



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CIVIL APPEAL NO. 21 OF 2011**

**KARAYA MWANGI .....APPELLANT/RESPONDENT**

**VERSUS**

**JOHN GITAHI KABUE.....RESPONDENT/APPLICANT**

**RULING**

The Respondent/Applicant seeks have this appeal dismissed for want of prosecution mainly because the appellant has not taken steps to prosecute it since it was filed on 1<sup>st</sup> July 2015. The Applicant also states that on 16<sup>th</sup> September 2015 the Appellant was granted leave to file the decree within 30 days but failed to do so, hence evidence of laxity on his part.

The Appellant states that the decree was obtained on 23<sup>rd</sup> May 2016 and a supplementary record of appeal was filed on 25<sup>th</sup> May 2016. The applicant states that the decree has been ready since 2011 hence the reason given by the Appellant is not true. I note that the copy exhibited by both parties was certified on 23<sup>rd</sup> May 2016 the same day the Respondent states it became available even though its dated 8<sup>th</sup> April 2011. There is no document by either party showing when the decree was applied for or paid for or collected from the court but one thing is clear to me, that is, an Appellant is required to avail a certified copy of the decree or order appealed against and that the copy exhibited by both sides was certified on 23<sup>rd</sup> May 2016, a clear indication of when it became available.

Regarding the alleged laxity on the part of the Appellant, find it fit to recall the words expressed by the court in *Utalii Transporters Co. Ltd & Others vs NIC Bank & Another*<sup>[1]</sup> where it was stated *inter alia* that:-

*"the first intuitive feeling one gets is that the offending proceeding should quickly be removed out of the way of the innocent party. But, the law prohibits a court from such impulsive inclination, and requires it to make further inquiries into the matter under the guide of defined legal principles on the subject of dismissal of cases for want of prosecution; a view which is undergirded by the fact that dismissal of a suit without hearing the merits is draconian act which drives the plaintiff from the judgement seat.*

*It is, therefore, a matter of discretion by the court.....Accordingly, I will discern the principles which the law has developed to guide the exercise of discretion by the court in an application for dismissal of suit for want of prosecution.*

*These principles are:-*

*a. Whether there has been inordinate delay on the part of the plaintiffs in prosecuting the case;*

- b. Whether the delay is intentional, contumelious and, therefore, inexcusable;
- c. whether the delay is an abuse of the court process;
- d. whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the defendant;
- e. what prejudice will the dismissal occasion the plaintiff?;
- f. whether the plaintiff has offered a reasonable explanation for the delay;
- g. Even if there has been delay, what does the interest of justice dictate; lenient exercise of discretion by the court?

Section 3A of the Civil Procedure Act[2] provides that ‘Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.’

In my view, the court is not powerless to grant relief when the ends of justice and equity so demand, because the powers vested in the court are of a wide scope and ambit.[3] The inherent power, as observed by the Supreme Court of India[4] “has not been conferred on the court; it is a power inherent in the court by virtue of its duty to do justice between the parties before it.” Lord Cairns[5] stated as follows:-

*“One of the first and highest duties of all, Courts is to take care that the act of the court does no injury to any of the suitors and when the expression 'Act of the court' is used it does not mean merely the act of the primary court, or of any intermediate court of appeal, but the act of the court as a whole from the lowest court which entertains jurisdiction over the matters up to the highest court which finally disposes of the case.”*

The fundamental duty of the court is to do justice between the parties. It is, in turn, fundamental to that duty that parties should each be allowed a proper opportunity to put their cases upon the merits of the matter. It is fundamental principle of natural justice, applicable to all courts whether superior or inferior, that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case. If this principle be not observed, the person affected is entitled, *ex debito justitiae*, to have any determination which affects him set aside. Discussing the nature and objects of the inherent powers of the court, Sir Dinshah Mulla[6] observes that:-

*“..... The court has, therefore, in many cases, where the circumstances so require, acted upon the assumption of the possession of an inherent power to act **ex debito justitiae**, and to do real and substantial justice for the administration, for which alone, it exists. However, the power, under this section, relates to matters of procedure. If ordinary rules of procedure result in injustice, and there is no other remedy, they can be broken in order to achieve the ends of justice.....”*

Discretion vested in the court is dependent upon various circumstances, which the court has to consider among them the need to do real and substantial justice to the parties to the suit.[7] Discretion must be exercised in accordance with sound and reasonable judicial principles.

