REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 299 of 2000

NYAMONDI OCHIENG ONYAMOGO…….....……...APPELLANT

VERSUS

KENYA PORTS AUTHORITY

MWAKA MUSAU CONSULTANT

CHESTEM ENTERPRISES ……..RESPONDENTS

R U L I N G

By a Notice of Motion, dated 14/12/05, under Order 41 Rules 4(1) and (2) and Rule 16 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, the appellant/applicant sought the following orders:

1. **Already spent**

2. **Extension of the orders of stay of execution, dated 3/7/2000.**

3. **Setting aside the orders dismissing the appeal for non-attendance on the part of applicant.**

4. **Re-admission of the appeal for hearing.**

5. **Costs.**

The application is supported by an Affidavit by Nyamodi Willys Nyamogo and is on the grounds, **inter alia,** that when the matter was called out for the allocation of hearing time, the Counsel for the applicant was before the Duty Judge for a mention which was item No. 5 for that day before the Duty judge, and that the Counsel thought that he would be through and then turn to attend to the appeal herein in issue. The Deponent – who is also an Advocate of long standing – states that the absence or non-attendance when the matter was called out was not deliberate. It was a mistake.

In opposition, the Respondent avers, **inter alia,** that the appeal was rightly dismissed because the applicant has not shown a good or genuine reason for failing to attend court on the given date and time;

the conduct of the applicant is material in considering whether to reinstate the appeal and this is as shown by prayer No. 2 seeking extension of orders of stay issued in July 2000 which were to stay in force till appeal is determined which is more than 8 years old and no prosecution of the appeal since then; re-instatement is a court discretion and the entire conduct of the applicant must be taken into account.

I have closely and carefully looked at the pleadings and considered the submissions by Learned Counsel for both sides, and I have reached the following findings and conclusions.

I begin by pointing out that prayer No. 4 should be seeking re-instatement, not re-admission of the appeal.

The explanation by the applicant for non-attendance on the date and time shown is far from satisfactory to this court. I have already observed that the applicant is an advocate of the High Court of long standing. He is or ought to be aware of the practice of the court, including the simple one that the court starts with allocation of time before the actual hearings commence for the given day. That allocation of time is for both the applications and the substantive hearings of full cases including appeals, with substantive cases taking preference in terms of time allocation, then followed by the applications.

The apparent reason given for non-attendance, of the dismissed appeal herein, falls a short of what is acceptable. The case, shown as item No. 16 on the day's cause list, was actually item No. 1 on the Hearing list while the alleged mention before the Duty Judge that day is item No. 5 on that duty Judge's list.

To assume that I would go through all the mentions, and all the applications listed before reaching the hearings is both unreasonable and impracticable. That would mean that the court would never, at any given day, reach the hearings!! That excuse by the applicant is unfaithful and dishonest, to say the least.

Further, there is no evidence that the appellant was actually before the Duty Judge. Many are the items which are listed before any court – Judge –which are never heard because the parties are not in attendance. In brief, the list of what was before the duty Judge offers no evidence required to tilt the balance in favour of this court's discretion towards the applicant/appellant.

In exercising its discretion in favour of any party, the court is very much guided and influenced by the totality of the conduct of the party concerned. Here, the applicant had obtained orders of stay of Execution on 3/7/2000 which orders were to stay till the appeal was heard and finally determined. That was in the year 2000, and by 14/12/2005, the appeal had not been prosecuted. To apply for extension of such an order, against execution by the Respondent, is, in my humble view, both oppressive and prejudicial to the Respondent, and all because of an indolent appellant.

I say indolent guardedly because the Memorandum of Appeal is dated, and filed, on the 20/6/2000. And for all those years, the appeal had not been prosecuted and on the day and time the matter was listed for hearing, **not mention,** on 14/12/2005, the appellant, whose duty it is to prosecute the appeal, was absent, and for no explained or acceptable reason. I am aware of such conflicts as the applicant might have found himself in, on the given date – 14/12/05 – having two cases before different courts at the same time. The prudence of such practice not withstanding, the applicant- advocate of this court – could have asked somebody else to hold brief for him in one or other of the cases. In my humble view and preference the mention before the Duty Judge, rather than a full hearing of an appeal dating as far back as the year 2000.

The applicant did not behave reasonably under all the circumstances of the case.

Before concluding my findings and conclusions, I wish to point out that although the applicant purportedly brought the application under Order 41 rules 4(1) and (2) and rule 16 of the Civil Procedure Rules, not once did the counsel for the applicant refer to the tenets stipulated under Order 41 rule 4(1) and (2) of the civil Procedure Rules.

Presumably that was because the stay of execution was coming for extension, rather than a fresh order of stay of execution. But that is as far as the logic of such an assumption can go.

In my humble and considered opinion, such stay order of execution, went through the window with the dismissal of the appeal. To fail to show how the applicant merits a grant of stay of execution, under the provisions under which the application is brought, is rather strange, to say the least.

I raise the issue simply to show that I considered it, but given that the issue was not canvassed either in the grounds of the application or the submissions by the counsels, I did not feel safe to assume that the same had been abandoned. Yet that is the unavoidable conclusion which raises the issue of whether or not the application is properly before the court. I leave the issue at that as I have sufficient grounds on which to dispose off the application herein before me.

All in all, and for the foregoing reasons, the Notice of Motion herein, dated 14/12/05, is hereby dismissed with costs in favour of the Respondents and against the applicant/appellants.

The applicant to pay the costs of both this application and the appeal.

Dated and delivered in Nairobi this 10th Day of April, 2008.

O.K. MUTUNGI

JUDGE