



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELCA NO 3 OF 2018

STEPHEN KIHARA GITHINJI.....APPELLANT/APPLICANT

VERSUS

JACKSON MUIRURI NDUATI.....RESPONDENT

RULING

1. By a Notice of Motion dated 3rd May 2019 and filed on the 10th May 2019 pursuant to Order 42 Rule 21, Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B and 3A, 3B 63(e) and 95 of the Civil Procedure Act and all enabling provisions of the law, where the Appellant/Applicant seek for orders that:-

i. The Court be pleased to vacate its orders issued on the 21st Day of March, 2019 dismissing this Appeal for want of prosecution and re-admit the same.

ii. That the costs of this application be provided for.

2. The Applicant relied on the grounds on the face of their application and the Applicant's affidavit dated the 3rd May 2019.

3. That facts giving rise to the said Application being that vide an application dated the 20th March 2018, the Applicant herein sought for temporary a stay of execution of the ex- parte Judgment and Decree passed on the 4th day of July 2017 in the Engineer Principle Magistrates Court in Civil Suit No. 22 of 2017, pending the hearing and determination of the application.

4. The court directed that the matter be served upon the Respondent for inter parties hearing which was scheduled for the 19th April 2018 and on which day, the matter did not take off and neither had there been service for reasons that Counsel for the Applicant was indisposed.

5. A subsequent date was taken with orders to serve. On the 26th June when the matter came up for hearing, the court was informed that the Appellant had been served with notice of intension to act in person on the 18th June 2018 and Counsel for the Appellant was taking his child back to school. By consent however, parties sought have the matter disposed of by way of written submissions. Leave was granted to parties to file and serve their submissions within 14 days each with the highlighting of the same slated for the 24th October 2018.

6. A ruling was delivered on the 28th January 2018 wherein the court was not inclined to grant the order of stay of execution so sought thereby dismissing the application but with orders that *the Appellant/Applicant shall lodges his Appeal against the decree of the lower Court within 15 days, file and serve his Memorandum of Appeal within 45 days from the date of the ruling.*

7. On the 21st March 2019, when the matter came up for mention to confirm compliance there was appearance by the Applicant wherein the court was also informed that its orders had not been complied with. The Respondent sought that the matter be dismissed. The court dismissed the Applicant Appellant's Appeal for want for prosecution, which dismissal gave rise to this application.

8. On the 17th June 2019, Direction were taken that this application dated the 3rd May 2019 be disposed of by way of written submissions. Parties filed their submission which I shall address as follows.

Applicant's submissions.

9. The Appellant Counsel's submissions was to the effect that the delay in complying with the orders of the court to file and serve his record of Appeal upon the Respondent was neither deliberate nor intentional.

10. It was their submission that the law court record and had still not been availed to the Applicant for purposes of preparation of his record of Appeal and due to an oversight on his part, the proceedings and judgment of the trial court had not been formally requested for.

11. It was the Applicant/Appellant's plea that he was eager to prosecute his Appeal without any further delay if this instant application was granted.

12. That the parties had been engaged in this matter since the year 2016 when the Respondent filed suit against the Applicant in the lower court wherein judgment was entered against the Applicant who had failed to enter an appearance despite there having been service of summons.

13. The Applicant framed his issues for determination as follows:

- i. Whether this honorable court applied the correct and/or right procedure in dismissing the Appeal for want of prosecution.
- ii. Whether the grounds advanced by the Appellant/Applicant as having been the cause of his failure to prepare file his record of Appeal upon the Respondent were sufficient and/or adequate enough to warrant the instant application being allowed.
- iii. Whether the Appellant/Applicant should have been deemed to abandon the Appeal.
- iv. Whether the Appellant/Applicant contravened Section 1A and 1B of the Civil Procedure Act on the overriding objective which is anchored on the duty to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes by the Act.
- v. Whether justice can be done despite the Appellant/Applicants delay/whether the Respondent will be highly prejudiced by the delay.
- vi. Whether the delay on the part of the Appellant/Applicant is prolonged and inexcusable and if it is, whether justice can still be done despite the delay.
- vii. Whether this honorable court has inherent powers to the extend time and save the Appeal from premature death.

14. The Applicant condensed the seven issues for determination and submitted that the relevant provisions on dismissal of an Appeal for want of prosecution was provided for under Section (sic) 42 Rule 35(1). That the court acted suo motto by dismissing the Appellant/Applicant's Appeal for want of prosecution instead of advising the Respondent to set down the Appeal for hearing or to file a formal application to dismiss the Appeal for want of prosecution. In so submitting the Applicant relied on the case of **Pyramid Haulers Co. Limited vs James Omingo Nyaaga & 3 Others [2017] eKLR** to buttress their application.

