



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 127 OF 2008

SANG'ANYI TEA FACTORY CO. LTD.....APPELLANT

VERSUS

SAMWEL BUNDI ONDIEKI..... RESPONDENT

(An appeal from the judgment and decree of Hon. S.R. WEWA (Resident Magistrate) dated and delivered on the 23rd day of July, 2008 in the Original Kisii SRMCC. No. 123 of 2007.)

RULING

1. Through a Notice of Motion application dated 27th April, 2016, the applicant herein seeks orders to reinstate the Appeal herein following its dismissal by this court on 6th July 2015. The applicant also prays that the orders dismissing the Appeal and all other consequential orders be set aside.

2. The application is premised on the grounds enumerated on the face of the application, namely;

i) That the order of dismissal was made through no fault or wrongdoing on the part of the Appellant.

ii) That counsel for the Appellant was not served with Notice to Show Cause.

iii) That the Appeal herein had not been admitted and neither had directions been taken.

iv) That the Appellant has not been dormant in the matter and was pursuing monies that were deposited in the joint account and that was irregularly and unlawfully withdrawn by the Respondent's Counsel while the Appeals were still pending.

v) That the Appellant is desirous of prosecuting the Appeal and in fact has been following the same with the Advocates Complaints Commission and the Court Registry.

vi) That the Applicant is keen on prosecuting the Appeal as it feels aggrieved by the decision of the trial magistrate.

vii) That it is in the interest of justice that the Applicant's prayers be granted.

3. The application is also supported by the affidavit of Boniface Wachira, the applicant's advocate, in which he gives a detailed explanation for the delay in the prosecution of the appeal which he attributed to the fact that the respondent's counsel had irregularly and unlawfully withdrawn the sums of money that had been deposited in the joint interest earning account at Credit Bank Kisii Branch as security and

condition for stay pending the appeal. The applicant explains that his advocate then embarked on a process of pursuing the issue of the respondent's advocate's irregular withdrawal of the decretal sum deposited as security by filing a complaint before the Advocates Complaint's Commission and by writing to the Banking Fraud Investigators to take up the matter with a view to initiating Criminal proceedings against the respondent's advocates.

4. The applicant has attached the various correspondence between his advocates and the **Advocates Complaints Commission**, Credit Bank Limited and the respondents said advocates as annexures **"BWW3-BWW17"**

5. A copy of the court order directing the applicant to deposit the decretal sum in a joint interest earning account held by his advocate and the respondent's advocate together with the bank statements have also been attached to the applicant's affidavit as annexure **"BWW1"** and **"BWW2"** respectively.

6. The applicant's advocate further depones that upon realizing that not much progress was being made in respect to the complaint initiated with the Advocates Complaints' Commission, he decided to move the court for appropriate action in relation to the unlawful and irregular withdrawal of the money deposited as security for the appeal. He states that he was unable to trace the court file for some time for purposes of filing the intended application only for him to be informed that the appeal had been dismissed on 6th July 2015 without service of any Notice to Show Cause on the Appellant or his advocate. He attached copies of letters dated 23rd February 2016 and 14th March 2016 addressed to the Deputy Registrar seeking her assistance in tracing the court file as **"BWW19"**.

7. The Applicant contends that the order of dismissal of appeal was made with no fault on his part as he was then actively pursuing the complaint lodged against the respondent's advocates regarding the irregular withdrawal of the money deposited in the interest earning account as security for the appeal.

8. The applicant's case is that the delay in prosecuting the appeal was neither inordinate nor inexcusable and that the respondent will not suffer any prejudice if the instant application is allowed.

Respondent's replying affidavit

9. The respondent opposed the application through the replying affidavit of the respondent's advocate, Samuel Nyabuto Nyachae, dated 4th May 2016 in which he states that the court was justified in dismissing the appeal since the appellant had delayed in prosecuting it for a period in excess of 7 years. He further states that two other related appeals were determined and decretal sums released to the appellant's advocates, but that in the instant case, the appellant/applicant had not provided sufficient reasons for the reinstatement of the appeal.

10. When the application came up for hearing before me on 8th June 2016, parties agreed to canvass it by way of written submissions.

Analysis and Determination

11. I have considered the instant application, the respondent's replying affidavit, the written submissions filed by both parties and the authorities cited. The main issue that requires the court's determination is whether the applicant's delay in prosecuting the appeal has been explained such that the appeal should be reinstated for hearing.

12. Courts have held, time and again, that there is no standard measure of whether a delay is inordinate or not as such delay will differ from case to case depending on the circumstances of each case. In the case of **Ivita vs Kyumbu [1984] KLR 441**, Chesoni J. (as he then was) had the following to say on the subject of inordinate delay:

"The test applied by the courts in an application for dismissal of a suit for want of prosecution is

whether the delay is prolonged and inexcusable, and if it is whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter in the discretion of the court."

