



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL APPEAL NO. 37 OF 2010**

*(Being an appeal from the Judgment of the Senior Principal Magistrate's Court at Narok at Naivasha SPMCC No. 38 of 2007 delivered on 29/01/2010)*

**SHALIMAR FLOWERS (K) LTD.....APPELLANT/APPLICANT**

**VERSUS**

**SAMUEL E. OMUSUGU.....RESPONDENT**

**RULING**

1. Shalimar Flowers (K) Ltd the Appellant herein brought an application dated 16<sup>th</sup> September, 2014 and filed on the 17<sup>th</sup> September, 2014 under the provisions of order 42 rule 21, 50 rule 6 of the Civil Procedure Rules and Section 3A, 1A, 1B and 63 of the Civil Procedure Act.
2. The Applicant seeks that the order issued by this court on the 10<sup>th</sup> July 2014 dismissing the appeal for want of prosecution be stayed, varied or vacated and an order readmitting to hearing and or reinstating the appeal for hearing on merit be granted. The grounds advanced by the Applicant are that the lower court delayed in furnishing the Appellant with the proceedings and decree, that the proceedings were ready for collection on the 15<sup>th</sup> September, 2014 and that the Appellant furnished security of shs. 232,380/= which sum is deposited in a bank, and that the Appellant is willing to pay throw away costs and comply with any conditions as the court may impose.
3. The Application is further supported by the affidavit of Jackson Omwenga, Advocate for the Appellant both in the lower court and in this court.

In his supporting affidavit, he reiterates the above grounds and states that failure to file the record of appeal on time was beyond his control and blames the lower court for failure to provide him with the proceedings, judgment and decree. He further argues that the appeal has a good chance of success and should not be shut out and urges this court not to lock the Appellant out on a procedural technicality.

4. The application is opposed by the Respondents Advocate Mr. Robert H. Ndubi swore a very detailed replying affidavit, and terms the application as incompetent and full of falsehoods. He urges this court to dismiss the application with costs.
5. A brief background leading to the application before me is that judgment in the lower court PMCC No. 38 of 2007 at Naivasha was delivered on the 29<sup>th</sup> January, 2010 against the Appellant. A Memorandum of Appeal was filed on the 24<sup>th</sup> February, 2010 and the lower court ordered a stay of execution of the judgment and the decretal sum of shs. 232,380/= was deposited in a bank pending the hearing and determination of the appeal.

6. The Appellant then went into slumber up to the 28<sup>th</sup> February, 2012 when the proceedings and judgment and decree were applied, a period of two years since the entry of judgment. The Appellant then forgot about the matter and never followed up with the lower court until the when they collected the proceedings on the 15<sup>th</sup> September, 2014 and thereafter filed the Record of Appeal on the 17<sup>th</sup> September, 2014 by which the appeal had been dismissed for want of prosecution pursuant to a Notice to Show Cause why the appeal should not be dismissed issued by the court on the 24<sup>th</sup> February, 2014 and served upon the Appellants Advocates. In these chronology of events, the Appellant blames the lower court for failure to furnish them with proceedings.
7. In support of the application, Ms. Atusimiiri, Advocate for the Appellant urged this court to allow the application and reinstate the appeal for hearing on merit as the record of appeal was filed on the 17<sup>th</sup> September, 2014. She however did not disclose to the court that the said record was filed after the appeal was dismissed nor did she respond to the allegations of falsehoods in the replying affidavit by the Respondent. She urged the court that the Appellant will be prejudiced and condemned unheard if application is not allowed.
8. In opposing the application Mr. Ndubi Advocate for the Respondent relied on his replying affidavit and annexures thereto. It was his submission that an appeal dismissed under Order 42 rule 35(2) of the Civil Procedure Code cannot be reinstated as the dismissal motion was initiated by the court by way of a Notice to Show Cause why the appeal should not be dismissed. The Respondent stated that the Appellant had lost interest in the appeal in that proceedings were requested for 2 years after the judgment, that the proceedings were collected on the 12<sup>th</sup> August, 2014 after the appeal was dismissed. He produced as exhibits a letter from the Chief Magistrate's Court at Naivasha that stated that proceedings were requested for on the 15<sup>th</sup> March 2012, that they were ready for collection in on 5<sup>th</sup> July, 2012, the that Defendant/Appellant never followed-up to the 7<sup>th</sup> August 2014 when the proceedings were collected after the appeal had been dismissed. It was submitted that the lower court can not be blamed for the Appellants indolence.
9. Further, the Respondent submitted that the Appellant was granted leave twice by this court to file a replying affidavit to the Notice To Show Cause but none was filed, and the court, there being no cause shown, dismissed the appeal on the 10<sup>th</sup> July, 2014. The Respondent submitted that the Respondent has been prejudiced by the 4 years delay when the Appellant did nothing to prosecute the appeal and as such justice ought to be dispensed fairly. There being no reasons given to persuade the court to exercise its discretion in favour of the Applicant, he prayed that the same be dismissed with costs.
10. I have considered the application on record, the supporting affidavit and submissions by counsel. I must state that there were serious lapses and lack of interest in the appeal by the Appellant. The delay was not sufficiently explained and this was exhibited by failure to show cause why the appeal should not be dismissed. The court had no option but to dismiss it. The application under review too does not give any reasons or at all, coupled with the false allegations against the lower court that it failed to provide the proceedings in good time. The letter written from the Chief Magistrate at Naivasha was self explanatory. There was no reason at all to blame the said court. For 4 years since judgment was delivered the appellant went to sleep and the inertia runs contrary to the provisions of the law. Section 1A and 1B of the Civil Procedure Act was invoked.

Section 1A states -

***“the overriding objective of this Act and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act.”***

Section 1B -

***(1) For the purpose of furthering the overriding objective specified in Section 1A, the court shall handle all matters presented before it for the purposes of attaining the following:***

- (a) *the just determination of proceedings.*
- (b) *the efficient disposal of the business of the court.*
- (c) *the efficient use of available judicial and administrative resources.*

11. In this application, the letter and spirit of the above sections tilt in favour of the Respondent.

12. As held in the case **IVITA VS KYUMBU (1984) KLR**, Justice is justice to both parties.

13. Having considered all the submissions and the law I come to the inevitable conclusion that the application lacks merit, was brought in bad faith and must therefore be dismissed with costs to the Respondent.

**Dated, signed and delivered at Nakuru this 26<sup>th</sup> day of March 2015**

**JANET MULWA**

**JUDGE**

**In the presence of:**

N/A for Appellant

Ms. Mwera for Respondent

Omondi - Court clerk