



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

HIGH COURT CIVIL APPEAL NO. 124 OF 2012

BETWEEN

ANDREA MUSI LYADIAPPELLANT

AND

WEST KENYA SUGAR CO. LTD.....RESPONDENT

(Being an appeal from the judgment and decree of the Chief Magistrate's Court in Kakamega Civil Suit No. 435 of 2011 delivered on 2011.2012)

RULING

The Application

1. The appellant herein filed the Notice of Motion dated 22.07.2016 seeking orders;-

(i) THAT the honourable court be pleased to review and/or set aside the order of Honorable Justice R. N. Sitati on 16th June, 2016 dismissing the appellant's appeal for want of prosecution.

(ii) THAT the appellant's appeal be reinstated and directions be given

(iii) THAT the costs of this application be provided for.

2. There are 6 grounds set out on the face of the application in support of the orders sought. There is also a supporting affidavit dated 22.7.2016 sworn by Hezron Abok, Advocate. He depones therein that though the application dated 25.05.2016 seeking to dismiss the applicants appeal was served on them, they failed to diarise the matter and as a result thereof both Counsel and applicant failed to attend court on 16.06.2016 when the application for dismissal came up. The application thus proceeded *ex parte* and the appeal was dismissed, hence this application.

Response to the Application

3. The application is opposed. The Respondent filed grounds of opposition as well as a replying affidavit sworn by Linah Jepkosgei Kigen on 13.09.2016. In brief, the respondent contends that the appellant is indolent and that there has been inordinate delay by the applicant in bringing the instant application, which in the deponent's view is a clear indication that the applicant is out to frustrate the respondent from enjoying the fruits of his judgment. The deponent says further that the applicant is dishonest and that the application is made in bad faith and intended to mislead the court. The respondent also contends that the instant application is an abuse of the due process of the court and prays that the application be dismissed with costs.

Background

4. The background to the instant application is brief. On the 31.10.2011 the appellant herein commenced suit against the respondent claiming both general and special damages in respect of an alleged industrial accident which took place on or about 22.09.2007 while the appellant was working with the respondent as a casual worker. The appellant alleged the respondent was negligent and in breach of his (respondent's) duty of care by failing to provide the applicant with adequate and suitable plant appliances to enable the applicant carry out his work in safety. Due to this alleged negligence, the respondent was cut on the head as he was removing excess sugar from a shredder and suffered a cut wound on the scalp.

5. The defendant/respondent urged the lower court to dismiss the applicant's claim on grounds, inter alia, that if any accident occurred, which was denied, then the same was caused by or substantially contributed to by the applicant herein.

6. Before the case was heard, the respondent filed a notice of preliminary objection dated 17.08.2012 on grounds;-

1. THAT the plaintiff's suit was bad in law and time barred under the Limitations of Actions Act (cap 22) Laws of Kenya

2. THAT this suit is frivolous, vexatious, mischievous, unmeritorious, baseless and otherwise an abuse of the court process.

3. THAT this Honourable court lacks the inherent powers to validate a non-existent suit.

4. THAT on the basis of foregoing grounds, we opine that the instant suit be dismissed with costs to the Defendant.

7. The suit was found to be time barred and accordingly struck out with costs to the respondent in the appeal. The order which is dated 19.11.2012 is the subject of this appeal.

8. The Memorandum of Appeal dated 30.11.2012 was filed on 20.12.2012 but from that date until 30.05.2016, no action was taken on the file by the appellant. On 30.05.2016, M/S Kigen for the respondent filed their application dated 25.05.2016 by which the respondent sought to dismiss the appellant's appeal for want of prosecution. Admittedly, the application was served upon the appellant's counsel, but they allege they did not diarise the matter. Having been served and being absent on 16.06.2016, the respondent's application was allowed and the appeal dismissed with costs to the respondent.

Analysis and Determination

9. The instant application was filed on 30.08.2016 although the same is dated 22.07.2016. The issue to be determined here is whether the applicant acted timeously when he filed this application on 30.08.2016 following the dismissal orders of 16.06.2016? Mr Obilo who appeared for the applicant did not make any specific submissions on this point but urged the court to apply its mind to the "Oxygen rule" under Sections 1A and 1B, as well as its inherent powers under Section 3A of the Civil Procedure Act and give the respondent an opportunity to ventilate his appeal on the merits. On the other hand the respondents counsel Mr. Kagunze submitted that since the applicant has remained asleep since filing of the Memorandum of Appeal on 30.11.2012, he deserves no mercy from his court. Counsel also submitted that the applicant's indolence is apparent from the fact that even when the application dated 25.05.2016 seeking to dismiss the appeal was served on the appellant, no response was filed. Counsel urged the court to dismiss the application with costs.

10. The applicant's application is expressed to be brought under Order 45 Rule 1 of the Civil Procedure Rules as well as Order 12 Rule 7 and Order 51 Rules 1 and 15. In other words the applicant is seeking a review of this court's order of 16.06.2016. Rule 1(1)(a) and (b) of Order 45 of the Civil Procedure Rules

reads as follows:-.....

1. (1) Any person considering himself aggrieved;-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree of order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

11. The requirements of Order 45 Rule 1(1) (a) and(b) of the Civil Procedure Rules were made clear by the Court of Appeal in the case of **National Bank of Kenya Ltd – Vrs – Ndung’u Njau – Nairobi C.A Civil Appeal No. 211 of 1996**, and as applied in the case of **Edward Kings Onyancha Maina T/A Matra International Associates – Vrs – China Jiangu International Economic Technical Cooperative Corporation[2001]eKLR** where at page 3 of the judgment in the latter case, the Court stated, inter alia, that;-

“.....a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established.”

12. My considered view of the instant applications is that this is a case of pure indolence and not discovery of any new matter or an error apparent on the face of the record or the presence of any other sufficient cause. The record indicts the applicant. It is noteworthy that even the Record of Appeal was not filed until 10.09.2016. The applicant is clearly not keen on prosecuting this appeal in accordance with Section 1A and 1B of the Civil Procedure Act. This court holds the view that he who seeks equity must do equity. The inordinate delay by the applicant in even filing the instant application shows that he is indolent and the delay is prejudicial to the respondent.

Conclusion

13. In the circumstances, I have reached the considered opinion that the instant application lacks merit and ought to be dismissed. The application is accordingly dismissed but with no order as to costs.

Orders accordingly

Ruling delivered, dated and signed in open court this 25th day of October,2016

RUTH N. SITATI

JUDGE

In the presence of;-

Mr. Minishi for Abok(present).....Applicant/Appellant

Mr. Kigen(absent).....for Respondent

Mr. Polycarp.....Court Assistant