



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 79 OF 1999

BAINS CONSTRUCTION CO. LTD.APPLICANT

VERSUS

JOHN MIZARE OGOWERESPONDENT

RULING

The application dated 5th and filed in court on 6th February 2003 seeks various orders from this court; namely:-

- c. Stay of execution of court decree/orders dated 1st February 1999 issued by Thika Law Court in CMCC No. 254 of 1995 and all the consequential orders therein pending the determination of the appeal filed herein.
- d. That the appeal filed herein and dismissed on 5th day of July 2002 for want of prosecution be reinstated and admitted to hearing. e. That the Honourable Court be pleased to allow the firm of Messrs Mariaria & Co. Advocates to act for the appellant.
- f. That the Honourable Court be pleased to allow the appellant to deposit the decretal amount into court pending the determination of the appeal.
- g. That the respondent by himself, his agents and/or servants be and are hereby restrained from carrying away and advertising for sale either by public auction or by private treaty or in any other way alienating the appellants proclaimed goods till further orders of this court.
- h. Cost of this application to be provided for.

The grounds on the body of the application to support it:-

- 1) That the appeal had not been admitted to hearing as directions had not been given;
- 2) That the appellants goods and tools of business had been proclaimed by the auctioneers under instructions from the respondent;
- 3) That the appellant was willing and ready to deposit the entire decretal amount of money in court as security; 4) That the auctioneers had issued a seven(7) days notice of proclamation instead of the legally required fourteen (14) days;
- 5) That the appellant who was represented by Arum and Co. Advocates, had given full instructions to Mr. Arum to prosecute the appeal diligently as an attorney;

6) That the appellant was not aware the appeal was dismissed on 5.7.2002 until it was visited by the auctioneers on 4.2.2003;

7) That the appeal was dismissed for the mistakes of appellants' lawyer and not the appellant itself;

8) That the appellant will suffer a substantial loss and its business operation would come to halt if the proclaimed goods are sold;

The supporting affidavit was deponed to by one Balbir Singh Bains, the Managing Director of the appellant company.

In this affidavit, the deponent stated that though he had given instructions to the firm of Arrum & Co. Advocates to file this appeal on behalf of the appellant, he was not given a progress report of such appeal until the respondent through its auctioneers proclaimed the appellant's company tools of work for the decretal sum of money on 4th day of February 2003.

That when Mr. Arrum was contacted, he informed the deponent that he was not aware of the position of the appeal and this is why new counsel in the name of Mariaria & Co. Advocates were instructed to proceed in the same matter only to learn from it a day later that the appeal had been dismissed for want of prosecution on 5th of July 2002.

That it was not the fault of the appellant that the appeal was not prosecuted within the time stipulated by law.

That on advice of its new counsel the appeal had yet to be admitted to hearing and that the appellant company has, a good appeal.

That the appellant's proclaimed goods were in danger of being alienated to a 3rd party which would push it out of business and that if an order of stay was made the respondent would suffer no prejudice as the appellant would deposit the decretal sum of money in court, and so forth.

The respondent filed a replying affidavit and grounds of opposition on 3rd March 2003.

In the case of the latter, counsel stated that the application was defective, misconceived and bad in law; that there has been an inordinate delay in bringing the application for stay of execution which has not been explained, that the appeal herein was dismissed on 5th July 2002 for want of prosecution - - - and no sufficient grounds or at all for reinstatement have been given, that the respondent would be greatly inconvenienced (prejudiced) if these orders are granted and that the application herein was an abuse of this court's process.

The replying affidavit deponed to by counsel for the respondent stated that the appellant herein had filed the appeal on 3rd March 1999 and thereafter did nothing to ensure the same was diligently dealt with, that he failed to extract and file the decree from the lower court so that the appeal could be admitted to hearing despite the respondent counsel's requests to do so;

That the appellant's assertion that the appeal should be reinstated on the ground that Directions had not been given cannot be sustained when in particular it was dismissed under Order XLI rule 31(2) of the Civil Procedure Rules.

That the appellant has had no interest in the prosecution of the appeal, hence the dismissal for want of prosecution.

That there is no appeal in place to warrant stay of execution. That there has been an inordinate delay in bringing this application for stay of execution, that the respondent will be greatly prejudiced if the appeal is reinstated and/or stay of execution granted as justice delayed is justice denied and that the appellant has not given the usual undertaking to pay the respondent's thrown away costs;

That the application is fatally defective and bad in law and should be dismissed with costs.