13. In the instant case, the applicant's explanation for the delay in prosecuting the appeal was that he was still pursuing the complaint filed with the Advocates Complaints Commission regarding the respondent's advocates withdrawal of the money deposited in the joint interest earning account as security for the appeal.

14. The applicant exhibited numerous letters to show that there was correspondence between its advocates and the Advocates Complaints Commission and other agencies regarding the said complaint as annexures to the affidavit in support of the application. The correspondence cover the period between the year 2011 when the security deposit was made to 2015 when the appeal was dismissed. The respondents advocates have in their replying affidavit, not denied the claim that they irregularly withdrew the money deposited in the joint interest earning account as security pending the outcome of the appeal. To my mind, the applicant's claim that the respondent's advocate acted improperly by withdrawing the security deposit could be true and in the circumstances, a breach had taken place which the applicant could not turn a blind eye to by proceeding with the appeal before the same could be dealt with or clarified. By irregularly withdrawing money deposited as security for appeal before the appeal was determined, the respondent's advocates set in motion, a sequence of events that had the net effect of throwing the intended appeal into a spin thereby contributing to the delay in its prosecution. If the allegation that the respondent's advocates irregularly withdrew the money set aside as security deposit is true, which allegation has not been denied in these proceedings, then the conduct of the respondent's advocates can be said to border on contempt of court since the court gave specific orders on the deposit of security as a condition for stay pending appeal.

15. In the case of **Austin Securities vs Northgate and English Stores Ltd [1969] 1WLR 529**, it was held that:

"...the court will look at the conduct of both parties. If the defendant has considerably contributed to the delay or, a fortiori, has actually agreed to it, he will seldom obtain the dismissal of the action..."

16. A perusal of the Record of Appeal shows that even though the instant appeal was filed in 2008, the said appeal had, as at the time of its dismissal on 6th July 2015 not been admitted for hearing and neither had directions been taken on the appeal. The court record does not also show if the appellant was given notice of the intended dismissal of his appeal. It is clear to me that the applicant was in the above circumstances, not accorded an opportunity to appear in court and show cause why its appeal should not be dismissed. I am sure that had the appellant been granted the opportunity, it could have informed the court of the on-going proceedings before the Advocates Complaints Commission over the irregularly withdrawn security funds.

17. One can say that the prosecution of the appellant's appeal was hampered or frustrated by the withdrawal of the security deposit money, an eventuality which the respondent's advocates cannot escape responsibility for.

18. The applicant's explanation about his inability to immediately apply for reinstatement of the appeal upon realizing that it had been dismissed was that the court file could not be traced thereby prompting his advocates to write letters to the Court's Deputy Registrar to assist in the tracing of the file. I find the applicant's explanation to be plausible. This court is aware that the instant appeal was dismissed during the Judiciary Service Week dubbed "**Justice at Last**" that took place in July 2015. During the service week, the Judiciary dealt with hundreds of files and therefore, there is the possibility of a file being misplaced in the process. It is my finding that the applicant's explanation for the delay in filing the instant application is plausible.

19. Order 42 Rule 35 (2) of the Civil Procedure Rules under which the applicant's appeal was dismissed stipulates that:

“(2) If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.”

20. My humble view is that before the court would proceed to dismiss the appeal pursuant to the above provision, the court had to be satisfied that notice had been issued to the affected parties. In this regard, I align myself to the observations of Azangalala J. (as he then was) in the case of **Associated Warehouse Co. Ltd & Others vs Trust Bank Ltd HCCC No. 1266 of 1999 (unreported)** when he held:-

“Rule 2 (1) of order 16 (repealed Civil Procedure Rules) presupposes service before dismissal. It is also clear under this rule that even where cause is not shown, dismissal is not mandatory as the rule is permissive. In this case the plaintiffs were not given a chance to show cause why their suit should not be dismissed. The plaintiffs have this persistent complaint regarding alleged “Bearer certificates of Deposit”. The plaintiffs may have misinterpreted the effect of the interlocutory order made by Gacheche, Commissioner of Assize as she then was. This reason for delay in prosecuting this suit may be unsatisfactory, but I will not hold it against the plaintiffs. In any event the Defendant has not demonstrated the prejudice it will suffer.

21. Having found that the applicant tendered reasonable, sufficient and plausible explanation for the delay in prosecuting the appeal and having found that the applicant was not given a notice to show cause prior to the dismissal of the appeal, I am of the view that the said dismissal cannot stand.

22. Accordingly I allow the application and I set aside the order issued on 6th July 2015 dismissing the appeal which is hereby reinstated.

23. The applicant is directed to set in motion the process of having the appeal listed for hearing within 30 days from the date of this ruling.

24. The costs of this application shall abide the outcome of the appeal.

Dated, signed and delivered in open court this 14th day of December, 2016

HON. W. A. OKWANY

JUDGE

In the presence of:

- N/A for the Appellant
- N/A for the Respondent
- Omwoyo court clerk