REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 558 OF 2009

GEORGE NGUGI NJUGUNA. …… APPELLANT

VERSUS

JEREMIAH M NJEHU. ……..…… RESPONDENT

R U L I N G

The Applicant/Appellant has moved the court by way of a Notice of Motion Application dated 11th July 2014. The same is brought under Sections 3, 3A, Order 42 Rules 20 and 21 of the Civil Procedure Rules and all other enabling provisions of the law.

The Applicant seeks for the following orders: -

1. Spent
2. That the Honourable Court be and is hereby pleased to vary and set aside its orders issued on 3rd July, 2014 dismissing the appeal herein for want of prosecution and do re-admit the appeal and grant the Appellant an opportunity to prosecute his appeal and reinstate the Orders of stay of execution.
3. That the Honourable Court be and is hereby pleased to vary and enlarge the time within which the Appellant was to file and serve his written submissions pursuant to the orders of 28th February, 2014.
4. That the costs of this application be cost in the cause.

The Application is premised on the grounds set out on the body of the same and it's supported by the annexed affidavit of Richard Mobisa Ongegu sworn on the 11th day of July, 2014.

The Appeal herein was filed on the 9th day of October, 2009 and on the 28th February, 2014, the court issued directions on the hearing of Appeal after the same was admitted on 19th September, 2011 and after directions were given of 28th February, 2014.

The Appellant was granted leave to file a further supplementary record of Appeal 30 days from the 28th February, 2014 which he duly filed. Directions were given that parties do file their written submissions and the Appellant was given 30 days within which to do so but failed to do so allegedly because the office file was filed away after obtaining the court orders in High Court Misc. 392 of 2009 and the Advocate handling the matter failed to diarize the same in his diary to the effect that the case was coming up on 3rd July, 2014 hence his failure to attend court when the matter was called out for hearing and in his absence, the same was dismissed.

It is deponed that failure by the Appellant's counsel to attend court when the Appeal was dismissed was not deliberate but the same was caused by an inadvertent mistake on his part to diarize the hearing date in his dairy. He only came to learn about the dismissal order through a text message by a colleague namely Mr. Amuga who happened to be in court and heard his name being mentioned in the proceedings and he informed him of the orders.

He urges the court to grant the Appellant another chance as he was not aware of the hearing date of 3rd July, 2014.

The Respondent has opposed the Application by way of a replying affidavit sworn by Victoria Wambui on the 15th December, 2014, wherein she depones that the Application is frivolous, vexatious and the same lacks merit.

He depones that directions on filing of submissions and the timelines within which to do so were issued the 28th February, 2014 in the presence of counsel for the Appellant and the court then directed that the hearing would proceed by way of highlighting of the said submissions on the 3rd July, 2014.

He contends that allegations by the counsel for the Appellant that he failed to diarize the hearing date are part process of sheer selective memory of the orders issued to suit his own whims. According to him, the laxity in prosecuting the Appeal is nothing new as even the Appeal itself was lodged late and the Appellant had to seek leave to enlarge the time to file the Memorandum of Appeal and that even after filing the Appeal he only woke up when the Respondent proceeded to execute the judgment when he filed an application for stay of execution pursuant to which he was granted orders of stay of execution which he has been enjoying to date and thus the main suspicion as to the laxity in prosecuting the Appeal.

It was further deponed that the laxity in prosecuting the Appeal was portrayed in the fact that since 11th November, 2009 there was no action in the matter for about three years and vide a letter dated 21st February, 2011, the Respondent requested the Deputy Registrar to list the matter for dismissal and though it was listed for Notice to Show Cause why it should not be dismissed, the court granted the Appellant more time to prosecute his Appeal. Several other notices for dismissal dated 19th September, 2011, 11th September, 2012, 30th November, 2012, 18th March, 2011 and 8th July, 2011 were issued but the court was still very lenient by not dismissing the Appeal. The court issued a date for directions on 25th January, 2013 on which date the court was not sitting and it's surprising that the Appellant had no initiative to re-fix the date for directions and it is the Respondent who re-fixed the hearing date for directions on 31st May, 2013.

He depones that if the Appellant failed to diarize the matter as alleged, no reason was given why he did not file his submissions because the court attendance of 3rd July, 2014 was merely meant to highlight the same. He further states that there is no affidavit by the Appellant himself in support of the Application and that the Advocates on record are therefore pursuing the appeal for academic purposes as it's clear that the Appellant lost interest in the matter a long time ago. He urges the court to dismiss the Application as it lacks merit and it's a sheer waste of the court's time.

I have considered the Application, the Affidavits, the submissions filed by both counsels and the authorities cited. The submissions herein reiterates the contents of their respective Affidavits and I would not, therefore repeat the contents of the same.

The Application has been brought under Order 42 rules 20 and 21 of the Civil Procedure Rules among other orders.

Order 42 Rule 20 provides: -

> ***"Where on the day fixed or on any other day to which the hearing may be adjourned the Appellant does not appear when the Appeal is called on for hearing, and has not filed a***

declaration under Rule 16 the court may make an order that the Appeal is dismissed."