15. That Article 50 of the Constitution provides that every person had the right to have any dispute that could be resolved by the application of the law, decided in a fair and public hearing before a court or if appropriate, another independent and impartial tribunal or body.

16. That the Appeal was filed in the year 2018 where the Appellant was preoccupied with his application for stay of execution of the Decree obtained by the Respondent ex-parte from the trial court to pending the hearing and determination of the Appeal.

17. That following the finding in **Eastern Province Kenya Ltd vs Rongai Workshop & Another [2014] eKLR** the test to be applied in applications for dismissal for want of prosecution is whether the delay is prolonged and inexcusable, to and whether justice can still be done despite the delay. That if the court is satisfied with the Plaintiff's excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it to be set down for hearing at the earliest time which was the discretion of the court. That the rational of the decision was the supremacy of the courts to exercise discretion not to deprive a party to a right to access court to pursue his claim which by reason of delay would not see the light of day. That the primary concern of courts is to balance the competing interests and priorities between the parties to ensure the fair administration of justice.

18. That whereas the Respondent in this case obtained a judgment from a competent court on his claim, on the other hand the Appellant/Applicant as a result of the judgment, has a right to seek redress and challenge the decision of the trial court. In the event this court refuses to extend time therefore, there will be denial of justice for the Appellant to maintain the action.

19. That the Appellant Counsel's indisposition for a considerably a long period of time should be deemed to be legitimate and beyond his control. That the court had inherent powers under section 3, 3A and Order 50 rule 1 of the Civil Procedure Act and Rules respectively to save the action from premature death and in the interest of justice.

20. Counsel submitted that in the event the Appeal was dismissed at this stage the Appellant/Applicant would suffer and injustice. Additionally, the injury if any caused by the delay on the part of the Appellant/Applicant can be compensated the by way of payment of costs to the Respondent.

21. That the Appeal was dismissed suo moto wherein the Respondent should have either set down the Appeal for hearing or made a formal application for dismissal of the Appeal for want of prosecution.

22. That the subject matter of the Appeal was land that belonged to the Appellant/Applicant's father, now deceased, and no Petition for grant of Letters of Administration intestate of the estate of the said the deceased had been filed. The Appellant/Applicant therefore will suffer injustice if the Appeal was not admitted.

23. The Appellant/Applicant sought that his application be allowed and for orders to issue to the Deputy Registrar to supply him with the trial court proceedings, within 21 days from the date of the ruling, so as to enable the Appellant/Applicant file his Record of Appeal.

24. The Application was opposed by the Respondent in his written submissions filed on the 9th July 2019 where he framed his issue for determination as :

i. whether the Appellant has brought the application without inordinate delay.

ii. Whether the Appellant has given viable reasons on the basis of which the court can exercise its discretion in his favour to set aside the orders dismissing his Appeal.

25. The Respondent's submission was that after the Appellant's application for stay had been dismissed and he had been given 14 days to lodge his Appeal and a further 45 days to file his record of Appeal, he had gone to sleep such that when the matter came up for mention to confirm compliance, he had neither complied with the orders nor was he present in court.

26. That the Appellant woken up from his slumber three months after the order of dismissal of his Appeal had been issued and the Respondent had begun the execution process as per the determination in the Engineer SPM Civil Suit No. 22 of 2017.

27. That the Appellant had been indolent in prosecuting the Appeal and the explanation given that the failure to prosecute the same was due to his Advocate's ailment was an afterthought as there was no evidence availed to prove the allegation.

28. That it was trite law that where a party files an Appeal and goes to sleep, delay defeats equity. The Respondent relied on the case of **Pan African Paper Mills Limited vs. Sylvester Nyarango Obwocha [2018] eKLR** to submit that in such circumstances, the court would invoke its inherent powers under section 3A,1A and 1B of the Civil Procedure Act as well as Article 159 (2)(b) of the Constitution which abhors delayed justice, to dismiss the Appeal.

29. The Respondent also relied on the case of **Cecelia Wanja Waweru vs Wainaina Muiruri & Another [2014]** to submit that the reinstatement of the Appeal would amount to an abuse of the process and the justice. That in the instant case, the Appellant was allowed 14 days to lodge his Appeal and a further 45 days to file his record of Appeal but he failed to do so. It then took him 3 months to file the present application for reinstatement and the only reason was because the Respondent had initiated the process of execution. This clearly was to deviate justice.

