



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 129 OF 2019

LAKE VICTORIA SOUTH WATER SERVICES BOARD.....APPELLANT

VERSUS

TICHO ENTERPRISES LIMITED.....RESPONDENT

[Being an appeal from the Judgment and Decree of the Hon. W.K. Onkunya given

at Kisumu on the 6th day of November 2019 in Kisumu CMCCC No. 103 of 2017]

RULING

The application dated 18th May 2021 was brought by the Appellant, seeking the setting aside of the Order dated 22nd April 2021. The Order in question served to dismiss the appeal for want of prosecution.

1. It was the Appellant's contention that they were never served with the requisite Notice to Show Cause, prior to the dismissal of the appeal.
2. However, the Respondent is convinced that the Appellant had been duly served. Therefore, the Respondent described the Appellant's assertion of non-service as being the height of hypocrisy and deceit.
3. As far as the Respondent was concerned, the Appellant was not being truthful when they said that they were still keen on prosecuting the appeal.
4. But the Appellant emphasized that they had not only requested the Court for a record of the proceedings, but had also paid the requisite court fees.
5. I note that whilst the Appellant exhibited 3 letters, showing that they had requested for the proceedings, the Respondent pointed out that the said letters had not been copied to them.
6. In my considered view, the failure by the Appellant, to copy the letters to the Respondent's advocates, is not necessarily proof that the said letters were not written.
7. One of the reasons advanced by the Appellant, for the delay in the matter was that the trial Court had not yet made available to them, the typed record of the proceedings.
8. But the Respondent exhibited a copy of the typed proceedings, in draft form. The Respondent asserted that the typed proceedings had been ready and available from December 2019. Therefore, it was the Respondent's contention was that the Appellant had simply fallen asleep, having lost interest in their intended appeal.
9. Based on the Respondent's contention about the record of proceedings being ready, the Respondent submitted that the Appellant was guilty of inordinate delay in moving the appeal forward.
10. By the Respondent's calculations, the delay was for a period of One Year and 5 months. Therefore, the Respondent urged this Court not to reward the Appellant for their indolence.
11. It is well settled that when an Applicant was asking the Court to exercise its discretion, the Applicant should place before the said Court, material that would justify the exercise of the said discretion.

12. If the Applicant does not make available material that shows that the delay in question was excusable in the circumstances, the Court would be deemed to be acting in a capricious or whimsical manner, if it exercised its discretion in favour of the said Applicant.

13. In this case, there is evidence which shows that the Applicant first wrote a letter dated 19th November 2019, asking for the typed proceedings, for the purposes of lodging an appeal.

14. There was also evidence that the Appellant had sent 2 reminders to the Court, asking for the typed proceedings.

15. In effect, the delay in putting together the record of appeal can be attributed to the fact that the trial Court had not made available the typed record of proceedings.

16. I note that the Respondent has annexed a copy of the draft typed proceedings. However, I find it curious that whereas the Respondent appears to have “*collected*” the proceedings from the Court, I say so because there is no record that the Respondent had ever requested the Court to provide it with the proceedings. Indeed, it would appear that the Respondent had no need to lodge any appeal, as the trial Court had ruled in its favour.

17. In any event, it is inexplicable why the Respondent collected the typed proceedings in draft form. The said action by the Respondent raises more questions than answers.

18. In the event that the appeal was reinstated, I hold the considered view that the Respondent would not be prejudiced at all. I so hold because the Respondent would still have the opportunity to respond to the said appeal.

19. I further find that justice would be done to both parties when both of them have the opportunity to canvass their respective cases, substantively.

20. Therefore, I now set aside the order made on 22nd April 2021; and thus reinstate the appeal herein.

21. As regards the costs of the application, I order that the same be in the cause, in the substantive appeal. The party in whose favour the appeal is ultimately determined, shall also be awarded the costs of the application.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 18TH DAY OF NOVEMBER, 2021

FRED A. OCHIENG

JUDGE