REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO. 589 OF 2012

TRICLOVER INDUSTRIES (K) LTD…….APPELLANT/APPLICANT

VERSUS

PATRICK KITHEKA MULATYA …….RESPONDENT

RULING

This appeal was filed in court on 2nd November 2012 by **TRICLOVER INDUSTRIES (K) LTD** against the Respondent **PATRICK KITHEKA MULATYA**. The appeal arises from the judgment and decree passed by Honourable Ole Keiwa Principal Magistrate delivered on 19th October 2012 in Nairobi Milimani CM CC No. 2456 of 2009. The appeal was dismissed on 5th December 2014 under the provisions of Order 42 Rule 35 (2) of the Civil Procedure Rules for want of prosecution after the court issued Notice to Show Cause why the appeal could not be dismissed for want of prosecution and the appellant did not attend court to show cause.

On 18th December 2014, the appellant approached this court vide a Notice of Motion dated the same day seeking for reinstatement of the dismissed appeal and to be heard on merit and seeking for stay of execution of decree pending hearing and determination of the application for reinstatement of the appeal.

The application for reinstatement of the appeal is the one before me for determination. The said application is predicated on the grounds, inter alia, that the appellant had been constantly pursuing for typed proceedings and judgment from the lower court but that to date the said documents had not been typed or availed to its advocates to enable them compile and file a record of appeal.

Further, that albeit its advocates were served with Notice to Show Cause why the appeal herein should not be dismissed, scheduled for 5th December 2014, they were unable to attend the hearing and requested Mr Andrew Kariu Advocate to hold their brief but that the said Mr Kariu arrived in court after the appeal had already been dismissed for want of prosecution. That their non attendance to show cause was not intentional. The appellant urges the court to exercise its discretion to restore the appeal so that it can be heard on merit. The appellant also sought for stay of execution of decree because it was apprehensive that the respondent would execute it anytime since the earlier stay granted had lapsed upon the appeal being dismissed on 5th December 2014.

The said application was also supported by the affidavits sworn by Peris Karanja and Andrew Kariu Advocates.

In their separate sworn affidavits, the two advocates contend that the decretal sum had been deposited in court amounting to Kshs 351,500 on 20th November 2012 and that they had timeously filed this appeal on behalf of their client following judgment of 19th October 2012. That they applied for copies of proceedings and judgment on 2nd November 2012 and paid for the same on 6th November 2012 and had been constantly pursuing the same, annexing PK9 copies of letters requesting for the same between November 2012 and July 2012 but that to date, the proceedings had never been availed. That on the 5th December 2014 when this appeal was due for Notice to Show Cause for which they were duly served with Notice, Mr Andrew Kariu advocate was requested to hold brief but that he arrived in court after the matter had been dealt with after attending to another matter CA 2220/2007 Peter K. Karimi vs The commissioner of Lands and that immediately thereafter they embarked on preparing this application for reinstatement of this appeal.

The appellant urged the court to exercise its discretion to restore the appeal and order for stay of execution until the appeal is heard and determined, by its application dated 12th January 2015 which this court did direct that the two applications be heard together. The appellant states that it is willing to abide by any other conditions or directions that this court may impose on it for the appeal to be reinstated.

Mr Andrew Kariu advocate too swore an affidavit confirming what M/S Peris Karanja deposed that indeed he had been requested to hold brief for the appellant's counsel in this matter on 5th December 2014 but that since he was engaged in Civ. App 2220/2007 he arrived in court after the Notice to Show Cause had been heard and the appeal dismissed hence he relayed the information to the appellant's counsel who immediately lodged this application for reinstatement of the appeal and for stay of execution pending appeal. The latter application as stated earlier is dated 12th January 2013.