In court on 5th March 2003 counsel for the applicant (Mr. Mariaria) submitted that the applicant had fully instructed an advocate by name Arum who did file the appeal.

That mistakes of counsel should not be visited on his client or that the counsel did not receive the letter inviting him to come in the court.

According to counsel, the applicant did not know that his appeal had been dismissed until he saw auctioneers visit its premises to execute by way of attachment.

That it is in the interest of Justice that the appeal be reinstated.

According to counsel the appellant was not prosecuting the appeal, by itself and that no prejudice will be suffered by the respondent, who is ready and willing to abide by any security or condition to be ordered by the court.

He asked that the appeal be reinstated.

Miss Waithaka for the respondent opposed the application saying it was too late. According to her though the appeal was filed four (4) years ago, the appellant had shown no interest to prosecute it.

That the mistake in not prosecuting the appeal lay on counsel for it but that the principal should bear the cross.

That if the appellant did not go to his advocate to find out why the appeal had not been prosecuted for four (4) years then it was to blame.

Counsel submitted that the respondent is entitled to enjoy fruits of his sweat and should not be denied this by unnecessary delay in prosecuting this appeal.

Counsel complained that the supporting affidavit from previous counsel was not substantial. According to her that counsel had refused service of application for dismissal of the appeal for want of prosecution thus contributing to this delay.

Counsel stated that no reasonable ground had been laid for the reinstatement of this appeal as there had been no demonstration of substantial loss if the suit is not reinstated or stay order refused.

According to her, 4 years is a long time for an application for stay of execution to be made. And that since there is no appeal, stay of execution cannot be made. She prayed for the dismissal of this application with costs.

The only reason given in the affidavit of previous counsel for the applicant for failure to attend court on 5th July 2002 when the appeal was dismissed for want of prosecution was that he did not receive letter of 4th June 2002.

No where in that affidavit does the previous counsel intimate any reasons why he had never moved the court in regard to the prosecution of this appeal since filing it 4 years ago.

The notice to show cause was sent out from this court to the parties counsels as required by order XLI Rule 31(2) of the Civil Procedure Rules.

Previous counsel says in the affidavit that he did not receive this notice yet these were sent to both counsel through their respective post office boxes. If this is so, how come counsel for the applicant received his and came to court on 5th July 2002?

Previous counsel does not say his box, number 40182 is no longer in use!

In its grounds on the body of the application and affidavit in support thereof, the applicant says it had given full instructions to Messrs Arum & Co. to prosecute the appeal and that this appeal was dismissed for the mistakes of its lawyer and not the appellant itself – see paragraphs 5 and 7 of the grounds, and that it is the mistake of counsel which caused the appeal to be dismissed for want of prosecution and not that of the applicant itself.

It is to some extent true to say mistakes of counsel as in the present case should not be visited upon the party. But it is equally true that when counsel as agent is vested with authority and trust to perform some duties for his client as principal and does not perform it, surely such principal should bear the consequences otherwise he would never learn from his folly.

Once the client engages the services of a lawyer, there is general power for him to do everything for his said client in respect to the particular case. He is the one through whom all correspondence is channeled, either from the court or the opposite party.

He goes to court to arrange for any mention or hearing of the case and he is supposed to appraise his client of the goings-on.

The previous counsel for the applicant filed this appeal on 3rd March 1999. He did nothing else after that and the applicant itself does not show it approached him to inquire at what stage the appeal was.

As it were both advocate and client went to some sort of sleep.

And if I heard present counsel well, he and the previous counsel appear to be in the same office and none of them says what exactly caused this delay which culminated in the dismissal of the appeal for want of prosecution.

And up to the date of hearing of this application neither the lower court record nor the record of appeal are on this appeal file, yet these are preliminary issues to be pursued by the applicant's counsel.

There is no letter on this appeal, file to show the appellant's counsel followed this matter up.

What do all these show? They show neither the appellant nor its counsel was interested in this matter after filing the appeal.

I agree with counsel for the respondent that applying for stay of execution in an appeal which has already been dismissed for want of prosecution does not make any sense. In any case this sort of application, being made after 4 years of filing appeal is inordinately late; and not worth of consideration by a reasonable court.

This court has a discretion to allow or not the application presented before it, but before exercising this discretion, sufficient grounds should be laid by the applicant for it. Unfortunately I am not convinced this has been done.

Not without some sympathy for the applicant, I am not inclined to exercise my discretion infavour of the applicant in all the prayers sought.

I dismiss the application with costs.

Delivered this 13th day of March, 2003.

D.K.S. AGANYANYA

JUDGE

