REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL N0.109 OF 2009

EQUITY BANK LTD.....APPELLANT /APPLICANT

VERSUS

EUSTACE NDUNG'U MUNYORI.....RESPONDENT

RULING

By a ruling delivered on 8/3/2013, this court dismissed the appeal herein for want of prosecution. The order dismissing the appeal was made after the respondent moved the court for dismissal of the appeal on the ground that since filing of the appeal and obtaining orders of stay of execution, the appellant has taken no step to have the appeal heard and determined.

Aggrieved by the dismissal of the appeal, the appellant (applicant) brought the notice of motion dated 24/4/2014 seeking to set aside the said ruling and order. The applicant also seeks an order of stay of execution and/ or proceedings in the lower court (**Nyahururu PMCC N0.404 of 2006)** pending the hearing and determination of the application.

The application is supported by the affidavit of the applicants' advocate, Tim Agufana Liko, and is premised on the grounds that on 13/ 11/2009 the applicant was granted a conditional stay of execution of the judgment of the lower court pending the hearing and determination of the appeal, that the applicant complied with all the conditions imposed by the lower court for stay of execution; that following an application by the respondent for the dismissal of the appeal, on 8/3/2013 this court dismissed the applicant's appeal for want of prosecution.

Contending that it was not aware of the date slated for hearing of the respondent's application for dismissal and that the dismissal of the appeal exposes it to execution; the applicant urges the court to review and/ or set aside the order dismissing the appeal.

In opposition to the application, the respondent through its advocate, Nancy Njoki Mureithi, filed the affidavit sworn on 29th April, 2013 and filed in court on 2nd May, 2013. In that affidavit the respondent's advocate has admitted that the pleadings served on the applicant's advocate were not endorsed with the date of hearing. Notwithstanding that admission, the respondent's advocate contends that the applicant could not have mounted any plausible defence to the application.

The respondent's advocate argues that despite several notices having been served on the applicant to prosecute the appeal, then it failed to heed the notices. She singled out, the ultimatum given to the applicant on 27.1.2012 to take the necessary steps and fix the appeal for hearing within sixty (60) days. Contending that the applicant failed to prepare the record of appeal and fix the appeal

for hearing with the time ordered by the court and at all, she argues that no mischief was occasioned by the irregular service and that no prejudice would be occasioned on the applicants if the orders sought are denied.

On 24/4/2013, when the instant application was called for hearing, the advocates for the parties, with the concurrence of the court, agreed to have the application disposed off by way of written submissions. Subsequently, filed and exchanged submissions.

In the submissions filed for the applicant, it is reiterated that the applicant was not served with any hearing notice of the application for dismissal. It is contended that since the applicant's advocate was not seized with sufficient information regarding the application for dismissal, it could not attend court for the hearing of the application. The fact that the respondent was not served with a hearing notice of the application for dismissal is said to be a sufficient ground for review of the ruling and the order for dismissal. In this regard, reference is made to **Ramco Ltd** v. **Mistry Jadra Parbat & 2 others Nairobi HCCC NO. 171 of 2001** for the proposition that where service is irregular a court ought to set aside any ex parte orders *ex debito justiticiae*.

Reiterating the contention that its advocate's discovered the order of the court only after the respondent's advocate wrote to their advocate threatening it with execution, the applicant has argues that discovery of the *ex parte* judgment was a new and important matter which it could not get seized of despite exercise of due diligence.

Concerning the application for stay, it is submitted that if the prayer for review is granted, the appeal will be automatically reinstated. Further that upon reinstatement of the appeal, a stay of execution is necessary to avoid the reinstated appeal being rendered nugatory.

The application herein is said to have been filed immediately after the applicant got to know about the ruling and order of the court hereto. The applicant is also said to be willing, ready and able to abide by any conditions imposed by the court and/ or furnish such security as may ordered by the court for grant of the orders sought.

In reply the respondent has reiterated the contention that the applicant was given various notices to prosecute the appeal to no avail. The respondent maintains that even after being given the sixty (60) days ultimatum, the applicant failed to take steps necessary to prosecute the appeal. The respondent pointed out that the Sixty (60) days ultimatum issued by this court was never extended.

Concerning the applicant's argument that owing to the irregular service it could not have attended court to defend the application for dismissal of the appeal, it is submitted that with due diligence, the applicant's advocates could have known about the date set down for hearing.

Arguing that discovery of the *ex parte* ruling does not amount to a new and important matter which was not within the appellants' knowledge even after exercise of due diligence. The respondent have submitted that the appellants could have known about the date slated for hearing of the application by making an inquiry in court or calling the respondent's advocate to inquire about the hearing date.

Reiterating the contention that the delay in prosecution of the appeal was inordinate and inexcusable, the respondent referred to the decision in Et Monks & Company Ltd v. Evans (1985) KLR 584 in support of the argument that the applicant was duty bound to move the court as fast as possible to get his appeal heard and determined. It is submitted that the applicant having failed to do so has no right to complain that its appeal was dismissed.

Further that the discretion of the court to set aside *ex parte* orders should be exercised to avoid injustice or hardship resulting from accident inadvertence and excusable mistake or error but not to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.

In this case, the appellant having failed to take any steps to prosecute its appeal since 17.6.2009, and even after having been given an ultimatum to do so, is said to be undeserving of the exercise of the court's discretion in its favour.

I have read and considered the application herein, the response thereto and the submissions by the respective parties. The sole issue for determination is whether the court should exercise the discretion vested in it in favour of the applicant?

The law applicable to the application:-

Under Order 45 of the Civil Procedure Rules a court has power to review its own orders. The Order provides as follows:-

> **"(45)(1) Any person considering himself aggrieved-**
>
> **(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**
>
> **(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay."**

This legal position flows from Section 80 of the Civil Procedure Act which gives a Court power to review its own order where an appeal has not been preferred against its order for sufficient cause.

Whether the court should exercise the discretion vested in it in favour of the applicant?

In the instant application it is not in dispute that the applicant's advocate was not aware of the date slated for the hearing of the respondent's application for dismissal. That notwithstanding, it is contended that with due diligent the applicant would have got to know of the date slated for the hearing of the application. The respondent has submitted that the applicant's advocate would easily have known about the hearing date if he had called the respondent's advocate and/ or made an inquiry in court.

I agree. Instead of conducting the court and/or the respondent's advocate to clarify on the issue of the hearing date, the applicant's advocate opted to sit pretty and wait, when he knew very well that the court had already given it ultimatum to fix the appeal for hearing. He now moves this court for review on the basis that he did not know the hearing date of the application for dismissal. In that application there is nothing to prove that the applicant took any steps towards prosecution of the appeal as ordered by the court. Besides, there is no prayer for extension of the court's ultimatum.

In view of the foregoing the question to ask is what justice would review of the orders serve?

In my view, granting the orders sought would only serve to prolong the life of this appeal is already enjoying its 6th year in court. Without any evidence of the applicant's willingness to prosecute the appeal expeditiously, I decline to exercise the discretion vested in this court in the applicant's favour.

The upshot of the foregoing is that the application has no merit and is dismissed with costs to the respondent.

Dated and **delivered** this **27th day** of June 2014 at Nakuru.

H A OMONDI

JUDGE