



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 28 OF 2008

SOCFINAF COMPANY LIMITED.....APPELLANT

VERSUS

JANE WAIRIMU.....RESPONDENT

RULING

The Applicant/ Appellant herein has moved this Court by way of a Notice of Motion dated 22nd January, 2019 seeking to review the orders that were made on the 22nd November, 2018 in this matter, requiring the Appellant to prosecute the Appeal within a period of 45 days from the date of the aforesaid order.

The Application is premised on the grounds set out on the body of the same and it's supported by the annexed affidavit of KAIRU TIMOTHY WAWERU, sworn on the 22nd of January, 2019.

The Appeal herein was filed on the 8th day of February, 2009 challenging the judgement and Decree in Gatundu SRMCC Number 1444 of 2004 but due to the slow pace at which it was being prosecuted, the Court gave the orders that the Appellant is now seeking to review.

In the supporting and the supplementary affidavits, the reason given for failure to comply with the Court order is that there has been an issue of representation on the part of the Respondent, which has been a major obstacle on the part of the Appellant and thus the delay in prosecuting the Appeal.

The deponent avers that the firm of Nyamori & Company Advocates who are on record for the Respondent no longer accepts service of notices citing the fact that the Counsel who has the conduct of the matter left the firm and opened his own firm of Advocate and though he has been accepting service, he has failed to file a notice of change of Advocates.

The Applicant avers that the Respondent and her advocate have frustrated his effort to prosecute the Appeal by not attending Court despite being duly served with the relevant documents.

That as a result of the problem of representation on the part of the Respondent, the Applicant filed the Notice of Motion dated 11th October, 2017 seeking leave to serve the Respondent by way of registered post, which Application was granted. It has thus urged the Court to grant the orders sought herein.

The Court has considered the Application together with the grounds in support of the same and the affidavits filed herein. The Court has also perused the record of the proceedings. It is noted that, this is an old matter and since it was filed, the Appellant has not been active in prosecuting the same. However, as deponed in the supporting affidavit, it is apparent that there has been an issue of representation on the part of the Respondents.

The Application herein proceeded ex parte as there was no appearance on the part of the Respondent and his Advocate despite the fact that they had been served with a hearing notice as evidenced by the Affidavit of service filed on 2nd June, 2020.

The orders sought herein are discretionary in nature. The discretion of the Court in this regard, is wide and its entrenched in Sections 1A,1B and 3A of the Civil Procedure Act. In the case of Alimohamed Haji Suleiman Body Builders Ltd Vs Jivraj & Another (1990) KLR 224, Justice Bosire held inter alia;

“The exercise of judicial discretion to set aside is unlimited provided it is exercised judicially.....The Court is vested with the discretion so that in exercise of it, injustice or hardship resulting frominadvertence or excusable mistake or error may be avoided”.

As the Court rightly noted in the case of Bamanya Vs Zaver (2002) 329 2EA (CAU);

“The other principle governing the application.....is that administration of justice requires that all substances of disputes be heard and decided on merits.....”.

For the foregoing reasons and in the interest of justice, the orders made on 22nd November, 2018 are reviewed in the following terms;

- (1) The Appeal herein is reinstated for hearing.
- (2) The Appeal be disposed of by way of written submissions.
- (3) Parties to file and exchange submissions within a period of 30 days from today.
- (4) The matter shall be mentioned on the 13th of July, 2020 to confirm compliance,
- (5) The Applicant to extract and serve this order upon the Respondent.
- (6) Costs of the Application shall be in the Appeal

Dated, Signed and Delivered at Nairobi this 11TH day of JUNE 2020.

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L. NJUGUNA

JUDGE

In the Presence of

.....For the Applicant

.....For the Respondent