



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 288 OF 2010

KAVILI MBITI..... APPELLANT/APPLICANT

VERSUS

ACADEMIC SERVICES LIMITED.....RESPONDENT

RULING

1. The Appellant/Applicant moved the court vide a Notice of Motion dated 29th June, 2016 under Order 45, Rule 1 of the Civil Procedure Rules, 2010 seeking orders that ;

a. The Orders issued on 6th June, 2016 by this Court dismissing the appeal and ordering costs to the Respondent be set aside and the Appeal be reinstated forthwith and be heard on merits;

b. The Executive Officer, Chief Magistrates' Court Milimani Commercial Courts be ordered to produce the original court file in respect of CMCC NO. 5964 of 2005, the subject of the Appeal herein to this court for further directions of the court; and

c. The costs of the application be provided for

2. It is clear that on 3rd June, 2016, the Court issued a notice to show cause under Order 17 Rule 2 (1) and (4) and Order 42 Rule 35 (2) of the Civil Procedure Rules via the Daily Nation Newspaper in respect of suits which had not been prosecuted for more than a year. The cases listed for dismissal on 6th June, 2016 included the one before the court. The Applicant argues that he was not aware that the matter was listed on that day. He also avers that the delay in having the appeal prosecuted in time should not be attributed to him as all attempts to have the lower court file forwarded to the High Court had been futile and the response had been that the file is not available at the lower court registry.

3. The Appellant has annexed to his Supporting Affidavit, letters written to the registry making follow up on the file. The Appellant further states that the delay was also occasioned by the previous advocates acting for him Lumumba Mumma & Kaluma Advocates , which firm of Advocates he realised in early 2015, was no more and his file was lying dormant.

4. In response, the Respondent filed a Replying Affidavit sworn by MUMO IKUI MWENDWA, the Chief Executive Officer of the Respondent Company wherein, he states that the Applicant filed the Memorandum of Appeal, the subject of this Application on 22nd July, 2010 and since then, it was 6 years without the Applicant taking a meaningful step to prosecute the same. The Respondent also takes note that the Applicant filed his record of Appeal 3 years after filing the Memorandum of Appeal.

5. The Application is erroneously brought under Order 45 Rule 1 of the Civil Procedure Rules. This Order

provides for review of decrees and Orders where there is discovery of new and important matter or evidence that was not within the Applicant's knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record. The instant application seeks reinstatement of Appeal which had been dismissed for want of prosecution. Nonetheless this is a technicality which can be overlooked by this Court in the spirit of article 159(2)(d) of the Constitution.

6. The Applicant's main contention is that he was not served with the notice to show cause why the Appeal should not be dismissed. As noted earlier, the notice in the instant case was through a publication in the Daily Nation from where the Respondent came to learn of the same. The said notice was published by the Civil Division, Nairobi on 3rd June, 2016 as per the annexure "mim1" annexed to the Respondent's Replying Affidavit. I take notice that this was proper service which applied to multiple cases which were creating a backlog within the judiciary.

7. The said notice was given under Order 42 Rule 35 (2) of the Civil Procedure Rules concerning dismissal of Appeals for want of prosecution. The Rule provides that, *"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."*

8. The subject Memorandum of Appeal was filed and served in the year 2010 and the Record of Appeal filed in the year 2013 whereas the Applicant appear to have started following up on the matter in the year 2015. It is clear from the line of events that the Appellant started following up on the matter five years after filing and serving the Memorandum of Appeal.

9. The Appellant blames the lower court for the delay in having this case prosecuted for failure to forward the lower court file to the High Court. The Appellant who is represented by an advocate for that matter is aware or ought to be aware that there are avenues of moving the court in such a situation for the court to address the issue of the missing file and the appropriate directions would have been given by the Court. It is only after the Appeal had been dismissed that all these allegations are coming up. The Appellant did not have to wait until the Appeal had been dismissed for him to raise the issue of the missing Lower Court file.

10. No good reasons have been given by the Appellant for failure to prosecute the Appeal. However, in the interest of justice, this court shall give him a chance to prosecute the Appeal considering that he has already filed a record of the Appeal.

11. In the upshot, the application dated 29th June, 2016 is hereby dismissed. Costs shall abide the outcome of the Appeal.

This being an old matter, it is further ordered that, the Appeal be prosecuted within 90 days from the date of this ruling. Failing which, it shall stand dismissed.

Dated, signed and delivered at Nairobi this 28th day of June, 2017.

.....

L. NJUGUNA

JUDGE

In the presence of

..... *for the Appellant/Applicant*

..... *For the Respondent*