REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 113 OF 2007

K. G. PATEL & SONS LTD…….APPELLANT/APPLICANT

VERSUS

JOHN KABUKURU GITURO…….....RESPONDENT

RULING

Before me for determination is a notice of motion dated 24th May 2016, filed by the Appellant (hereinafter referred to as the applicant) seeking orders that this court be pleased to set aside the orders dismissing this appeal for want of prosecution on 6th July 2015 and reinstate the same for hearing.

The application is expressed under the provisions of Sections **3A** of the Civil Procedure Act[1]and Order **12** Rule 7, Order **42** Rule **21** of the Civil Procedure Rules and all other enabling provisions of the law. The application is premised on the grounds stated on the said application and the supporting affidavit of the Applicants advocate **Francis Manthi Masika** a annexed thereto. Essentially, the main grounds relied upon is that counsel was not served with the Notice to show Cause and as a consequence he did not attend court nor did the Respondents advocate attend. Further, counsel argues that the Respondent will not suffer any prejudice if the orders are granted and that the appellants ought to be afforded an opportunity to be heard.

The application is vehemently opposed. The Respondent states in his replying affidavit that the appellant has lost interest in the matter, that the appellants advocates previously wrote to court asking for the case to be listed for notice to show cause why it ought not be dismissed for want of prosecution, and it was listed on two occasions and on both instances the appellant was allowed by the court to remedy the situation, and that the court on its own motion issued the notice in question and since no cause was shown, the appeal was dismissed. The Respondent reiterates that there was inordinate delay in prosecuting the appeal on the part of the Appellant which runs to 7 years.

At the hearing of the application, the applicants advocate adopted their written submissions filed on 29th August 2016 and reiterated that no steps could be taken before the appeal was admitted and cited delay in forwarding the lower courts file and it was only on 23rd July 2015 that they were informed that the lower courts file had been forwarded and managed to file the record of appeal on 9th April 2015 and the appeal was dismissed on 6th July 2015.

The applicants' advocate maintained that they never received the notice to show cause, hence the reason why there was no attendance. There is absolutely nothing in the court file to show that either of the parties were served with the notice to show cause. I find that there is nothing to demonstrate that the applicants advocate received the notice as required, hence counsel for the applicant cannot be blamed for non-attendance to show cause.

Counsel for the Respondents submitted that notice was publicised in the official website and through the print media and cited the case of *Neptali East Africa Ltd vs Investments & Mortgages Bank Ltd*[2]where the court citing previous decisions found delay to be inexcusable. The delay in the present case has in my view been explained nor was there a delay in filing the present application as in the decisions cited in the foregoing cases. Further, counsel for the Respondent also cited decisions in support of the argument that Article 159 (2) (d) of the constitution is no panacea for all procedural shortfalls. In my view, the applicants case is not about procedural technicalities but is premised on whether or not the applicant has

offered sufficient reasons for failing to attend court for the notice to show cause and whether there is a reasonable basis to reinstate the appeal for hearing. Another fundamental issue to mention is that the relief sought is basically a matter of courts discretion as discussed below and the manner in which the discretion ought to be exercised.

In my view, this court has jurisdiction to reinstate an appeal dismissed under the above provision. Section **3A** of the Civil Procedure Act[3] 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.[4] The inherent power, as observed by the Supreme Court of India in[5]"*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** in *Roger Vs Comptoir D' Escompts De Paris**[6]* 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 justiciae*, to have any determination which affects him set aside. Discussing the nature and objects of the inherent powers of the court, *Sir Dinshah Mulla* in *The Code of Civil Procedure*[7]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 justiciae**, 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....."*

In considering the question whether **inherent powers** should be exercised for the ends of justice, the **court** would take into account relevant considerations, such as, the order impugned before the **court**, injustice caused to the applicant, remedy available to the aggrieved party, inconvenience and unnecessary expenses likely to be burdened on the parties, multiplicity of proceedings which can be avoided and other such matters.

Every **court** of law is constituted for the purpose of administering justice between the parties and, therefore, must be deemed to possess, as a necessary corollary, all such **powers** as may be necessary to do the right and undo the wrong in the course of administration of justice. **Inherent powers** of the **court** are complementary to those **powers** and the **court** is free to exercise them for the ends of justice or to prevent the abuse of the process of the **court**. The reason is obvious.[8] Legislature is incapable of contemplating all the possible eventualities which may arise in future litigation. **Inherent powers** come to the rescue in such unforeseen circumstances. They can be exercised *ex debito justitiae* (as a matter of course) in the absence of express provisions in the Code. The **inherent power** has not been conferred upon the **Court**; it is a **power inhere**nt in the **Court** by virtue of its duty to do justice between the parties before it. Thus, this **power** is necessary in the interests of justice. The **inherent power** has its roots in necessity and its breadth is coextensive with the necessity.[9] The provisions of the Civil Procedure Code, therefore, have to be liberally construed to facilitate justice and following the principles of justice, equity and good conscience.

