

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 1011 of 2005

CANNON INSURANCE LIMITED. RESPONDENT/APPELLANT

VERSUS

PATRICK N NDIANGUI..... APPLICANT/RESPONDENT

R U L I N G

The application before the court is dated 22nd November, 2010 and was filed by the Appellant. It sought the setting aside of the ex parte proceedings of the 26th October, 2010 which culminated in orders dismissing the appeal for want of prosecution. The application was filed by M/s Kairu Mbutia and Kiingati Advocates who were not the advocates of the Applicant in the matter before the delivery of the judgment dated 5th December, 2005 and who therefore, required leave of court under Order 9 rule 9 before lawfully coming on record to offer the Applicants representation.

The record shows that on 26th October, 2010 an application filed by the Respondent in the appeal to dismiss the appeal was argued. A ruling dated 20th December, 2010, dismissed the appeal for want of prosecution, after noting that the Appellant had not taken action on the appeal for a period of over five years and had lost interest, although inequitably using the stay orders which the court had granted. Indeed even on the day of hearing of the application, the Appellant had not attended court to defend the suit although properly served.

When the Applicant Appellant filed this application targeting the dismissal of the appeal, he did not seek to set aside the dismissal for want of prosecution order which was the substantive order based on the meritorious facts deponed and recorded. He instead targeted merely to set aside the proceedings leading to the dismissal together with consequential orders – a very clever way, one may say, but clearly intended to mislead this court.

Mr. Omogeni's attack against this application was double-pronged. First, that the application was incompetent for being filed by an advocate who joined the game too late in the day, contrary to order 9 rule 9. Secondly, that the relief sought i.e. the order to set aside ex parte proceedings and consequential order of dismissal, were wrong and inappropriate reliefs brought under a misapplication of Order 9B rule 8 – instead, of seeking reinstatement of the appeal dismissed for want of prosecution.

Mr. Ndirangu on the other hand admitted that his firm filed the application without getting leave of court as required under the relevant order.

It is the view of the court that on their own admission, M/s Kairu Mbutia & Kiingati Advocates were not authorized by law to file this application. Order 9 is not merely procedural. It is also substantive in nature. In the circumstances, this application is incompetent and would be and is hereby struck out.

Independently, and notwithstanding the above finding, the court is of the view that the dismissal of the appeal for want of prosecution was based on meritorious facts which have not been explained away by the Applicant in this application. The Applicant's approach for orders to set aside, is not only procedurally wrong but is also deceptive. The Applicant should have sought to reinstate the appeal for reasons which would explain away the long delay in fixing the appeal for directions and for a hearing. The Applicant instead tried to hide under a procedural approach with a view to avoid explaining the failure to prosecute for a long time.

Furthermore the Applicant did not explain his absence or absence of counsel on the day the appeal was dismissed notwithstanding the fact that they had been served.

In the above circumstances, this application on its facts, show no merit and is dismissed with costs to the Respondent. Orders accordingly.

Dated and delivered at Nairobi this 29th day of October, 2012.

.....

D A ONYANCHA

JUDGE