



REPUBLIC OF KENYA

High Court at Nakuru

Civil Appeal 241 of 2004

DEVKISTEEL MILLS LIMITED.....APPELLANT

VERSUS

SILVESTER WAMBUA MUMO.....RESPONDENT

RULING

The Notice of Motion dated 11/10/2012, is brought pursuant to **Order 42 Rules 21, 22** and **Order 51 Rules 1** and **15** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**. The appellant/applicant seeks an order that the court be pleased to set aside its order of 5/10/2012 dismissing the appeal for want of prosecution and that the court do stay execution pending hearing and determination of the application. The application is supported by the affidavit of Daniel Auta Nyakundi, advocate for the appellant. He deponed that on 5/10/2012, he traveled to Nakuru to handle the matter on behalf of Desai Sarvia & Pallan Advocates but found that it had been dismissed. He deponed that the appellant is eager to prosecute the appeal and his inadvertence should not be visited on an innocent litigant and that he has good grounds to show cause why the appeal should not be dismissed and if the application is not granted, the appellant is likely to suffer irreparable loss.

I have seen an affidavit of service sworn by Michael Chenza in which he depones that he served Kagia & Co. Advocates on 22/2/2013. Indeed the firm of Kagia & Co. Advocate duly stamped the application as evidence of service. I am satisfied that Kagia & Co. Advocate were duly served but have not appeared or filed a response.

Notwithstanding the fact that there was no response to the application, this court will go ahead to consider the application. It is this court which took out the notice to the applicants on 29/8/2012, to show cause why the appeal should not be dismissed for want of prosecution. The matter came up for hearing on 5/10/2012 and it is evident that the appellant's counsel were aware of the hearing date because Ms Wanjiru Advocate held brief for one Ms Cheruiyot and asked for some time as the said Ms Cheruiyot was said to be travelling from Nairobi. The court allowed the applicant 30 minutes. This matter had been listed for hearing at 9.00 a.m. By 10.30 a.m. the applicant's counsel had not arrived and the court went ahead to dismiss the appeal for want of prosecution.

Although counsel alleges that he had filed an affidavit in reply to the notice to show cause, there is no evidence on record that any had been filed. So far, the applicant has not adduced any grounds as to why the court should set aside its order dismissing the appeal. Indeed so far, there are no grounds adduced as to why the appeal was not prosecuted.

At paragraph 6 of Mr. Nyakundi's affidavit, it is deponed that an affidavit of *Sundeep Sarvia* was annexed showing grounds as to why the appeal should not be dismissed but none was exhibited. It is not for this

court to fish out for evidence to assist the applicant in the prosecution of its case.

Is it in the interest of justice that the order be set aside? To answer this question, this court must consider the history of this case. The respondent had sued the appellant in the Principal Magistrate's Court for general damages following an industrial accident which occurred way back in the year 2000. The respondent filed suit in the Principal Magistrate's Court in 2002, judgment was entered in favour of the respondent on 19/8/04. A notice of appeal was filed on 13/10/2004, out of time and the applicant filed an application dated 8/10/04 seeking to file the appeal out of time and the court allowed that application on 25/4/2005. Thereafter, the applicant did nothing towards prosecution of the appeal and the respondents filed the application dated 14/12/06 seeking to have the appeal dismissed for want of prosecution. When the respondent's counsel did not appear on 21/7/09, when the application came up for hearing, the court dismissed the application. The appeal was admitted to hearing on 30/3/2011. After that nothing seemed to have happened in the file from 2011. The appellant went to sleep again till the notice to show cause was issued about 1½ years later. In the meantime, though the appellant is purporting to exercise its right of appeal, the respondent has not been able to enjoy his fruits of judgment for 13 years after the industrial accident. After setting out the history of this case, I find that the applicant has not adduced any ground nor has it convinced this court as to why the court should set aside its order of 5/10/2012. The courts have a delicate duty of balancing the rights of all parties before it and that scale should not be seen to lean too much on one side to the detriment of the other. For those reasons, in the interest of justice and fairness, I decline to grant the application and dismiss the notice of motion dated 11/10/2012. The applicant to bear its own costs.

DATED and DELIVERED this 19th day of April, 2013.

R.P.V. WENDOH
JUDGE

PRESENT:

Ms Kahunga holding brief for Mr. Sarvia for the appellant/applicant

N/A for the respondent

Kennedy – Court Clerk