The two applications were heard by way of oral submissions on 21st April 2015 with Mr Kariu appearing for the appellant and submitting, reiterating the grounds upon which the application was premised and the depositions in his affidavit and the affidavit of Peris Karanja advocate. He contended that the lower court had been non responsive in availing the proceedings and judgment appealed from and that they had constantly sought to know the fate of those proceedings and judgment to facilitate preparation of the record of appeal but to no avail. Counsel for the appellant also maintained that they had not been indolent but that the lower court was to blame for the delay and that the High Court is also to blame for administrative mistakes for not calling for the submission of the lower court file.

Mr Kariu charged that for very strange reasons, all the letters written to the lower court were missing from the court file but that they had been received by the court as annexed to the affidavit of Peris Karanja. In his view, the mischief of the missing letters from the file can be beneficial to the respondent, relying on the case of **Wanandege vs Gaboi & Another (2002) 2EALR EA 652**.

Mr Kariu urged that if the appeal is reinstated then they pray for stay of execution pending hearing and determination of the appeal on merit. In his view, the court did not act suo moto to dismiss the appeal but was prompted by the respondent who wrote to the court.

The applications for restoration of the appeal and stay of execution were opposed by Miss Arati counsel for the respondent who submitted that the matter has been pending in court for the last 9 years and that the appellant had gone to sleep after filing a Memorandum of Appeal. She relied on the replying affidavits sworn on 4th March 2015 contending that the delay was inordinate and that it was the respondent who had been pushing for the proceedings and informed the appellant's counsel that the said proceedings were ready for collection. In her view, both parties received the Notice to Show Cause dated 11th November 2014 and it mattered not that it was the respondent who had prompted the court to issue Notice to Show Cause since the appellant had been indolent on having the appeal heard and determined.

Counsel for the respondent further submitted that from the time the appellant was served with the Notice to Show Cause, it had time to prepare record of appeal but instead slumbered and even failed to attend court to show cause why the appeal should not be dismissed. She submitted that the appellant

had exhibited only 2 letters concerning inquiries on the proceedings and that therefore where an appellant fails to prosecute the appeal, it is deemed to be withdrawn. She relied on the case of **Kenya Shoe and Leather Workers Union vs Human Resource Strategic Partners Ltd.**

On the issue that some letters written to the lower court were missing from the court file, Miss Arati stated that there was no letter of complaint to the Chief Magistrate and urged this court to dismiss the twin applications and allow the execution of decree to proceed as the decretal sum was held by the court. She concluded that delayed justice had denied justice for the respondent who lost his job because of this cause of action.

In response, Mr Kariu stated that the Notice to Show Cause was mischievous since Order 42 Rule 35 only comes into effect when the court moves itself to dismiss the appeal for want of prosecution. He maintained that the appeal had merit and that the same should be heard on merit as their failure to attend court on 5th December 2014 had been explained.

I have carefully considered the appellant's twin applications for reinstatement of the appeal and for stay of execution pending hearing and determination of the appeal on merit. I have examined all the affidavit evidence, the annextures thereto and submissions by both parties' advocates on record and the relevant applicable law and precedents relied upon.

In my view, the issues for determination is two namely:

1. Whether the appeal as dismissed n 5th December 2014 should be reinstated.
2. Whether the court should grant stay of execution.

On the 1st issue, it is clear that this appeal was dismissed on 5th December 2014 for want of prosecution following a Notice to Show Cause issued by this court on 11th November 2014 and served on both parties advocates.

No doubt, the notice was prompted by the respondent's advocates letter to the Deputy Registrar dated 4th November 2014 urging the court to list the matter for dismissal under Order 42 Rule 35(2) of the Civil Procedure Rules,2012 and stating that since 2nd November 2012 no steps had been taken to prosecute the matter.

The appellant's advocate was served on 12th November 2014 and on 5th December 2015 when the Notice to Show Cause came up for hearing only the respondent's counsel appeared in court.

The court after examining the record and satisfying itself that indeed the matter was last in court on 20th September 2013 before Honourable Hatari Waweru J and upon satisfying itself that the lower court record was availed on 4th August 2014 upon which the respondents had then written to court urging it to list the appeal for dismissal, did dismiss this appeal for want of prosecution, as the appellant did not attend court to show cause.