30. That the reason the Appellant presented before court for failing to file his Appeal on time was not viable and the court should not rely on the same to exercise its discretion as that would amount to denial of justice. The Respondent prayed for the dismissal of the application.

Analyses and Determination.

31. I have considered the application, the affidavit on record, and submissions by counsel and the law. The law concerning dismissal of an Appeal for want of prosecution is contained in Order 42 Rule 35 (1) & (2) of the Civil Procedure Rules which provide as follows:-

1. Unless within three months after the giving of directions under rule 13 the Appeal shall be set down for hearing, the Respondent shall be at liberty to either set down the Appeal for hearing or to apply by summons for its dismissal for want of prosecution.

2. If, within one year after service of the memorandum of Appeal, the Appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the Appeal before a judge in chambers for dismissal.

32. As noted herein above, an ex-parte judgment in the subordinate court was delivered on the 4th July 2017, wherein the trial Magistrate denied the Applicant stay of execution. After a period of about 8 months, the Applicant filed an Application dated the 20th March 2018 to this court seeking stay of execution pending the application to set aside ex parte judgment. Ruling was delivered on the 28th January 2018 wherein the court was not inclined to grant the order of stay of execution so sought thereby dismissing the application but with orders that *the Appellant/Applicant shall lodge his Appeal against the decree of the lower Court within 15 days and file and serve his Memorandum of Appeal within 45 days from the date of the ruling.* On the 21st March 2019 when the matter came up to confirm compliance, there was neither appearance of the Applicant nor of his Counsel and neither had he complied with the orders of the Court. The matter was dismissed for want of prosecution and attendance wherein it took the Appellant another 2 months after dismissal to file the present application.

33. The court, after having studied the development of this matter, was of the view and in agreement with the Respondent that Appellant were not desirous of prosecuting this matter wherein on its own motion, and having found that the Appellant had failed to comply with the orders issued on the 28th January 2018 and was absent on the day the matter was called out, dismissed the Appeal suo motu thus giving rise to the present Application to have the Appeal re-instated.

34. The order for the dismissal of the suit was at the instance of the court. In other words, the court was not moved by any application, when it dismissed the Appeal as the continued pendency of the Appeal was not only against the principles of justice but also prejudicial to the Respondent.

35. *Order 42 Rule (35) (1)* in my view is meant to take care of dormant Appeals which are simply abandoned after they are filed such that no interest is demonstrated by the Appellants in taking any single step towards progressing it for admission, directions or hearing.

36. The Constitution demands, under Article 159(2) (b) that cases should be disposed of expeditiously. Indeed justice delayed is justice

denied. Here, I am reminded that justice is to all the parties and not only the Appellant.

37. I have considered the submissions of Counsel for the Appellant and the application herein, I have also considered the provisions of *Order 45 Rule 1* of the *Civil Procedure Rules* where the court has jurisdiction to review and set aside its orders if the conditions stipulated under the rule are satisfied.

38. I am satisfied that when the impugned order was made, the Appellant filed the application for Review. Granted, there appears to have been some lack of diligence on the Applicant's part and or his Advocates in following up the matter, yet it cannot be said that the Appellant has totally lost interest in prosecuting the Appeal given his efforts to have the same re-instated so that it can be admitted and heard.

39. In the case of *Ivita vs Kyumbu, [1984] KLR 441*, Chesoni, J (*as he then was*) stated thus:

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite the delay. Justice is justice to both the plaintiff and the defendant; so both parties to a suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time.”

40. A party should always take steps to progress its case to a logical conclusion, because dismissal of a case is a draconian judicial act and should be done sparing and in cases where dismissal is the feasible and just thing to do. Courts should strive to sustain rather than dismiss suits especially where justice would still be done in a fair trial despite the delay. The Respondent herein has not shown any prejudice that it is likely to suffer if the Appeal is reinstated.

41. For the foregoing reasons and considering that the court is enjoined to administer substantive justice to parties before it, I find that there is sufficient reason in this case to warrant a review of the dismissal order made on the 28th January 2018 In the premise thereof;

- i. The order made on 21st March 2019 dismissing the Appeal for want of prosecution is herein set-aside and the Appeal is hereby reinstated.
- ii. The Applicant/Appellant's record of Appeal shall be filed and served upon the Respondent within the next 45 days for the delivery of this ruling.
- iii. Costs of the application shall be in cause.

Dated and delivered at Nyahururu this 5th day of November 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE