



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL CASE NO. 45 OF 1999

KARATINA MUNICIPAL COUNCIL.....APPELLANT

versus

KANYI KAROKIRESPONDENT

RULING

INTRODUCTION

1. There are two applications before court one dated 22nd November 2003 by the Appellant/Applicant (KARATINA MUNICIPAL COUNCIL) under order IXB rule 8 of the then Civil Procedure Rules and section 3A seeking

a. That the order entered herein on 19th November 2003 dismissing the appeal be set aside and the appeal be reinstated and set down for hearing.

b. That this honourable court be pleased to make such further or other orders as the court may deem fit.

2. The application was supported by the affidavit of A.J. Kariuki Advocate where he deponed that on 19th November 2003 he went to the High Court for mention on criminal case No. 9 of 2003 and when he went through the cause list he found out that the appeal was appearing on the cause list for the day.

3. It was further deponed that the respondent advocate did not invite him for the fixing of the date neither did the same serve hearing notice and therefore his failure to attend court was not intentional. It is therefore in the interest of justice that the appeal be reinstated and matter decided on merit.

4. The application was opposed through replying affidavit sworn by Gacheche Wa Miano filed on 2nd March 2004 in which he deponed that on 5th March 2003 he sent a letter of invitation for fixing of hearing date for 19th day of March 2003 and that though the date was taken mutually the clerk for the applicant's advocate refused to sign the record.(emphasis added)

5. That he had instructed his clerk to serve and had all along believed that he had served although the record stated that the date was taken exparte.

6. That there is no appeal before court since leave to appeal out of time was granted on 10th May 1999 that appeal be filed within 15 days while memorandum of appeal had been filed 7th May 1999 without leave. It was therefore deponed that prayer NO. 1 of the application is untenable and ungrantable since an

appeal that never was can not be reinstated.

7. The second application is a dated 24th April 2012 notice of motion under order 50 rule 1 of CPR in which the respondent (Kanyi Karoki) seeks orders that:

1. The amount of Ksh. 152,252.50 together with interest deposited in KCB Ltd Nyeri Branch A/c No. 112457864 be released to GACHECHE WA MIANO advocate.

8. It is supported by the affidavit of Gacheche Wa Miano sworn on 24th April 2013 in which he deponed that the honourable court on 10th day 1999 gave an order that decretal sum be deposited in an interest bearing account at KCB Nyeri Branch in the joint names of the Advocates which was duly done.

9. On 19th March 2003 the appeal herein was dismissed and no appeal has been preferred therefore withholding of the decretal amount herein will serve no purposes. He further deponed that soon after the appeal was dismissed counsel for the appellant left practice to become the vice chairman of Cooperative Tribunal and he also relocated from Karatina to Busia and his attempts to get in touch with AJ Kariuki Advocate proved fruitless.

10. The application was opposed by Appellant through an affidavit by AJ Kariuki where he deponed that application dated 22nd November 2003 is still pending for hearing and should be heard and determined.

11. The reason for the delay was that Mr. Gacheche Wa Miano was out of touch and could not be reached and as will be observed from the court record was at one time replaced as an advocate for the Respondent until 24th April 2003.

12. There is also a further affidavit by S.N. Chengecha the interim administrator and representative of the Appellant in which he deponed that the appellant out to have enforced the order and the judgment obtained on 2nd March 1999 before expiry of twelve years as per section 4(4) of Limitations of Actions Act.

PROCEEDINGS

13. The appeal herein was admitted on 26th March 2000 and on 19th March 2003 the appeal herein was fixed for hearing exparte for 19th November 2003 when Mr. Miano appeared before Okwengu J as she then was and applied for the appeal to be dismissed which was duly done and on 22nd November 2003 the appellant filed the present application for reinstatement of the suit.

14. The said application has been pending before this court until the Respondent filed an application under certificate of urgency on 25th April 2013 for release of the decretal sum herein and on 31st May 2013 this court ordered that the two applications be heard together.

SUBMISSIONS

15. It was submitted by Mr. A.J. Kariuki that there was no service of the hearing notice and that once it is established that there was no notice the ruling ought to be set aside as a matter of justice.

16. Mr. Miano submitted that the application is an abuse of court since judgment appealed against was delivered on 2nd March 1999 and parties had 30 days to file an appeal which expired on 2nd April 1999 and no appeal was filed until 7th May 1999 when the appellant filed an application for leave to file an appeal out of time

17. On 10th May 1999 JV Juma J. as he then was granted the appellant 15 days which would have taken the same upto 25th May 1999 which was not done and on 30th June 1999 the respondent filed an application to inform the court that there was no appeal.

18. It was submitted that no steps were taken to prosecute the application dated 23rd November 2003 for

over ten years and on the authority of ET MONKS & CO LTD v EVANS NAIROBI CIVIL SUIT No. 71 OF 1971 reported in [1985] KLR 584 public policy demands that the business of the courts should be conducted with expedition and that should a party not move the court as fast as possible it would have no right to complain that his matter has been dismissed.

19. On the authority of NILANI v PATEL & OTHERS reported in 1969 E.A page 34. He submitted that if there had been inordinate delay by the plaintiff which was inexcusable then the court has power to dismiss.

DETERMINATION

20. It must be pointed out at this stage that the Respondent did not file any application for dismissal of the appellants application herein dated 23rd November 2003 for want of prosecution but filed an application for release of the decretal sum herein therefore the authorities submitted by the same are distinguishable. The question for the court to answer as regards the respondents application is whether the decretal sum can be released while an application is pending to reinstate the appeal herein?

21. To my mind it would defeat the cause of justice should the decretal sum be released to the respondent herein and thereafter the appeal which has not been determined on its merit is reinstated.

22. The next issue is whether the appellant has made a case for reinstatement of the appeal herein?

From the record, the affidavit and submissions by counsels it is not disputed that the hearing date herein was taken *ex parte* and the appellant was not served with the hearing notice

23. It is trite law that where the service is not regular then the court ought to set aside the *ex parte* orders made as per the decision of Ringera J (as he then was) in HCCC No. 171 OF 2001 NAIROBI RAMCO LTD v MISTRY JADRA PARBAT & 2 OTHERS under what is known as ex debito justitiae.

24. It should also be pointed out that even where there is proper service the court still has discretion to set aside the orders as can be seen from the case of SHAH v MBOGO [1967] EA 116 when it was stated

“This discretion is intended so as to be exercised to avoid injustice or hardship resulting from accident inadvertence and excusable mistake or error but not designed to assist the person who has deliberately sought to whether by evasion or otherwise to obstruct or delay the course of justice.”

25. From the proceedings herein I have noted that the application was filed two days after the appeal was admitted and it therefore can not be said that there was inordinate delay on the part of the appellant in filing the application.

26. On the issue of whether there was an appeal in the first place, as stated herein the appeal having been dismissed on 6th March 2000 and directions taken thereon I take the view that the appeal was properly before the court otherwise there would have been nothing for the court to dismiss for non attendance.

27. The upshot of this is that I would allow the application dated 22nd November 2003 set aside the order of dismissal and reinstate the appeal herein which must be fixed down for hearing and determination within the next 30 days failure to which the same stands dismissed for want of prosecution without further orders of the court and the decretal sum deposited in the joint names of the Advocates herein be released to the Respondent.

Dated and delivered at Nyeri this 30th day of January 2014

J. WAKIAGA

JUDGE

Mr. A.G. Kariuki for the appellant.

Mr. Gacheche Wa Miano for the Respondent.

J. WAKIAGA

JUDGE