



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC APPEAL NO. 50 OF 2015

EQUITY BANK LIMITED (FORMERLY

EQUITY BUILDING SOCIETY)..... APPELLANT

VERSUS

JAMES MURAYA MAHUGU..... RESPONDENT

RULING

On 7th March, 2013, Hon. R. A. Oganyo S.P.M entered judgment for the respondent against the appellant the particulars of which are set out in the judgment that was delivered on her behalf by Hon. D. Ole Kiewa P.M. on 8th March, 2013. The appellant was dissatisfied with the said judgment and filed the present appeal on 4th April, 2013. Together with the memorandum of appeal, the appellant filed an application for stay of execution pending the hearing and determination of the appeal.

On 13th May, 2013, the appellant was granted an order of stay of execution pending appeal on condition that the appellant deposited a sum of Kshs.3,269,242/= in a joint interest earning bank account in the names of the advocates for the parties and the appeal was prosecuted within seven (7) months of the order. The appellant filed a record of appeal on 6th November, 2013. After the filing of a record of appeal the appellant did not take further action in the matter for about a year.

On 19th December, 2014, the respondent filed an application for dismissal of the appeal for want of prosecution. The respondent's application was dismissed on 26th March, 2015 and the appellant was ordered to list the appeal for directions within 60 days. It was not until 9th July, 2018 that the matter came up for directions before this court. On that day, the court directed that the appeal be heard by way of written submissions. The appellant was ordered to file its submissions within 30 days and the respondent to respond to the same within 30 days from the date of service. The directions were given in the presence of the advocates for both parties. The appeal was thereafter set down for mention on 24th January, 2019 to confirm the filing of submissions and for fixing of a date for judgment.

When the matter came up on 24th January, 2019; 6 months after the directions on the filing of submissions were given, the appellant had not filed its submissions. The appellant's advocate asked the court for more time to file submissions. Despite protest from the respondent's advocate, the court granted the appellant 14 days from 24th January, 2019 to file its submissions in default of which the appeal was to stand dismissed with costs to the respondent. The matter was listed for further mention on 25th June, 2019 for fixing a date for judgment.

When the matter came up on 25th June, 2019; about a year after the initial order for the filing of submissions was made, the appellant had not filed its submissions. On that day, the appellant once again sought more time to file the submissions. In response to this request, the respondent's advocate pointed out that the appeal stood dismissed with costs at the expiry of 14 days from 24th January, 2019 when the appellant failed to file its submissions as had been ordered by the court. The respondent argued that since there was no appeal pending, the appellant could not be granted time to file submissions as the appeal was not in existence. The court agreed with the respondent's advocates that the appeal stood dismissed and ordered the file closed.

On 27th June, 2019, the appellant brought an application by way of Notice of Motion dated 26th June, 2019 seeking the setting aside of the orders that were made on 24th January, 2019, reinstatement of the appeal and enlargement of time within which to file submissions. The application was brought on the grounds that the delay in the filing of the submissions was inadvertent and not out of the applicant's fault. The appellant argued that the mistake of the appellant's advocate should not be visited upon the appellant. The appellant contended further that the respondent would not suffer any prejudice if the orders sought were granted.

The application that was supported by the affidavit of Samuel Kariuki advocate sworn on 27th June, 2019 was opposed by the respondent through a replying affidavit sworn on 16th September, 2019. The respondent averred that the appellant had been applying delaying tactics in the matter and that allowing the application would cause him great prejudice. The respondent averred that it was only fair, just and in the wider interest of justice that the appellant's application be dismissed.

The application was argued on 24th September, 2019. In his submission in support of the application, the appellant's advocate Mr. Kariuki relied entirely on the grounds set out in the affidavit in support of the application. He urged the court to allow the application so that the appeal could be heard on merit. He submitted that the appellant was prepared to pay thrown away costs to the respondent.

In his submissions in reply, the respondent's advocate Mr. Gathiga relied on the respondent's replying affidavit and submitted that the thrown away costs offered by the appellant would not compensate the inconvenience to the respondent who had waited for 8 years to realise the fruits of judgment that was entered in his favour in the lower court. He urged the court to dismiss the application.

I have considered the appellant's application together with the affidavit filed in support thereof. I have also considered the replying affidavit by the respondent and the submissions by counsels. The appellant's application was brought under order 45 Rule 1, 2 and 3 and Order 50 Rule 6 of the Civil Procedure Rules. Order 45 of the Civil Procedure Rules gives the court power to review its decrees or orders while Order 50 Rule 6 of the Civil Procedure Rules empowers the court to extend time fixed by the court for doing any act. Both provisions of the Civil Procedure Rules call for an exercise of discretion by the court. What I need to determine in the circumstances, is whether the applicant deserves the exercise of this court's discretion. I have set out at the beginning of this ruling the history of this appeal and the manner in which the appellant has conducted itself. I am of the view that the appellant does not deserve the exercise of this court's discretion in its favour. I am of the opinion that an advocate's acts of gross negligence and persistent failure to adhere to the time lines set by the court is not a sufficient ground for review. I am of the view that it was not sufficient to state that the failure by the appellant to comply with the orders that were made by the court on 24th January, 2019 was inadvertent. The order for the filing of submissions was made on 9th July, 2018. The appellant has not explained why it had not filed its submissions by 24th January, 2019. It should be noted that even by 25th June, 2019 when the court ordered that the appeal stood dismissed which was about 11 months after the order for filing of submissions was made, the appellant had not filed its submissions.

I am in agreement with the respondent that if the appellant's application is allowed, he will be prejudiced. The appellant has been kept out of the fruits of judgment that he obtained in the lower court for over 6 years. It appears that the appellant is not in a hurry to prosecute the appeal due to the orders of stay of execution that were granted in its favour. Due to the foregoing, I find no merit in the appellant's application. However, in the interest of justice, I will review and set aside the orders made on 24th January, 2019 and extend the time within which the appellant was to file its submissions up to 28th February, 2020. I will however, discharge the stay orders that were granted herein on 13th May, 2013 so as to create a level playing field for the parties. It is so ordered.

Delivered and Dated at Nairobi this 27th Day of February, 2020

S. OKONG'O

JUDGE

Ruling read in open court in presence of:

Mr. Kariuki for the Appellant

Mr. Gathiga for the Respondent

Ms. C. Nyokabi-Court Assistant