The King’s Bench in *Rookey’s Case*[8] stated as follows:-

*“Discretion is a science, not to act arbitrarily according to men’s will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a*

*judicial capacity is by the constitution entrusted with.”*

As was held in *Agip Kenya Ltd vs Highlands Tyres Ltd*<sup>[9]</sup> the process of the judicial system requires that all parties before the court should be given an opportunity to present their cases before a decision is given. The following observation by the Privy Council<sup>[10]</sup> has been consistently accepted by the courts as correct statement of law. The Privy Council observed:-

*"All rules of court are nothing but provisions intended to secure the proper administration of justice, and it is therefore essential that they should be made to serve and be subordinate to that purpose,....."*

In the leading English case of *Cropper v. Smith*,<sup>[11]</sup> Brown, L.J. stated as follows:-

*"It is a well established principle that the object of the courts is to decide the rights of the parties and not punish them for mistakes they make in the conduct in their cases by deciding otherwise than in accordance with their rights ... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct if it can be done without injustice to the other party. Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy,....."*

Writing on judicial power, Chief Justice John Marshall wrote the following on the subject:-

*"Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law."<sup>[12]</sup>*

I am persuaded by the principles laid down in the case of *Utalii Transporters Co. Ltd & Others vs NIC Bank & Another*<sup>[13]</sup> cited above. True, *there has been inordinate delay on the part of the appellant in prosecuting the appeal*; but on the other hand the supplementary record of appeal has already been filed and that shows that the appellant has woken up from his slumber and is ready to be heard.

Though to my mind the delay has not been sufficiently explained, I find nothing to show that the delay is intentional, contumelious and, therefore, inexcusable nor is there anything to suggest abuse of the court process. Further I am not persuaded that the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Respondent if he appeal is listed for hearing; in fact I hold the view that dismissing the appeal without affording the appellant an opportunity to be heard will occasion serious prejudice to the appellant and will amount to driving a litigant from the seat of justice without hearing him. I have already stated that the delay has not been satisfactorily explained, but the interests of justice dictate lenient exercise of the discretion of the court in favour of the appellant.

I hold the view that it would be unjust and indeed a miscarriage of justice to deny a party who has expressed the desire to be heard the opportunity of being heard especially so when the party has expressed a desire to be heard. In this regard I find useful guidance in the decision rendered in the case of *Richard Nchapai Leiyangu vs IEBC & 2 others*<sup>[14]</sup> as follows:-

*“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”*

A similar position was held by the court of appeal in the case of *Cecilia Wanja Waweru vs Jackson Wainaina Muiruri*<sup>[15]</sup> where the court allowed an application to reinstate an appeal that had been dismissed for want of prosecution.

I also find help in the position held by the court of appeal in the case of *Wenendeya vs Gaboi*<sup>[16]</sup> where the court in reinstating an appeal that had earlier been dismissed for non-attendance stated that disputes ought to be determined on merits and that lapses ought not necessarily debar a litigant from pursuing his rights.

In conclusion, I find that this is a proper case for this court to exercise its discretion in favour of the appellant. Accordingly, I refuse the application dated 4<sup>th</sup> May 2016 and make the following orders:-

*a) **That** the Respondents application dated 4<sup>th</sup> May 2016 be and is hereby dismissed.*

*b) **That** the appellant is directed to fix a date for directions before a judge within 30 days from the date of this order in default of which this appeal shall stand dismissed.*

*c) No orders as to costs.*

Orders accordingly. Right of appeal **30** days

Signed, Delivered and Dated at Nyeri this 21<sup>st</sup> day of September 2016

**John M. Mativo**

**Judge**

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[1] {2014}eKLR

[2] Cap 21, Laws of Kenya

[3] See Mamraj vs Sabri Devi, AIR 1999 P & H 96

[4] In Raj Bahadur Ras Raja vs Seth Hiralal AIR {1962} AC 527

[5] In Roger Vs Comptoir D' Escompts De Paris

[6] The Code of Civil Procedure 18th Edition Reprint 2012

[7] See Sir Dinshah F. Mulla, Supra, at page 1381.

[8] [77 ER 209; (1597) 5 Co.Rep.99]

[9]{2001} KLR 630

[10]Ma Shwe Mya v. Maung Mo Hnaung (1933) 35 Bom. L.R. 569

[11] (1884) 29 Ch D 700 7 (1878) 10 Ch. D 393

[12]Osborn V. Bank of the United States, 22 U. S. 738 {1824}.

[\[13\]](#) {2014}eKLR

[\[14\]](#) Civil Appeal No. 18 of 2013

[\[15\]](#) Civil Appeal no. 49n of 2013, Nyeri Court of appeal,

[\[16\]](#) {2002}2EA 662