



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CIVIL APPEAL NO. 86 OF 2013**

**EQUITY BANK LIMITED.....APPELLANT/RESPONDENT**

**VERSUS**

**ANDREW KARIUKI (TRADING AS ANDREW KARIUKI**

**(A.K.) & CO ADVOCATES.....RESPONDENT/APPLICANT**

**RULING**

The Respondent/Applicant seeks have this appeal dismissed for want of prosecution because the appellants filed this appeal on 30<sup>th</sup> October 2013 and have since then never complied with the provisions of Order 42 Rule 11 of the Civil Procedure Rules 2010.

In the replying affidavit filed on 3<sup>rd</sup> October 2016, the Respondents advocate avers that the proceedings regarding **CMCC No. 71** of 2013 are yet to be typed to enable the appellant to file and serve the record of appeal to enable the appellant to list the appeal for directions before a judge in accordance with the above rule.

Counsel averred that he reliably learnt from the lower court registry that the type proceedings were full of errors which necessitated retyping of the proceedings to correct the errors. Counsel further averred that without the lower courts file this application is premature and that the delay complained of is not deliberate but is beyond their control and that dismissing this appeal will occasion great prejudice to the appellant.

Both advocates filed written submissions which I have carefully considered. Regarding the delay complained of, I find guidance in 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?*

I am persuaded by the principles laid down in the above case. True, there has been inordinate delay on the part of the appellant in prosecuting the appeal; but on the other hand the delay cannot be blamed on the appellants wholly. They have stated that the lower court has not availed the typed proceedings. Even though the appellant has not exhibited letters addressed to court in support of the said averment I have no reason to doubt the said explanation.

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. 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 a hearing. The interests of justice dictate lenient exercise of the discretion of the court in favour of the appellant considering the reasons offered to the delay.

Section 3A of the Civil Procedure Act<sup>[2]</sup> 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.*'

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.<sup>[3]</sup> The inherent power, as observed by the Supreme Court of India<sup>[4]</sup> "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<sup>[5]</sup> 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<sup>[6]</sup> 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.<sup>[7]</sup> Discretion must be exercised in accordance with sound and reasonable judicial principles.

The King's Bench in *Rookey's Case*<sup>[8]</sup> 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>*

It would be unjust and 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>[13]</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>[14]</sup> where the court allowed an application to reinstate an appeal that had been dismissed for want of prosecution. In *Wenendeya vs Gaboi*<sup>[15]</sup> 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. I am persuaded that disputes ought to be determined on merits and that lapses ought not necessarily debar a litigant from pursuing his rights.

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 12<sup>th</sup> May 2016 and make the following orders:-

**a) *That*** the Respondents' application dated 12<sup>th</sup> May 2016 be and is hereby dismissed.

**b) *That*** the appellant be and is hereby directed to file the record of appeal and take a date for directions before a judge within 45 days from the date of this order in default of which this appeal shall stand dismissed.

**c) *That*** the appellant be and is hereby ordered to fix this appeal for hearing and determination within 30 days from the date of taking directions in default of which this appeal shall stand dismissed.

**d) *That*** the appellants shall pay to the Applicants the costs of this application.

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

Signed and Dated at **Nyeri** this **22<sup>nd</sup>** day of **November**, 2016

**John M. Mativo**

**Judge**

Delivered at Nyeri this **22<sup>nd</sup>** day of **November** 2016

**Hon. Justice Jairus Ngaah**

**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] Civil Appeal No. 18 of 2013

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

[15] {2002}2EA 662