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,[10] principles of justice, equity and good conscience. Discretion must be exercised in accordance with sound and reasonable judicial principles.

The King's Bench in *Rookey's Case*[11] 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."*

In my view, the court has wide discretion to reinstate an appeal dismissed for want of prosecution and as was held in *Agip Kenya Ltd vs Highlands Tyres Ltd**[12]*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[13] 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**[14]*, Browen, 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.**[15]***

I find that the reason given by the applicant for failing to attend court is excusable and that this is a proper case for the court to exercise its discretion in favour of the applicant. In this regard, I find useful guidance in the court of appeal decision in the case of *Richard Nchapai Leiyangu vs IEBC & 2 others*[16] cited by the applicants counsel where the court expressed itself as follows:-

> *"We agree with the noble principles which go further to establish that the courts' discretion to set aside ex parte judgement or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice"*

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 case was dismissed

without proper notice being served. The court in the above cited case of *Richard Nchapai Leiyangu vs IEBC & 2 others* proceeded to state 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"**[17]***

Dismissing a suit without proper notice being served as in this case creates serious doubts as to whether the integrity of the court process was protected and such a dismissal opens the court process to abuse that is a recipe for injustice and a court of law cannot tolerate such a process.

The Court of Appeal in *Harrison Wanjohi Wambugu vs Felista Wairimu Chege***[18]** reinstated an appeal that had been dismissed for non-attendance. A similar position was held by the court of appeal in the case of *Cecilia Wanja Waweru vs Jackson Wainaina Muiruri***[19]** where the court allowed an application to reinstate an appeal that had been dismissed for want of prosecution. Similarly, I stand guided and persuaded by the decision of the court of appeal in *CMC Holdings Ltd vs James Mumo Nzioka**[20]*** where it was held *inter alia*:-

> *"The discretion that a court of law has, in deciding whether or not to set aside ex-parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error"*

I also find help in the position held by the court of appeal in the case of *Wenendeya vs Gaboi***[21]** 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 *Katsuri Ltd vs Nyeri Wholesalers Ltd*,[22] a dismissed appeal was restored the mistake involved having been the omission of counsel to enter a date of the hearing in his diary.

In *Utalii Transporters Co. Ltd & Others vs NIC Bank & Another*[23]the court held *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:-*
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> *(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?

Given the time frame stated earlier between when the lower courts file was availed and the date the appeal was dismissed, I am not persuaded that there has been inordinate delay in prosecuting this appeal and also filing the present application. Further, there is nothing to suggest that the delay was intentional and therefore inexcusable. There is nothing to suggest or impute abuse of court process or improper motive on the part of the applicants. I also find that by reinstating the appeal the Respondent will be prejudiced in any manner. I strongly hold the view that after evaluating all the reasons offered for and against the application, the interests of justice dictate a lenient exercise of the discretion in favour of the applicant.

As herein above stated, the interests of justice in my view weigh in favour of having this appeal heard so that the respective rights of the parties can be determined by the court on merits.

In conclusion, I find that this is a proper case for this court to exercise its discretion in favour of the applicant. Accordingly, I allow the application dated 24th May 2016 and make the following orders:-

(a) That *the orders of this court made on 6th day of July 2015 dismissing this appeal for want of prosecution be and are hereby set aside and this appeal be and is hereby reinstated and that the same shall proceed for hearing and determination on its merits.*

(b) That *the appellant is hereby ordered to fix a hearing date for this appeal* ***in the next 60*** *days from today in default 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 **19th** day of **September** 2016

John M. Mativo

Judge

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[1] Cap 21, Laws of Kenya

[2] {2013} eKLR

[3] Cap 21, Laws of Kenya

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

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

[6] {1871} L. R. 3 P. C. 465 a 475 .

[7] 18th Edition Reprint 2012

[8]Code of Civil Procedure by C.K.Thakkar, Vol.II page 900) 16.5(B)

[9] Ibid (page 900) 16.5(C)

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

[11] [77 ER 209; (1597) 5 Co.Rep.99]

[12]{2001} KLR 630

[13]Ma Shwe Mya v. Maung Mo Hnaung {1933} 35 Bom. L.R. 569

[14] (1884) 29 Ch D 700 7 (1878) 10 Ch. D 393

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

[16] Civil Appeal No. 18 of 2013

[17] Supra

[18] Civil Appeal No. 295 of 2009, Visram, Koome, Otieno-Odek , JJA, Nyeri Court of appeal

[19] Civil Appeal no. 49n of 2013, Nyeri Court of appeal,

[20] {2004}KLR 173

[21] {2002}2EA 662

[22] CA App No. 248 of 2012, Nyeri

[23] {2014}eKLR