issued to it even online through the judiciary website, I take judicial notice that during the *justice@last* initiative, all matters scheduled for dismissal were published in the judiciary's website and all cause lists containing cases and appeals scheduled for dismissal were pinned on the court's notice board well before the hearing dates. The causelists contained a notice requiring the parties to attend the relevant court on the scheduled dates to show cause why those matters should not be dismissed for want of prosecution.

13. It is important to note that *Order 42 Rule 35 (2)* does not require personal service of notice of intended dismissal of appeals. It only provides that a notice be issued to the parties. As I have held previously in ***Vishva Builders Ltd V Moi University HCC (ELD) No. 51 of 1999*** and ***Eldoret Steel Mills Ltd V Patrick Ontita Mokuo HCC (ELD) No. 151 of 2010*** the two modes of publication aforesaid constituted sufficient notice to the parties in the affected cases or appeals. In the premises, the claim that the applicant was not issued with notice cannot be sustained.

14. Regarding the claim that the appeal was irregularly dismissed allegedly because it was not ripe for hearing, my perusal of the court record reveals the following; the appeal was admitted on 31st July,2012 and by the time it was dismissed, directions had not been taken. And as directions had not been taken, the applicant's contention that the appeal was not ripe for hearing is infact true. However, *Order 42 Rule 35 (2)* under which the appeal was dismissed does not predicate dismissal to compliance of procedural steps to make the appeal ripe for hearing. The rule envisages dormant appeals which are abandoned after they are filed and served such that no single step is taken towards progressing it for hearing within a minimum period of one year after service of record of appeal. This is so because it is an appellant's primary duty to ensure that the appeal is admitted and listed for hearing within a reasonable time.

15. The record in this case shows that the appeal was filed on 24th June, 2010. It is not disputed that it was served on the respondent on 20th June, 2011 about seven years ago. It was admitted on 31st July 2012. The sad truth is that the applicant simply went to sleep thereafter. Save for limited attempts to have the appeal listed for mention for directions in the year 2012 as can be seen from the annexures to the supporting affidavit, the applicant had not taken any step to set down the appeal for hearing or otherwise facilitate its hearing from year 2012 to the date it was dismissed about three years later. There is no doubt that the applicant was never keen on prosecuting the appeal. It was apparently woken up from its deep slumber by the dismissal of the appeal.

16. The claim that the delay in prosecuting the appeal was caused by misplacement of the court file and/or unavailability of the original record of the lower court is not supported by any evidence. The two letters exhibited by the applicant requesting the Deputy Registrar to help in tracing the court file are dated 19th January, 2016 and 8th August, 2016 long after the dismissal orders were made. The court record also confirms that the original record of the lower court was forwarded to this court on 27th July, 2012 about three years prior to the dismissal of the appeal. There is therefore no truth in the applicant's claim that the said record was unavailable.

17. In view of the foregoing, I am satisfied that the court was correct in dismissing the appeal for want of prosecution. The applicant's delay of about three years in setting down the appeal for directions to facilitate it's hearing was unexplained and inordinate. When delay is not explained, it is inexcusable. See: ***Ivita V Kyumbu [1984] KLR 441.*** It is thus my finding that the dismissal order was made in accordance with the applicable law. There is no mistake or error that is apparent on the court record.

18. In the end, I have come to the conclusion that the applicant has failed to establish any sufficient cause to warrant a review of the orders issued by this court on 7th July, 2015. Consequently, I find no merit in the application and it is hereby dismissed with costs to the respondent.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 25th day of May, 2017.

In the presence of:-

Mr. Langat holding brief for Ms Odwa for the applicant

Sarah Court clerk

No appearance for the respondent