



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J)

HIGH COURT CIVIL APPEAL NO. 72 OF 2016

ELIZAPHAN MAKORI SIRINGI.....APPELLANT

VERSUS

SAMSON MAMWACHA.....1ST RESPONDENT

DAKIANGA DISTRIBUTORS LTD.....2ND RESPONDENT

(On Notice to Show Cause (NTSC) why the suit should not be dismissed)

RULING

1. This ruling concerns a Notice to show cause why the appeal in this case should not be dismissed. The Notice, dated 4th June 2019, was issued by the Deputy Registrar and purportedly served on the parties by the Court registry. It reads:

“Notice Under Order 17 Rule 2 of the Civil Procedure Rules 2020

Take Notice that the above captioned matter shall be mentioned on 11/7/2019 in open court where you are expected to show cause why the suit should not be dismissed.

Further take notice that if you fail to appear on the date aforementioned, the suit shall be dismissed under Order 17 Rule 2 without further notice to you”

2. The respondent supports the Notice which is strongly opposed by the appellant, with both parties filing submissions herein.

3. **Order 17 Rule 2** provides as follows:

“2. (1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.

(4) The court may dismiss the suit for non-compliance with any direction given under this Order.”

4. The prerequisite for the court to issue notice to show cause is: That no application or step has been taken in the matter for one year. This is what the court must now first ascertain.

5. The record shows that the appeal was filed on 2nd November, 2016. The court file shows that the High Court registry sought the lower court file and proceedings on 2/11/2016, and a reminder was sent on 9/2/2017. On 10/2/2019 the Court wrote to the appellant, copied to the respondent, notifying them that the lower court record had been received and the appellant was required to file the record of appeal on or before 7th February, 2019. The record was filed on 12th February, 2019.

6. The appeal was admitted by the court under **section 79** of the CPA on 10th April 2019. The following day, 11th April, 2019, a Notice to both parties notifying them of the admission and requiring compliance with **Order 42 Rule 13**, and to fix the matter for directions was issued. This is where the crux of the problem seems to have arisen, as there is no evidence that the notice requiring parties to fix the matter for directions was served on the parties. The appellant, whose counsel operates from Nairobi, submitted that he received no such notice.

7. The Notice to Show Cause, subject of this ruling, followed dated 4th June, 2019, and a Notice of a hearing mention to show cause dated 13th January, 2020 was issued. Although again there is no evidence of service of the mention Notice for the NTSC, the appellant responded to it by way of a Replying Affidavit filed on 28th January, 2020. In essence, the appellant's affidavit and submissions explain that he was surprised to receive a NTSC from the Court dated 4th June, 2019 when in fact he had filed the record of appeal on 12th February, 2019 and had never received any indication that it had been admitted under **section 79 CPA**. He submits that the NTSC is premature.

8. On their part, the respondents support the dismissal, and urges that the appellant is seeking to shift blame on the court, since he did not demonstrate having pursued the typed proceedings which were done on 2nd March 2017.

9. As I have already indicated, under **Order 17 Rule 2** the court may give notice in writing to the parties to show cause why the suit should not be dismissed only if in any suit, no application has been made or step taken by either party for one year. In the present case, there is no doubt that the court admitted the appeal on 10th April, 2019. Accordingly, the Court Registry erred in issuing a NTSC on 4th June, 2019, only two months later

10. Accordingly, I am satisfied that the NTSC was improperly issued, and is hereby vacated. I am alive to the fact that the substantive appeal is against a lower court Ruling of Hon P Gesora, Chief Magistrate, dismissing the plaintiff's suit for want of prosecution of the substantive suit issued on 30th September, 2016. That suit was filed ten years ago on 14th June 2010. Directions are therefore issued as follows:

- a. That the appellant do file and serve their written submissions on the substantive appeal within seven (7) days from the date hereof.
- b. The respondent to file submissions in response within seven (7) days from the date of being served.
- c. There shall be no need for highlighting of submissions and the file to be brought before the Judge for determination within twenty-one (21) days from the date hereof.
- d. There shall be no extension of time for either party.
- e. All filings to be in soft form in word format
- f. Submissions shall not exceed three (3) typed pages in regular 12 point size font or larger.

Administrative directions

11. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Zoom/Teams video/tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Deputy Registrar/Executive Officer, Naivasha.

12. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

13. Orders accordingly

Dated and Delivered via videoconference at Nairobi this 9th Day of July, 2020

RICHARD MWONGO

JUDGE

Delivered by video-conference in the presence of:

1. Mr Mageto for the Appellant
2. F I Mburu for the Respondent
3. Court Clerk - Quinter Ogutu