



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NUMBER 784 OF 2006

**JARED OMBARAIA OIMA (Suing as the legal Representative of the Estate
of The late HARRISON ODHIAMBO OIMA. APPELLANT**

VERSUS

MUIGAI MUTUTA NJAU. RESPONDENT

RULING

By a Notice of Motion dated 28th October, 2015, the Appellant/Applicant has moved this Honourable Court for the following orders inter alia: -

1. THAT this honourable be pleased to set aside and/or vary the orders made on the 16th June, 2015, dismissing the Appeal and order that the Appeal be reinstated.
2. THAT consequent to prayer two (2) above, the Honourable court be pleased to order the expeditious hearing of the reinstated Appeal.
3. THAT costs of the Application be provided for.

The Motion is brought under Order 51 Rules 1 and 3, Order 12, Rule 7 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act.

It is premised on the grounds set out on the body of the Application which are that failure to attend court on 16th June, 2015 by the Appellant/Applicant and/or his Advocate was not deliberate but due to lack of service of the Notice to Show Cause, the Appellant undertakes to expeditiously prosecute the Appeal if the same is reinstated, in the interest of justice the Appeal should be reinstated for hearing on merits and that this Honourable court has jurisdiction to consider the Application under the law.

It is supported by the Affidavit of Julius Nyakiangana Advocate sworn on the 28th October, 2015 and filed in court on the 2nd November, 2015.

In summary the Appellant/Applicant's case is that the Appeal herein arises from the ruling of the court in CMCC No. 152/2003 which dismissed the Appellant's Application seeking leave to amend plaint.

The Memorandum of Appeal was filed on 14th November, 2006 and thereafter record of Appeal was filed on the 5th June, 2012.

That on the same day the counsel for the Appellant forwarded a letter dated 29th May, 2012 to the registry requesting that the matter be listed for directions and in the year 2013, Counsel and/or his representative visited the registry when he was informed that the Appeal had not been admitted.

On various dates thereafter he invited the counsel for the Respondents to fix a date for directions but the court file could not be traced which prompted him to write a letter dated 5th August, 2015 to the Deputy Registrar requesting for the file to enable him fix the Appeal for directions.

It was not until latter on when he visited the Registry with another letter dated 11th October, 2015 when the registry personnel retrieved the file and upon perusal, he learnt that the Appeal was on the 16th June, 2015 dismissed for want of prosecution. Upon further perusal of the file, it was clear that the Notice to Show Cause was never served in this office.

The Respondent has opposed the Application vide a Replying Affidavit sworn by Esther Muigai Advocate on 30th November, 2015 and filed in court on the 30th November, 2015.

The Deponent avers that as per the provisions of Section 79B of the Civil Procedure Act when an Appeal has not been admitted for hearing it then means the same has been summarily rejected by the court and as such it cannot be fixed for directions. Thus, the letters that the Appellant wrote of invitation as stated in paragraph 9 of their Supporting Affidavit were not relevant as the Appeal had not been admitted for hearing.

Regarding the letters dated 5th August, 2015 and on 11th October, 2015 they are of no consequence since by the time they were written, the Appeal had already been dismissed.

On the issue of the Notice having not been served upon the Appellant's counsel, the Respondent's counsel deponed that over and above issuing a Notice to Show Cause the court listed all the cases that were coming up for dismissal in the cause lists of each particular day and had publicized the exercise widely.

The Counsel for the Respondent further deponed that under Order 42 Rule 35 (2) pursuant to which the Appeal herein was dismissed there is no provision for setting aside an order for dismissal for want of prosecution.

She further stated that there is no explanation why the Appellant/Applicant took six (6) years between filing the Memorandum of Appeal and the Record of Appeal and a further 2 years before he could take action on filing the record of Appeal.

She concluded by saying that the delay has not been explained and that the Appellant has not been vigilant in prosecuting the Appeal and urged the court to dismiss the Application.

I have carefully read the Application together with the supporting Affidavit, the Replying Affidavit and the submissions made by the counsels.

Counsel for the Appellant/Applicant has taken issue with the Replying Affidavit which he submitted was filed out of time to which the counsel for the Respondent explained and the reason given was that she was bereaved.

Counsel for the Respondent also took issue with the Appellant's, Application for the reason that it has been brought under the wrong provisions of the law.

In dealing with both issues, I wish to refer to Article 159 (2) of the Constitution of Kenya 2010, and excuse both parties for their failure to comply with the law which to me are mere legal technicalities which do not affect substance of the matter.

I have also noted the submissions by the counsel for the Respondent with regard to the admission of the Appeal. I have perused the court file and record clearly shows that the Appeal was not admitted under Section 79B of the Civil Procedure Act.

Under this Section the Court should either admit or summarily reject the Appeal. There is nothing on record to show that the Appeal was summarily dismissed which therefore means that no directions were given under Section 79B. Before the appeal is admitted as aforesaid, the Appellant's hands are tied and he cannot legally take any step towards prosecuting the same.

I am aware that the court has inherent powers to dismiss suit for want of prosecution as was laid out in the case of **Mukisa Biscuits Manufacturing Company Vs West End Distributors E. A 696** but in the face of the provisions of Section 79(B) of the Civil Procedure Act, I am of the view that the Appeal herein ought not to have been dismissed for want of prosecution before directions could be given by the court under Section 79B of Civil Procedure Act.

In the premises aforesaid I will make the following orders: -

- a) The Notice of Motion dated 28th October, 2015 be and is hereby allowed.*
- b) The order for dismissal of the Appeal herein made on the 16th June, 2015 be set aside.*
- c) The Appeal herein be and is hereby reinstated.*
- d) The Appeal herein be and is hereby admitted to hearing and the appeal to be prosecuted within the next four (4) months from today, failure to which it shall stand dismissed.*
- e) Costs of the Application be in the cause.*

Dated, signed and delivered at Nairobi this 28th day of January, 2016.

.....

L. NJUGUNA

JUDGE

In the presence of

..... *for the Appellant.*

..... *For the Respondent.*