



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 44 OF 2012

ISAACK MUTURI NYAKI.....APPELLANT/APPLICANT

VERSUS

SIMON NJAGI NYAKI.....1ST RESPONDENT

THE REGISTERED TRUSTEES

CHURCH OF ALL KENYA.....2ND RESPONDENT

RULING

1. This ruling relates to a notice of motion dated 22.07.2018 and filed in court on the same date and wherein the applicant substantially prays for orders that this Honourable Court be pleased to set aside the dismissal order dated 25.10.2018 and the appeal herein be reinstated and be heard expeditiously and on priority basis. The appellant further prayed for costs of the application.
2. The application is premised on the grounds on its face and further on the affidavit in support of the same. In a nutshell, it is the applicant's case that upon filing the notice of appeal, he applied for typed proceedings and he was keen to prosecute the appeal but the parties herein tried to have the matter settled out of court and which negotiations took some time but when the same failed, he decided to proceed on with the appeal. That he visited the court registry but the court file could not be traced. That later he learned that the respondent herein had commenced execution proceedings and when he visited the court's registry, the file was traced and he was informed that the appeal had been dismissed for want of prosecution on 25.10.2018 despite him not having been served with the Notice to Show Cause and thus he was condemned unheard.
3. The application is opposed vide the replying affidavit sworn by Bishop John Njiru Nyaki with authority from the 1st respondent wherein he deposed that ever since the appeal was filed in 2012, the applicant herein had never taken any steps to prosecute the same which is a clear indication that he has lost interest in the appeal. Further that the applicant herein is not entitled to the orders sought and the same ought to be dismissed with costs for the reason of the equity maxims that *ex turpi causa non oritur actio* and *ex dolo malo no oritur action*. He deposed that if this court is inclined to grant orders sought, then it ought to order that he deposits the decretal amount of Kshs. 1,500,000/- in court.
4. With the leave of this court, the applicant filed a supplementary affidavit wherein he reiterated the contents of the affidavit in support of the application and further deposed that he is not in a position to raise the Kshs. 1,500,000/- as security as he is a casual labourer and not in gainful employment and thus denying him a chance to prosecute the application herein due to lack of the said amount would be unfair and unjust in the circumstances and that the respondents will not suffer any prejudice if the application is allowed as upon the hearing and determination of the appeal, the respondents shall have a chance to follow up depending on the outcome.
5. Directions were given that the application be canvassed by way of written submissions and which directions were duly complied by the parties herein.
6. I have considered the application, the replying and further affidavits and the rival submissions filed herein.
7. As I have already noted, the application seeks reinstatement of the appeal herein. I have perused the court record and indeed the appeal was dismissed on 25.10.2018. I make some preliminary observation that the application is brought under the provisions of Order 12 Rule 17. However, the said rule provides for setting aside of an order dismissing a suit. What was dismissed herein is not a suit but an appeal and prosecution of which is provided for under Order 42. I also note that the appeal was dismissed under Order 17 Rule (2) and which does not apply to dismissal of an appeal. The right order ought to be Order 42 Rule 35(2). I also note that the said order does not provide for setting aside of orders dismissing an appeal for want of prosecution. Such provisions are only available under the Court of Appeal Rules.
8. However, the instant application is under section 3A of the Civil Procedure Act Cap 21 Laws of Kenya and which section donates to this court the inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. It is by invoking these powers that I will proceed to determine the application herein.

9. The applicant filed his memorandum of appeal on 30.03.2011 against the judgment of Hon. E.K. Nyutu and in which memorandum of appeal he challenged the said decision on seven (7) grounds. The record strangely shows that the appeal was admitted for hearing on 12.03.2013. This notwithstanding, it's clear that at the time the appeal was dismissed (25.10.2018), more than 5½ years had lapsed without the appeal being prosecuted and as such this court cannot be faulted for dismissing the appeal for want of prosecution.

10. However, this court has unfettered discretion to set aside an *ex parte* order where sufficient cause has been demonstrated. According to the Court of Appeal in the case of ***CMC Holdings Ltd v James Mumo Nzioki Civil Appeal No. 329 of 2001 [2004] eKLR*** this wide discretion of the court is intended to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. The test which courts have set to determine whether or not to set aside *ex-parte* orders is whether sufficient cause has been shown.

11. The question therefore is whether the applicant herein has passed the said test. In support of the application, he proffered the reasons that upon filing the notice of appeal, he applied for typed proceedings and he was keen to prosecute the appeal but parties were engaged in out of court settlement which took some time. However, it is clear from the court record that the proceedings were ready from as early as 22.03.2013. Further, the applicant did not attach any evidence to prove the alleged out of court settlement that he has alluded to. As such, the said reason does not amount to a sufficient reason.

12. He further deposed that when the negotiations collapsed, he decided to proceed with the appeal and that he visited the court registry but the court file could not be traced. That later, he learned that the respondent herein had commenced execution proceedings and when he visited the court's registry on 15.07.2019 the file was traced and he was informed that the appeal had been dismissed for want of prosecution on 25.10.2018. He avers that the dismissal was made without him having been served with Notice to Show Cause and thus he was condemned unheard.

13. I have perused the court record and I indeed note that when the matter came up for Notice to Show Cause on 4.09.2018, the court gave orders that there was no sufficient service of the said notice. The court directed that the file be returned back to the registry. What appears after that is a Notice to Show Cause why the appeal should not be dismissed. The date for the Notice to Show Cause is indicated to be 25.10.2018. However, there is no evidence of service upon the applicant herein. Order 42 Rule 35 (2) of the Civil Procedure Rules the provisions under which an appeal can be dismissed provides that; -

“If, within one year after the 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.”

14. There having been no evidence of service of the notice upon the parties, more so the applicant herein, it is clear that the appeal herein ought not to have been dismissed.

15. Further, I note that under article 50(1) of the constitution of Kenya 2010, every person is entitled to a fair trial. It therefore follows that every person ought not to be shut out from accessing justice or having his day in court. It has been held by this court and the superior courts that **dismissal of suits (in this case appeal) is a draconian act** which drives away the litigant from the seat of justice. It is my view that dismissing the application herein would be shutting out the appellant from accessing the court and would be contrary to Article 50(1) of the Constitution.

16. In the circumstances of this case and since it is clear that the applicant herein was never served with the Notice to Show Cause, the court ought to exercise its discretion and set aside the dismissal orders made on 25.10.2018. It has not been shown that the respondents will suffer any prejudice if the applicant/appellant is given a chance to prosecute the appeal.

17. However, to progress this appeal further and since the typed proceedings are ready and certified, the applicant/appellant should be directed to file and serve the Record of Appeal within sixty (60) days from date of this ruling failure to which the appeal herein shall stand as automatically dismissed.

18. I note that the respondents in their replying affidavit prayed that the applicant/appellant do deposit Kshs. 1,500,000/-. However, the law on setting aside *ex-parte* orders does not donate such powers to this court. The only time this court can make such orders is when it's invited to stay execution of a decree pending appeal (under Order 42 Rule 6) and which is not the case herein. As such the said issue is moot.

19. The application is allowed in terms of prayers 2 and 3. As for the costs, the applicant/ appellant shall to bear the costs of the application.

20. It is so ordered.

Delivered, dated and signed at Embu this 3rd day of March, 2021.

L. NJUGUNA

JUDGE

.....for the Applicant/Appellant

.....for the Respondents