



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 288 OF 2016

KENYA NATIONAL HIGHWAY AUTHORITY.....APPELLANT/APPLICANT

-VERSUS-

ZENITH STEEL FABRICATORS LIMITED.....1ST RESPONDENT

SBI INTERNATIONAL HOLDINGS AG (KENYA) LIMITED.....2ND RESPONDENT

RULING

1. Before me for resolution is the Notice of Motion dated 14th August, 2020 brought by the appellant/applicant and supported by the grounds set out on its face and the facts stated in the affidavit of advocate *Christine Olando*. The applicant sought for the following orders in its Motion:

i. Spent.

ii. Spent.

iii. THAT this Honourable Court be pleased to set aside and/or vacate and/or discharge its orders of 31st January, 2020 dismissing the appeal for want of prosecution.

iv. THAT this Honourable Court be pleased to order that the Deputy Registrar avails to the applicant certified copies of typed proceedings within seven (7) days from the date of issuance of order (iii) above.

v. THAT pending the hearing and determination of the appeal, this Honourable Court be pleased to grant a stay of execution of the ruling/order delivered on 17th May, 2016 in MILIMANI CMCC NO. 7044 OF 2014 and all consequential orders arising therefrom.

vi. THAT the costs of the application be awarded to the applicant.

2. In her affidavit, Christine Olando deponed that on 17th May, 2016 the trial court granted an application filed by the 1st respondent in which it sought to have the applicant's statement of defence struck out and for entry of judgment on admission. That in so doing, the trial court awarded the 1st respondent a principal amount of Kshs. 4,241,829.50 plus costs and interest.

3. The deponent stated that being aggrieved by the aforementioned order, the applicant lodged an appeal against the same and requested for the certified typed proceedings to enable the filing of the record of appeal but the same have not been availed.

4. It was the assertion of the deponent that at around the same time, the applicant successfully applied for a stay of execution pending appeal vide the ruling delivered by the court on 10th February, 2017.

5. It was also the assertion of the deponent that the applicant's advocate applied for handwritten copies of the court proceedings but that the same have equally not been availed to date and that the inactivity in the matter since June, 2018 was occasioned by the fact that the advocate who had conduct of the appeal left the firm and the file was not re-allocated to a different advocate.

6. The deponent averred that the applicant's advocate was never served with a notice to show cause prior to the dismissal of the appeal. The deponent went on to state that unless the order for a stay of execution is granted, the applicant stands to suffer irreparable loss and damage

which will render the appeal nugatory.

7. The 1st respondent opposed the Motion by putting in the replying affidavit of advocate *Mark Omuga* who stated that upon filing the memorandum of appeal and bringing the previous application seeking an order for a stay of execution, the applicant has not taken any steps in prosecuting its appeal.

8. The deponent stated that vide the letter dated 30th July, 2018 his office wrote to the advocate for the applicant urging them to prosecute the appeal but that the said letter did not elicit a response.

9. It was the averment of the deponent that the court informed the applicant's advocate concerning the availability of the lower court file and requested them to prepare and file the record of appeal, but that the applicant took no action in the matter.

10. It was also the averment of the deponent that the parties, including the applicant's advocate, were served with a notice to show cause why the appeal should not be dismissed and that the applicant neither responded to the same nor attended court for hearing of the notice to show cause.

11. According to the deponent, the applicant has benefited from an unconditional stay of execution order while denying the 1st respondent the fruits of its judgment and that the applicant has made no provision for security for the due performance of the decree.

12. The deponent stated that should this court be inclined to vacate its dismissal order, then the applicant be ordered to deposit the decretal amount in a joint interest earning account in the joint names of the parties' advocates and that it be further ordered to set the appeal down for directions on hearing within a reasonable time period.

13. *Christine Olando* rejoined with a further affidavit and reiterated her earlier averment that the applicant has been diligent in following up on the typed proceedings and stated that the documents referenced in the replying affidavit were never served upon the applicant's advocate.

14. The deponent restated that the advocate who had conduct of the matter and in fact received the notice to show cause, left the firm without including the appeal in her hand over report or diarizing the matter in any of the office files, which would explain the failure on the part of the advocate to attend court for the notice to show cause.

15. The Motion was heard orally before this court on 30th September, 2020. *Miss Olando* learned counsel for the applicant relied on the grounds in the Motion and the facts in her affidavit and further submitted that the court can exercise its discretion in reinstating an appeal where it is shown that the applicant had applied for the proceedings but the same were not availed in good time, as held in the case of **Joseph Kimani Kamuri & another v James Kangara Kihara [2016] eKLR**.

16. The advocate added that no other advocate save for the advocate who had conduct of the matter was aware of the status of the appeal and that the mistake of an advocate should not be visited on the client. It was further the submission of *Miss Olando* that the respondent does not stand to be prejudiced in any way should the appeal and stay order be reinstated.

