



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 19 OF 2019

M'ERURI NKARIMA.....APPELLANT/APPLICANT

VERSUS

JACOB NTONJIRI NKARIMA.....1ST RESPONDENT

ESTHER MWATHI NKARIMA.....2nd RESPONDENT

RULING

1. This appeal was filed in court vide the memorandum of appeal dated 23rd January 2019, of which, the appeal was dismissed on 31st August 2020 for want of prosecution. The Appellant approached this court vide a Notice of Motion dated 1st February 2021 seeking orders that; the firm of MUNENE KIRIMI & CO. ADVOCATES be allowed to come on record for the appellant/applicant and that the appeal be reinstated for hearing.

2. The application is based on the grounds on the face of it and on the supporting affidavit of **M'Eruri Nkarima**, the applicant who avers that he recently learnt that his appeal had been dismissed for want of prosecution and non- attendance, as counsels for the parties had apparently been served with the hearing notice via email. However, the applicant contends that he was acting in person and did not have an advocate who could be served with a hearing notice. Further, he was never served with the hearing notice himself. He states that he is keen on prosecuting the appeal. Thus, it would only be fair, just and equitable that the application be allowed.

3. The application is unopposed.

4. Section 3A of the Civil Procedure Act gives this court inherent power to make such orders as may be necessary for the ends of justice to be met. The court's discretionary power should be exercised judiciously, with the overriding objective of ensuring that justice is done to all the parties.

5. The guiding principle in the court's exercise of this judicial discretion was laid down in **Shah vs Mbogo & Another (1967) EALR 1908**. The court's discretion to set aside an ex-parte order of the nature of a dismissal order is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error. In the same vein, this discretion is not intended to assist a litigant who deliberately seeks to obstruct or delay the course of justice.

6. In the case of **John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation) [2015] eKLR** , it was stated as follows:

“The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of the Constitution. Article 50 coupled with article 159 of the Constitution on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the court. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such acts are comparable only to the proverbial “Sword of the Damocles” which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated.”

7. A perusal of the records reveals that the applicant was acting in person and had only provided a post office number and a telephone number, there is no email address. In the circumstances, there was an error in reference to service via email.

8. However, I note that the applicant has never filed a record of appeal. The orders of 15.1.2020 had directed the applicant to file the said record of appeal within 60 days. The element of keenness to prosecute the matter is therefore missing.

9. Nevertheless, I do opine that justice would be best served by reinstating the appeal with some conditions. Accordingly, I hereby set aside the dismissal order of 31.8.2020 and reinstate the appeal. However, the appellant shall file and serve his record of appeal within 30 days from the date of this ruling failure to which the appeal shall stand as dismissed. No orders as to costs.

DATED, SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF JULY, 2021

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Judgment was given to the advocates for the parties through a virtual session via Microsoft teams on 13.4.2021. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to 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.

HON. LUCY N. MBUGUA

ELC JUDGE