While Order 42 Rule 21 provides: -

"Where an appeal is dismissed under Rule 20 the Appellant may apply to the court to which such Appeal is preferred for the re-admission of the Appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the Appeal was called or for hearing, the court shall re-admit the Appeal on such terms as to costs or otherwise as it thinks fit"

I would wish to start by pointing out that the Appeal herein was not dismissed under Order 42 Rule 35. Under this Rule 35(1), the Respondent can apply for dismissal of an Appeal for want of prosecution if within three months after giving of directions under Rule 13, the Appeal shall not have been set down for hearing by the Appellant. On the other hand, under Rule 35(2) the Registrar shall on notice to the parties list the Appeal before a Judge in Chambers for dismissal if, within one year after the service of the Memorandum of Appeal, the appeal shall not have been set down for hearing. Dismissal of Appeal under this Rule (35) is called dismissal for want of prosecution while dismissal under Order 42 Rule 20 is referred to as dismissal of Appeal for the Appellant's default. When an Appeal has been dismissed under Order 42 Rule 20 the court can have it re-admitted where it is proved that the Appellant was prevented by any sufficient cause from appearing when the Appeal was called out for hearing.

In the Application before me, all what the Appellant is required to show is that there was sufficient cause of his failure to attend court. The explanation given by his Advocate in the Affidavit in support is that he failed to note the hearing date in his diary. He further depones that the Appellant did not attend court on that day because he was not aware of the hearing date. I understand this to mean that the Advocate failed to notify him of the hearing date.

The Respondent has raised the issue that the Affidavit in support was sworn by the Advocate and not by the Appellant himself. In this regard, my view is that the Advocate has been instructed in the matter and the facts that are contained in the Affidavit are within his knowledge and therefore, it was in order for him to swear the same.

The counsel for the Appellant made a mistake by not diarizing the matter. In the case of **Belinda Murai & Others Vs Amos Wainaina , [1978] LLR 2782** Madan J.A. (as he then was) described what constitutes a mistake in the following words: -

"A Mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by Senior Counsel. Though in the case of Junior Counsel, the court might feel compassionate more readily. A blunder on appoint of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of law and adoption of a legal point of view which courts of appeal sometimes overrule…."

In the Case of **Trust Bank Vs Portway Stores (1993) Limited & 4 others,** in which the subject matter was setting aside a default judgment, the learned judge thus stated: -

"I may state straight away that the principles applicable to the setting aside of default judgments which are regular on their face – as is the judgment in this case – are not in doubt. The Court has an unfettered discretion. Such discretion is exercised in order to do justice as between the parties. In weighing the interests of justice the Court has to consider, among other things, the reasons, if any, why the particular default was committed. The conduct of the parties and in particular such conduct as has a bearing on the course of justice in the case, whether the applicant has a defence on the merits, whether the respondent can be compensated by costs for any delay that may be occasioned by the setting aside of the judgment, and of course it should always be borne in mind that to deny a person a hearing should be the very last resort of a Court

of justice."

Setting aside of Orders as sought in this case is discretionary. The discretion of the court is wide and its entrenched in Sections 1A, 1B, 3A of the Civil Procedure Act. In the case of **Alimohamed Haji Suleiman Body Builders Ltd Vs Jivraj & Another (1990) KLR 224**, Justice Bosire held inter alia: -

"The exercise of judicial discretion to set aside is unlimited provided it is exercised judicially… The court is vested with the discretion so that in the exercise of it, injustice or hardship resulting from …. Inadvertence or excusable mistake or error may be avoided."

The Judge went on to say: -

> ***"It was imprudent on the part of the Advocate to have left the country and remained away for such a long time without any adequate arrangements as to the conduct of his case…. That was however the type of mistake which a court can excuse in order to do justice to the parties in particular case."***

Lastly, in the case of **Philip Chemowolo & Another -Vs- Augustine Kubede (1982-88) KAR 103 at 1040**, Apalo J. A (as he then was) poised: -

> ***"Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline."***

The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights… it would seem that the main purpose of litigation namely the hearing and determination of disputes, should be fostered rather than hindered. See the case of **Branco Arabe Espanol Vs Bank of Uganda (1999) 2 EA 22 (SCU)**. The same sentiments were echoed in the case of **Bamanya Vs Zaver (2002) 2EA 329 (CAU)** where the Judge observed: -

> ***"The other principle governing the application …. is that administration of justice requires that all substances of disputes should be heard and decided on merits and for the aforesaid reasons, errors or faults of the counsel should not necessary debar a litigant from enforcing his rights."***

The court went on to say, the right to a hearing has always been a well protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality. The Appellant in this case was denied a hearing, we have no choice but to allow this appeal as disallowing the same would go against the spirit of the overriding objectives and also the provisions of Article 159 of the Constitution. I would have no reason to disagree with the finding by the learned Judge.

Before I conclude, I must state and strongly so that the Appellant has not been keen in prosecuting the Appeal. It is an old matter which should have been concluded by now, but purely in the interest of justice, I will give the Appellant a chance to prosecute his appeal.

In the upshot, the Application dated 11th July, 2014 is hereby granted and I make the following orders: -

> ***1. The orders issued on the 3rd day of July, 2014 by Justice Onyancha dismissing the appeal herein for want of prosecution are hereby set aside.***
>
> ***2. The Appeal is hereby re-admitted to hearing and the orders of stay of execution are also***

reinstated.

3. The Appellant do file and serve written submissions within fourteen (14) days from the date hereof.

4. The Appellant to pay costs of Ksh.15,000/- to the Respondent within twenty one (21) dates from the date hereof.

5. Failure to comply with orders 3 and/or 4 above, the Appeal shall stand dismissed.

Dated, signed and delivered at Nairobi this 25th day of February, 2016.

……..

L NJUGUNA

JUDGE

In the presence of

…… *for the Appellant*

…….. *for the Respondent*