The appellant has now approached the court seeking for reinstatement of the appeal and stay of execution. The application was filed almost immediately after the dismissal on 18th December 2014 by which time the lower court file had nonetheless been expeditiously resubmitted to the lower court on 9th December 2014 , upon extraction of the order of dismissal of the appeal.

The court observes that from the affidavit evidence by the appellant's counsel, there is ample evidence to show that they have not been indolent in prosecuting this appeal in that immediately after filing the appeal, they did on 9th November 2012 request for certified copies of proceedings and judgment and followed by another request filed on 18th December 2013, 13th May 2014 and 31st July 2014 just a few days before the file from the lower court was received in the High Court on 4th August 2014. There is no evidence that the Chief Magistrate's Court ever responded to the inquiries

made by the appellant's counsel, who had already deposited the whole of the decretal sum in court for the due performance of decree as a condition for stay pending appeal pursuant to the provisions of Order 42 Rule 6(2) of the Civil procedure Rules.

In my view, a considering the incessant requests made to the lower court and the speed at which the appellant sought to reinstate the dismissed appeal showed that it had not lost interest in the appeal.

Further, this court accepts the explanation given by Mr Kariu that he arrived in court after the appeal had been dismissed. At that time, this court did not have a chance to see the evidence that has been annexed showing the efforts made to obtain the proceedings and judgment from the lower court by the appellant. Had that evidence been availed to the court, I see no reason why this court could not have accorded the appellant an opportunity to be heard, even if it was on new conditions.

I agree with the respondent's counsel that where a party files an appeal and goes to sleep, delay defeats equity and this court would invoke its inherent jurisdiction under Section 3A and the overriding objectives under Sections 1A and 1B of the Civil Procedure Act as well as Article 159(2) (b) of the Constitution which abhors delayed justice and dismiss the appeal.

Nonetheless, I find that in the circumstances of this case, the appellant is not wholly to blame for the delayed justice, which delay has been sufficiently explained. The court must therefore, in my view, not oust the appellant from the seat of justice for no absolute fault of its own. The respondent must however not be blamed for being vigilant in setting in motion the process of having the appeal dismissed for want of prosecution. Sections 1A and 1B of the Civil Procedure Act commands parties to the civil proceedings and their advocates to assist the court tin achieving the overriding objectives of the Act and in ensuring that justice is administered expeditiously, proportionately and in a cost effective manner.

However, this court must weigh the prejudice that is likely to be suffered if this appeal is not reinstated. In my view, the injustice of dismissing this appeal is graver than the justice of the case in that the court is conscious of the constitutional imperatives that the right of appeal and therefore the right to be heard on appeal as exercised by the appellant herein is a constitutionally guaranteed right which should not be taken away by the strike of a pen where sufficient cause has been shown why there was delay in prosecuting the appeal and for failure to attend court on 5th December 2015 by the appellant's advocate to show cause why the appeal could not be dismissed for want of prosecution.

I am enjoined to accept the holding in **Richard Ncharpi Leiyagu vs IEBC & 2 Others CA 18/2013** wherein the Court of Appeal was categorical that

" We agree with the noble principles which go further to establish that the court's discretion to set aside an exparte judgment or order for that matter is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice".

The question I ask is whether the appellant's failure to attend to court on 5th December 2014 to show cause why the appeal could not be dismissed under Order 42 Rule 35(2) constituted an excusable, mistake or was it meant to deliberately delay the cause of justice. I have already stated that the appellant contended that the advocate briefed to attend court was engaged in another matter Civ. App 22207/2009 and arrived in court after the court had already dealt with the Notice to Show Cause and notified the appellant's counsel who, with alarcrity, took steps to lodge this application for reinstatement and stay of execution. The mistake of not attending court in time was the appellant's counsel, but in the case **Belinda Murai & Others vs Amoi Wainaina (1978) KLR 2782** (CALL) Madan J A (as he then was described what constitutes as mistake in the following words:-

"A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel, though in the case of junior counsel the court may fee compassionate more readily.

