



REPUBLIC OF KENYA

THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO 178 OF 2017

JACKSON NDEREBA.....APPELLANT

-VERSUS-

RESMA COMMERCIAL AGENCIES (R).....RESPONDENT

RULING

1. The application before me seeks orders to set aside an order issued by this court on 14th March 2017 to dismiss the appeal. It is brought on the grounds that the appellant was keen on prosecuting the appeal; that the appellant's counsel failed to attend court to defend the dismissal owing to bereavement, and; that the mistake of the appellant's counsel should not be visited on the appellant.
2. The application is supported by the affidavit of **Nancy Njoroge** advocate sworn on 14th June 2017. She deposes that the appeal was listed for dismissal on 14th March 2017 and that she was then attending her brother's burial.
3. The application is opposed by the respondents. **Samuel Kimani Maigua** who is the managing director of the 1st respondent company has sworn a replying affidavit stating *inter alia* that the appellant's appeal lapsed prior to 13th February 2015 as the appellant had been directed by the court on 7th November 2014 to file the appeal within 45 days failing which the appeal would stand dismissed. He further avers that on the 14th March 2017 when the appeal was listed for dismissal one **Ms. Tarus** who held brief for the appellant's counsel informed the court that the delay in filing the appeal had been caused by the delay in typing of proceedings.
4. The application was argued orally before me on 26th July 2017. **Ms. Njoroge** for the appellant submitted that the court had granted the appellant 45 days to file the appeal and that they were not able to do so as the lower court file had been recalled by the Deputy Registrar of the court for perusal in a related matter. She further submitted that her absence from court on 17th March 2017 when the appeal was dismissed was inevitable as she was bereaved.
5. **Mr. Mbeche** for the respondent opposed the application on grounds that dismissal of the appeal on 17th March 2017 was in error as there was no appeal, the same having stood dismissed by the operation of the orders of the court granted on 7th November 2014. By the said order the court had directed the appellant to file the appeal within 45 days. Counsel argued that unless leave was sought to enlarge time, the appeal stood dismissed.

6. It is clear from the record that the appeal had come up for dismissal on 7th November 2014 when the court (**Mulwa J**) gave the appellant 45 days to file the record of appeal. On 14th March 2017 the Deputy Registrar of the court issued notice to show cause why the appeal should not be dismissed under **Order 42 Rule 35 (2)** of the **Civil Procedure Rules**. The said notice came up for hearing on 14th March 2017 when the court disallowed the appellant's request for additional time and dismissed the appeal for want of prosecution.

7. The applicant's counsel argues that had she been present in court, she would have argued against dismissal of the appeal. She explained that she was bereaved and sought assistance of another counsel to hold brief. I am minded to temper justice with mercy and accept that she possibly may have argued her client's case better had she been present. I would therefore exercise discretion under **Section 95** of the **Civil Procedure Act** to extend time and consider the question whether or not the appeal should be reinstated on merit.

8. There is no dispute that **Order 42 Rule 35 (2)** gives the registrar the power to issue notices for dismissal of dormant appeals. The principles upon which the court considers whether or not an appeal should be dismissed are also clear and settled. They are:

- i. whether there has been inordinate delay on the part of the plaintiff in prosecuting the case;**
- ii. whether the delay is intentional, contumelious and, therefore inexcusable;**
- iii. whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the defendant;**
- iv. whether the plaintiff has offered a reasonable explanation for the delay;**
- v. even if there has been delay, what does the interest of justice dictate.**

9. In the present case, the memorandum of appeal dated 9th October 2012 was filed on 16th October 2012. Parties appeared in court on 7th November 2014 and a 45 days window was given to the appellant. Nothing seemed to have happened until 14th March 2017 when parties were again in court in response to a dismissal notice. On both occasions, the appellant's counsel cited the delay in typing of proceedings as the reason for the delay in filing the appeal.

10. From this record it is apparent that there has been a delay of 5 years since the memorandum of appeal was filed. That by no means is a short time. There is no demonstration of the effort made by the appellant to move the appeal forward except a feeble attempt to enquire the status of the typing of the proceedings of the lower court. In the circumstances, I can only make a finding that there has been indolence on the part of the appellant.

11. The question I would ask however is whether the interest of justice can still be served in this appeal despite the delay. It is apparent to the court that the appellant has been shocked into action by the present notice and is now eager to pursue the appeal. The court can in the circumstances exercise discretion and excuse the lapses of the appellant and direct that the appeal be prosecuted expeditiously. **See Nicholas Kiptoo Arap Salat Vs. Independent Electoral and Boundaries Commission & Others (2013) eKLR.**

12. In the premises the appeal is reinstated for hearing on the following conditions:

- i. The appellant shall file the record of appeal within 30 days.**
- ii. The appellant though successful in the present application shall not be entitled to costs having occasioned the delay.**

Orders accordingly.

Ruling delivered, dated and signed in open court

This 30th day of November 2017

R. LAGAT KORIR

JUDGE

In the presence of:

C/A Emojong

Mr. Mureithi holding brief for Njoroge for applicant

Mr. Mbeche for respondent