REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 67 OF 2012

LAWRENCE KIMATTA….....APPELLANT

VERSUS

RESMA COMMERCIAL AGENCIES LIMITED.....RESPONDENT

(Appeal from Judgment of Hon. B. Kituyi Resident Magistrate in Nakuru CMCC No.1296 of 2002 dated 24th February 2012)

RULING

1. By his application dated 20th January 2015 the appellant sought an order to set aside orders of the court dated 14th November 2014 dismissing the appeal and re-reinstatement of the Notice to Show Cause for hearing and determination interparties on merit.

It is based on provisions of **Rule 50 rule 1** of the **Civil Procedure Rules** and **Sections 3A, 1B and 1B of the Act.**

In the affidavit in support of the application and the grounds thereof, Mr. Kimata Advocate for the appellant has attempted to explain his failure to attend court for hearing of the notice to show cause. It is his disposition that at that time he was before my court for another case whereas the notice to show cause was listed before Justice Mshilla's court and that when he stepped out as the court had not started, the notice to show cause was called out.

He deposes that he had instructed his court clerk to call him when the matter was called but he too stepped out and had gone to the registry. He states that his failure to attend court was not deliberate but a misjudgment of time and blames himself personally for the dismissal of the appeal.

Mr. Kimatta further states that in response to the notice to show cause, he had filed an affidavit to explain the delay. I have looked at the affidavit he swore on the 5th November 2014. It is stated that despite applying for typed proceedings and judgment soon after entry of judgment on the 4th April 2012, and again on the 28th June 2012, the said proceedings are yet to be provided. He has pleaded that his application be allowed.

2. In opposing the application, a Replying Affidavit was sworn by the managing director of the Respondent. He deposes that the appellant has taken no steps at all to prosecute the appeal for over one year and the court was proper in dismissing the appeal as no plausible reasons were given. He blames both the Advocate and the appellant in the delay, and urges that the application be disallowed.

3. It is trite that a case belongs to the plaintiff, or appellant in an appeal. It is the duty of the appellant to

take steps to prosecute his appeal, and if he goes to sleep he can only blame himself when he is awaked by a dismissal order. See

Ezekiel Sirma & Another -vs- Mark lettin e KLR, John Wachanga Kiama -vs- Daniel Kiboro Muchai (2016) e KLR where the Judges held that the appellants had lost interest in their appeal, went to sleep and left the respondents to suffer prejudice.

4. I have noted that since the judgment appealed from was delivered on the 24th February 2012, other than the two letters written questing for the proceedings in 2012, no other step was taken by the appellant.

The explanation given in the affidavit that was to explain the inordinate delay sworn by the appellants Advocate Mr. Kimatta does not demonstrate any seriousness on the part of the Advocate. He ought to have briefed an advocate to hold his brief when he stepped out. It is in order that he blames himself for the dismissal of the appeal on the 14th November 2014.

The Advocate by his own admission let the appellant down by not being diligent enough in the prosecution of the appeal. It is trite that a case belongs to the litigant who has a duty to pursue its case. A case cannot be dismissed or a a dismissal order set aside on account of an advocates mistake alone.

The indolence of the Advocate is very evident even on the delay he took to have this application prosecuted having been filed in January 2015.

The first step taken after its filing was again well over a year on the 25th July 2016 when the court made an order that a hearing date be taken at the registry.

5. In its totality, I find no seriousness in the conduct of the appellant and its advocates in the progression of the appeal.

In the case **John Wachanga Kiambo** (Supra) the court observed that it cannot be in the interest of justice to allow a party to file an a appeal and have it pending indefinitely by failing to taken any steps towards its persecution.

The applicant invoked the provisions of **Section 3A, 1A, 1B** of the **Civil Procedure Rules** where the court has inherent powers to step in a matter like this to prevent further prejudice and abuse. The advocate has taken full blame for the mess. For the interest of justice to be done, and in account of the Constitutional provisions under Article 159 of the Kenya Constitution, I shall not lock the doors of justice for the appellant for mistakes that they are not parties to. Accordingly, I shall allow the application and set aside the dismissal of the appeal on the 14th November 2014 on the conditions that the Notice to show cause that ought to have been heard on the said date the 14th November 2014 is dispensed with, parties having argued on its merits, and direct that the Appeal hereof be set down for hearing within 90 days.

That it is upon the appellant to take all necessary steps towards having the appeal ready for hearing within the period stipulated above.

The court further directs that throw away costs assessed at Kshs.20,000/= be paid by Advocate Lawrence Kimatta personally to the Respondent's within 30 days. In default and failure to comply with the terms set above the appeal shall stand dismissed unless otherwise by order of the court.

It is so ordered.

Dated, signed and delivered in court this 27th Day of October 2016

JANET MULWA

JUDGE