A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to have known better. The court may not condone it but it ought to certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule."

The respondent argued that the appellant was aware of the date for Notice to Show Cause but failed to attend court and that the explanation for the default was not acceptable. I am of the view that the reason for non attendance at the hearing of the Notice to Show Cause as deposed by Mr Andrew Kariu advocate is candid and excusable.

I am inclined to give the appellant a benefit of doubt that he was attending to another matter and hoped to finish and attend to Notice to Show Cause but could not make it in time. He indeed made a blunder of miscalculation of the time the Notice to Show Cause was to be called out.

In **Phillip Chemwolo & Another vs Augustine Kubede (1982-88) KAR 103 at 1040,** Apaloo JA (as he then was held:-

" Blunders will continue to be made from time to time and it does not follow that because of a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to over each, there is no error or default that cannot be put right by payment of costs . The court as is often said exits for the purpose of deciding the rights of parties and not the purpose of imposing discipline.

In this case, the inconvenience caused to the respondent by the non attendance of the appellant's counsel can be compensated by costs.

In **Richard Ncharpi Leiyagu case (Supra)** the Court of Appeal stated:

" 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 court 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"

This court does exist to serve substantive justice for all parties to a dispute before it. The respondent too deserves justice and his legitimate expectation is that the appeal be expedited so that he can know whether or not he will reap and or enjoy the fruits of this lawfully obtained judgment. In this case, however, the decree is a monetary one and the money is deposited in court as security for due performance of decree, albeit it would have been appropriate if the parties considered transferring the said sums into an interest earning account due to inflationary trends and the continued weakening of the Kenya shilling day by day against foreign currencies.

It is for the above reasons that I exercise my discretion and allow the appellant's application for reinstatement of the appeal as dismissed on 5th December 2014 and set aside the order of dismissal made on the same date.

On the issue of stay, having found that it was not the appellant's fault that there had been some considerable delay in having his appeal heard expeditiously and noting that the appellant had actively engaged the lower court to supply it with certified copies of proceedings and judgment to no avail or response, it is only fair and just that the appeal having been reinstated, the stay of execution as initially granted too, be reinstated. Accordingly, I reinstate the order of stay of execution of decree in the lower court pending hearing and determination of this appeal on the same terms that were made earlier.

So as not to allow the appellant to go into some form of inertia, I order that the appellant do compile, the file and serve the respondent with a record of appeal within 30 days from the date hereof.

I further direct that the Deputy Registrar of the High Court do call for the resubmission of the lower court file to this court within 14 days from the date hereof upon which the appeal herein should be placed before a judge of reconsideration under Section 79B of the Civil Procedure Act .

The matter shall be mentioned on 30th July 2015 to confirm compliance with the orders herein.

As the appellant's failure to attend court to Show Cause is what has led to these protracted proceedings, I order that they pay to the respondent the costs of the application for reinstatement of the appeal and stay. The said costs shall be taxed and paid forthwith in default execution to issue.

Dated, signed and delivered in open court this 30th day of June 2015.

R.E. ABURILI

JUDGE

30/6/2015

30.6.2015

Coram Aburili J.

C.C. Samuel

Mrs Otieno hold brief for Mrs Arati for respondent

No appearance for appellant.

COURT- Ruling read and pronounced in open court as scheduled. Mention on 30th July 2015.

R.E ABURILI

JUDGE

COURT – Respondent to serve appellant with mention notice of for 30th July 2015

R.E. ABURILI

JUDGE

30.6.2015

Mrs Otieno- We seek directions on our application filed this morning.

COURT- In view of the reinstated appeal, the respondent's application filed this morning dated 18th June 2015 shall be heard on 30th July 2015 service to be effected upon the appellant.

R.E. ABURILI

JUDGE

30.6.2015