



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 379 OF 2015

CALEB NYAKANGA CHOI.....APPELLANT/APPLICANT

-VERSUS-

STEPHEN MIGWI WANGUI.....RESPONDENT

RULING

1. The appellant/applicant herein took out the Notice of Motion dated 9th November, 2019 supported by the grounds presented on its face and the facts stated in the affidavit of *Jemimah Moragwa*. The applicant sought for the following orders from this court:

(i) Spent.

(ii) Spent.

(iii) THAT this Honourable Court be pleased to reinstate the appeal for hearing on merit upon considering the appellant's steps taken in following up on the typed proceedings at the Milimani Commercial Courts Civil Registry.

(iv) THAT this Honourable Court be pleased to reinstate the conditions for stay of execution pending the determination of the appeal as ordered on 17th September, 2015 that were fully complied with.

(v) THAT this Honourable Court do make any such further orders and issue any other relief it may deem just to grant in the interest of justice.

(vi) THAT costs of the application be in the cause.

2. The deponent stated in her affidavit that resulting from an oversight on the part of an employee of the applicant's advocate, neither the applicant nor his advocate were aware that a notice to show cause had been issued requiring the applicant to attend court and give reasons as to why his appeal ought not to be dismissed.

3. The deponent explained that the applicant's advocate only came to learn of dismissal of the appeal upon being served with the respondent's Party and Party Bill of Costs dated 7th November, 2019 and upon perusing the appeal court file.

4. It was the deponent's averment that the applicant is still desirous of prosecuting his appeal and urges this court to exercise its discretion in granting him a second chance to do so.

5. *Peter Mwaura Kamau* advocate for the respondent countered with a replying affidavit in which he stated that following delivery of the judgment against the applicant in the sum of Kshs.542,700/, the parties herein entered into a consent before the subordinate court on 17th September, 2015 to the effect that an order for stay of execution be granted on the condition that the applicant pays a sum of Kshs.240,000/ to the respondent and deposits a similar sum of Kshs.240,000/ in court within 21 days.

6. According to the deponent, while the applicant complied with the first condition, he has since failed to comply with the second condition requiring him to deposit part of the decretal sum in court.

7. The deponent further asserted that despite having been served with a notice informing him that the lower court file had been forwarded to the High Court, the applicant neglected to file his record of appeal or take any further steps in prosecuting his appeal. In the same respect, it was the deponent's assertion that the applicant did not file any reply to the notice to show cause giving reasons as to why the appeal should not be dismissed and is therefore not deserving of the prayers now sought.

8. The parties through their respective advocates argued the application orally before this court. *Miss Muragwa* learned advocate for the applicant relied on the grounds in the application and the supporting affidavit. *Mr. Mwaaura* counsel for the respondent likewise chose to rely on the averments made in his replying affidavit save to contend that the applicant has not offered any explanation for not filing his record of appeal and that the matter continued to subsist close to seven (7) years since the cause of action arose hence the more reason why litigation must come to an end.

9. I have cautiously considered the grounds set out on the face of the Motion, the facts deponed to, in the supporting and replying affidavits, and the reaffirming submissions put forward by the parties' respective advocates.

10. It is evident that the foremost prayer concerns itself with reinstatement of the appeal. I have looked at the record and I have ascertained that soon after the subordinate court delivered judgment in favour of the respondent and against the applicant in the manner established hereinabove, the appellants filed his memorandum of appeal on 5th August, 2015.

11. I have seen a copy of the letter dated 9th November, 2017 drawn by the applicant's advocate and addressed to the Executive Officer of the Chief Magistrate's Court, in which a request was made for certified copies of the typed proceedings, judgment and decree. It appears the said letter was received on 13th November, 2017.

12. There is nothing to indicate that the applicant or his advocate made any follow ups thereafter. Needless to say that the record shows the lower court file was forwarded to the Deputy Registrar-Civil Division on 2nd July, 2019 in compliance with a request made on 21st November, 2018 by the Deputy Registrar.

13. The record also shows that subsequently the Deputy Registrar issued a notice dated 3rd July, 2019 and received by the applicant's advocate on 11th July, 2019, informing it of availability of the lower court file and directing that the record of appeal be filed within 21 days thereof.

14. From my reading of the present application, I observed that the applicant did not deny that his advocate was made aware of the availability of the lower court file. On the same argument, the applicant did not offer any explanation as to why he did not comply with the aforementioned directions or demonstrate any attempts at compliance.

15. Be that as it may, the applicant's advocate admitted in his supporting affidavit that service of the notice to show cause was effected on 24th September, 2019. There is no question that the applicant did not attend court on the required date, hence the dismissal order made on 18th October, 2019.

16. Having considered the explanation offered by the applicant for non-attendance on the part of his advocate, I take the view that on the one hand, the courts have on several occasions ruled that the inadvertence of an advocate or in this instance; the employee of an advocate; should not be visited on the client. On the other hand, parties are deemed ultimately responsible for ensuring their cases are prosecuted with diligence and fervency.

17. In the present circumstances, it is apparent that the applicant has not shown any active steps taken in prosecuting his appeal by firstly complying with the directions to file the record of appeal or at the very least following up on the progress of his appeal with his advocate. If anything, the applicant's inaction could very well have been taken to mean that he lost interest in his appeal which I noted was lodged way back in 2015. Such inaction is what prompted the dismissal of the appeal to begin with.

18. I concur with the respondent's sentiments that litigation must have an end in sight. I am not convinced that the explanation given by the applicant meets the threshold of 'reasonable' and 'sufficient' reason which would warrant a review of the dismissal order and consequently, a reinstatement of the appeal.

19. Having determined the above, I find that there is no basis for this court to consider the second prayer for reinstatement of the order for stay of execution since there is no existing appeal.

20. The upshot is that the Motion is dismissed with costs to the respondent.

Dated, signed and delivered at NAIROBI this 13th day of February, 2020

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the Respondent