



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

CIVIL APPEAL ELC NO. 196 OF 2017

DEKOMA SLAUGHTER HOUSE MEAT VENDORS & LIVESTOCK

DEALERS CO-OPERATIVE SOCIETY.....APPLICANT/ APPELLANT

VERSUS

MAINA MAMO MATO.....RESPONDENT

(Being an appeal from the Judgment and Award of the Co-operative Tribunal in

Tribunal case No. 469 of 2010 at Nairobi delivered on 2nd December, 2016)

RULING

The matter for determination is the *Notice of Motion* Application dated **16th December 2019**, brought by the Applicant/Appellant herein brought under **Order 51 Rule 1** of the **Civil Procedure Rules, Sections 3, 3A and 1A** of the **Civil Procedure Act, Article 159** of the **Constitution** for orders that;

- 1. The Honorable Court be pleased to set aside its Orders given on 14th October 2019 dismissing this appeal for want of prosecution.***
- 2. The Honorable Court be pleased to reinstate this Appeal for hearing and disposal.***
- 3. Costs of this Application be provided for.***

This Application is premised on the grounds stated on the face of the Application and the Supporting Affidavit of **Apo Ogutu**. He deponed that the Co-operative Tribunal delivered a Judgement on **2nd December 2016**, which the Appellant was not satisfied with and intended to Appeal.

That the copies of proceedings and judgement were not availed to them after a reasonable time had passed prompting them to write a letter dated **24th January 2017**. He further deponed that this Court issued a Mention Notice for the case to be mentioned on **13th June 2019**, and on the same date, he sent his Associate to Court for the Mention of the matter, but he later informed him that he had arrived in Court late due to traffic and found the matter already called out and the Court issued a **Notice to Show Cause** why the suit should not be dismissed which was to be heard on **14th October 2019**.

It was his contention that the Appellant in an attempt to reactivate the matter, wrote to the Co-operative Tribunal on **14th June 2019** requesting for typed proceedings in order to prepare the **Record of Appeal**, but the typed proceedings were not availed by the said date of **14th October 2019**, when the Appeal was dismissed for want of prosecution.

It was his further contention that the Appellant took all reasonable steps within the law to reactivate the matter and the Co-operative Tribunal has furnished them with copies of the proceedings and judgement and they can now prepare the record of Appeal. That the Appellant has a very strong case against the Respondent and if this Appeal is not reinstated, the Appellant will suffer huge loss and damages.

The Respondent did not file any response to the Appellant's/ Applicant's Application as his Advocate asked the Court to allow him file an Application to cease acting.

The Appellant/Applicant filed its written submissions on 27th November 2020, through the **Law Firm of Ochieng Ogutu & Co. Advocates** and submitted that the Applicant having failed to obtain the proceedings within time, it was unable to file a complete Record of Appeal and secondly, failure of the Appellant's Counsel to attend the matter on 13th June 2019, was a mistake and not intentional and it relied on the case of **Richard Ncharpi Leiyangu vs IEBC & 2 others CA 18 of 2013**, and in the case of **Belinda Murai & Another v Amoi Wainaina (1978) eKLR 2782**.

The Appellant on its submissions also relied on the case of **Ivita v Kyumbu (1984) KLR 441** and in the case of **Pan African Paper Mills v Silvester Nyarango Obwocha (2018) eKLR**.

The Court has considered the pleadings in general and the annexures thereto and the main issue for determination is;

Whether the Appellant/Applicant has satisfied the conditions to set aside orders issued on 14th October 2019, dismissing the Appeal for want of prosecution.

The Appellant/ Applicant has sought for orders to set aside the Ruling made on 14th October 2019, dismissing the Appeal dated 3rd January 2019, for want of prosecution.

Order 12 Rule 7 of the Civil Procedure Rules, provides that where under this order judgment has been entered or the suit has been dismissed, the Court on application may set aside or vary the Judgment. The power to set aside ex parte orders are discretionary and the Court must use its discretion to come to a conclusion while also ensuring that Justice has been done. The Court in **Patel...Vs...E.A Cargo Handling Services Ltd (1974) EA 75**, held that:-

“There are no limits or restrictions on the Judge’s discretion to set aside or vary an ex-parte judgment except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the Court is to do Justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the Rules.”

In deciding further on whether or not to grant the orders sought and exercise discretion, the Court is also guided by whether there is sufficient cause for non-attendance and whether an injustice will be occasioned if the Application is allowed.

It is not in doubt that the said **Notice to Show Cause** was issued on 13th June 2019, by the Court and the Appellant/Applicant had not filed an Affidavit to Show Cause why the suit should not be dismissed. The Appellant/ Applicant states that he sent an Associate who had arrived in Court late due to traffic and found the matter had already been called out.

In deciding this matter, the Court will be guided by the decision in the Court of Appeal in the case of **CMC Holdings Lts Vs Nzioki (2004) 1KLR 173**, where the Court held that:-

“In an application for setting aside exparte Judgment, the court exercises its discretion in allowing or rejecting the same, That discretion must be exercised upon reasons and must be exercised judiciously”.

The Court found in its Ruling dated 9th March 2018, that the **Notice of Motion Application** dated 25th January, 2017, on seeking stay of the **Judgment and Award of the Co-operative Tribunal in Tribunal case No. 469 of 2010 at Nairobi delivered on 2nd December, 2016, not merited** and ordered the Applicant to file its Record of Appeal, within 30 days.

Further the Court issued its Ruling on 9th March 2018, allowing the Appellant/ Applicant to file his Records of Appeal within a period of 30 days. The same was not done within stipulated time. The instant Application is dated 16th December 2019, orders for dismissal for want of prosecution were issued on 14th October 2019. There is a delay of 2 months in bringing the instant application.

It is the Court's considered view that no sufficient compelling reasons have been tendered by the Appellant/ Applicant as to why there was non- attendance in Court on that particular day and to make matter worse, no cause has been shown why the Appeal remained inactive over a lengthy period of time, since the Court's Ruling delivered on 9th March 2018 ordering the Appellant/Applicant to file a Record of Appeal within 30 days.

It is evident that the Court has discretion to **set aside** an order of dismissal for non-attendance upon such terms. However, the said discretion must be exercised judicially. See the case of **Sametract...Vs...Mags Motors Ltd, Kisumu HCCC No.45 of 1996**, where the Court held that:-

“It is trite law that the court is vested with unfettered discretion in dealing with application for setting aside Judgement. It is also a well-known rule that the discretion must be exercised judicially”.

For the above explained reasons, the Court finds that the **Appellant /Applicant has not advanced sufficient reasons** to warrant this Court exercise its discretion in its favor.

Consequently, the **Notice of Motion Application** dated 16th December 2019 is **not merited**, and the same is dismissed entirely with no orders as to Costs.

It is so ordered.

DATED, SIGNED AND DATED, SIGNED AND DELIVERED AT THIKA THIS 26TH DAY OF JULY 2021.

L. GACHERU

JUDGE

26/7/2021

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

No appearance for the Appellant/Applicant

No appearance for the Respondent

L. GACHERU

JUDGE

26/7/2021