17. In reply, *Mr. Omuga* advocate for the 1st respondent argued that the averments made in the affidavits in support of the Motion contain falsehoods as concerns the issue of service of the documents and notice to show cause since there is evidence to show that the same were received by the applicant's advocate.

18. On the subject of reinstatement of the order for a stay of execution, the advocate restated that the applicant has not offered any security and has not addressed the issue on substantial loss. The advocate relied on the authorities constituted in his list and bundle of authorities.

19. *Mr. Ng'ethe* advocate for the 2nd respondent echoed the submissions of his counterpart and submitted that the applicant has been indolent in the matter.

20. In rejoinder, *Miss Olando* reinforced her earlier submissions.

21. I have considered the grounds as presented in the Motion, the facts deponed in the affidavits supporting and opposing the Motion, and the rival oral arguments and bundle of authorities filed by the relevant parties.

22. The Motion sought for twin prayers. I will first determine the prayer to do with the reinstatement of the appeal. The record shows that the appeal was dismissed by this court on 31st January, 2020 for want of prosecution. The record also shows that only the advocate for the 1st respondent was in attendance on that day.

23. Upon considering the explanation given by the applicant for the inaction in the appeal and upon perusing the record, I note that as at 19th March, 2019 and 26th March, 2019 when the Deputy Registrar wrote to the lower court, the lower court file and the certified typed proceedings had not been made available. I also looked at a few correspondences from the applicant's advocate to the Executive Officer of the lower court requesting for the typed proceedings and judgment.

24. I note that subsequently, the Deputy Registrar issued a notice dated 8th July, 2019 to the applicant's advocate, informing them of the availability of the lower court file and directing them to file the record of appeal within 21 days from that day.

25. Contrary to the averments made by the applicant regarding service, the aforementioned notice bears the official stamp for the applicant's

advocate which shows that the notice was received on 17th July, 2019.

26. Further to the foregoing, upon looking at the notice to show cause issued by the court on 16th December, 2019 I established therefrom that the appeal was last in court on 10th February, 2017 when the court granted an unconditional order for a stay of execution.

27. From my study of the notice to show cause, I note that the same also bears the official stamp of the applicant's advocate which shows the notice was received on 17th January, 2020 by Susan. This once again contradicts the averment of the applicant's advocate that the notice was received by the former advocate named Jane who has since left the employment of the applicant's advocate.

28. It is clear from the foregoing that the applicant's advocate was at all material times made aware of the status of the appeal and yet did not take any proactive steps to prepare and file the record of appeal and to prosecute the appeal.

29. Be that as it may, I have considered the applicant's explanation regarding the inadvertence of the advocate who had conduct of the matter and I am alive to the legal position that the mistake of an advocate should not be visited upon the client. It is apparent from the foregoing circumstances that the applicant was let down by its advocates who did not act on the instructions of the Deputy Registrar or attend court for the notice to show cause. In so finding, I draw guidance from the case of **Belinda Murai & 9 others v Amos Wainaina [1978] eKLR** where the Court of Appeal determined thus:

“The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.”

30. The above position was reaffirmed by the Court of Appeal in the case of **Ahmed v Highway Carriers (1986) LLR 258 (CAK)** where the Court of Appeal held that:

“...a litigant should not suffer for his advocate's mistakes; if the court should be inclined to punish the advocate, it should state so and choose the appropriate punishment without injuring the litigant's rights.”

31. Upon taking the above into account, I find that whereas there has been quite an inadvertent delay in the prosecution of the appeal, substantive justice enjoins me to grant the applicant an opportunity to pursue its appeal on merit. In any event, the 1st respondent has not demonstrated by way of credible evidence the prejudice it stands to suffer should the appeal be reinstated.

32. Having arrived at the above determination, I will now proceed to address the second limb of the Motion essentially touching on the reinstatement of the order for a stay of execution.

33. It is not in dispute that upon filing the memorandum of appeal, the applicant filed a Motion and sought for and was granted an unconditional order for a stay of execution of the judgment vide the ruling delivered on 10th February, 2017. It is apparent that following the dismissal of the appeal, the stay orders automatically lapsed.

34. In my view, there is no reason to vary the terms of the aforementioned ruling and in any event, should any party wish to vary or challenge the said terms, he is at liberty to take the appropriate legal measures.

35. Consequently, the Motion is allowed in respect to prayers (iii) and (v) the following orders are made:

a. The Deputy Registrar-Civil Division shall call for the lower court file to be availed to the High Court-Civil Appeals Division, together with the certified typed proceedings, judgment and decree within 14 days from this date.

b. The applicant shall thereafter prepare, file and serve its record of appeal within 7 days upon lapse of the 14 days.

c. The applicant shall prosecute its appeal within 60 days from today, failing which the order for reinstatement shall lapse and the appeal shall be dismissed.

d. Costs of the application to abide the outcome of the appeal.

Dated, Signed and Delivered at Nairobi this 15th day of October, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the 1st Respondent

.....for the 2nd Respondent