



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

HIGH COURT CIVIL APPEAL NO.98 OF 2018

(Being an appeal from the Judgement of Hon.M.Murage Chief Magistrate in CIVIL SUIT NO.45 OF 2017 in the Chief Magistrate's Court at Kitui delivered on 6th November, 2018)

PETRONILLA MULI.....APPELLANT/APPLICANT

VERSUS

RICHARD MUINDI AND CATHERINE MWENDE.....RESPONDENTS

R U L I N G

1. Before Me is a Notice of Motion dated 17th October 2019 brought by **Petronila Muli**, the **Applicant** herein asking this court for the following reliefs namely:-

i. That this Hon. Court be pleased to set aside the order made on 4th October 2019 dismissing the Appellant's Memorandum Appeal dated 15th November, 2018 and any consequential order made thereafter.

ii. That the appeal be reinstated and the Appellant be allowed to set down the appeal for directions.

iii. That costs be provided.

iv. The **Applicant** has cited the following grounds namely:-

a. The Applicant received the Notice to Show Cause on 7th October, 2019 after the matter had already come up in court.

b. That the default of appearance on 4th October 2019 was due to insufficient notice to show cause.

c. That the Applicant is desirous of prosecuting his appeal.

d. That it has been less than a year since the appeal was lodged and the Appellant has not inordinately delayed in prosecuting her appeal.

e. That it is in the interest of justice to allow this application.

3. This application is based on the Supporting Affidavit sworn on 17th October 2019 by the Applicant's Counsel **Christine T.Wanjiru**.

4. In that affidavit the **Applicant's** Counsel has deposed that this court issued a Notice to Show Cause why the appeal should not be dismissed and that the Notice was scheduled for 4th October 2019 but received on 7th October 2019 days after the Notice to Show Cause.

5. She avers that she could not attend court on 4th October 2019 as the notice was belated and that the delay in prosecution the appeal was due to delay in receiving typed proceedings and Judgement.

6. In her oral submissions in court the **Applicant's** Counsel added that the dismissal of the appeal for want of prosecution was erroneous because **Order 42 Rule 35** provides that an appeal can be dismissed for want of prosecution if no action to prosecute is taken after one year

of filing. According to the Applicant one year had not lapsed and there was no notice issued to the **Appellant** to Show Cause.

7. The **Respondent** has opposed this application through a Replying Affidavit sworn by **Richard Muindi Savi** on 19th January 2020. The main gist of the opposition is based on the Provisions of **Order 42 Rule 11, Civil Procedure Rules**. The Respondents faults the Applicant for not complying with the said rules. They contend that the **Applicant** should have placed her appeal before this Court for directions even before receiving the typed copy of the proceedings.

8. The **Respondents** further contend that due Notice to Show Cause was issued and that the same was pinned on the Court's Notice Board well in advance and the **Applicant** should have noted the same. According to the **Respondents'** counsel that in itself constituted sufficient notice to the **Applicant** and that she cannot claim that she received the notice late.

9. The **Respondent's** also aver that the **Applicant** has not challenged the validity of the Notice to Show Cause issued by the Deputy Registrar and that in their view means that the dismissed was proper.

10. They further fault the **Applicant** for indolence stating that the **Applicant** only moved after getting the dismissal order.

11. This court has considered this application and the response made. The **Applicant** has invoked the provisions of **Order 12 Rule 7** of the **Civil Procedure Rule** and **Section 3A of Civil Procedure Act**.

12. The Provisions of **Order 12 Civil Procedure Rule 7** in my view do not apply to appeals but rather the trial or hearing of main suit and consequences of non-attendance. The relevant provisions in respect to appeals and procedures are contained in **Section 79 of Civil Procedure Act** and **Order 42** of the **Civil Procedure Rules**.

13. This Court has perused through the proceedings in this appeal and notes that the Memorandum of Appeal was filed on 16th November, 2018. Thereafter the **Appellant** filed an application for stay of execution dated 28th November, 2018 which was canvassed and determined vide a ruling delivered on 18th December, 2018.

14. The **Appellant** thereafter took no step to prosecute her appeal and this may have informed the court's decision to issue a Notice to Show Cause dated 23rd September, 2019 requiring the **Appellant** to show cause why her appeal should not be dismissed. The Notice expressly stated that it was issued pursuant to the Provisions of **Order 42 Rule 35(2) of the Civil Procedure Rules**. The dismissal Order is dated 4th October 2019 which indicates that the **Appellant** failed to attend court on the 4th October 2019.

15. The **Applicant** has moved this court to set aside the dismissal Order and her application is hinged on two grounds namely:-

i. That she had not failed to take action to prosecute her appeal within prescribed period of 1 year.

ii. That the Notice to Show Cause was not served on herself or counsel.

16. The Provisions of **Order 42 Rule 35 (2)** provides as follows:-

“If after one year after the service of the Memorandum of Appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.”

17. In my considered view there are two operative words in that rule which are:-

i. The date of service of the Memorandum of Appeal. The Deputy Registrar should therefore be satisfied that the appeal has been served and when it was served. The date of filing though important is not significant for the rule to be operative.

ii. Notice to all the parties in the appeal.

18. To begin with the 1st condition, the **Appellant** avers that her appeal was lodged on 16th November, 2018. The **Respondent** has not indicated when he was served but even supposing he was served on the same day 16th November, 2018 it is rather obvious that the one year period had not lapsed to kick start the operation of the said rule. This means therefore that the provisions of **Order 42 Rule 35 (2)** upon which the Notice to Show Cause was based renders the said Notice premature because the maturity was supposed to after 16th November, 2018 subject to the date of service of the Memorandum of Appeal as provided.

19. The **Respondent** has faulted the **Applicant** for failing to place the appeal before this court pursuant to the Provisions of **Order 42 Rule 11**. The Provisions of **Order 42 Rule 11** of the **Civil Procedure Rules** relates to directions under **Section 79B** of the **Civil Procedure Act** which provide as follows:-

“Before an appeal from a Subordinate Court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding Section 79C reject the appeal summarily.”

The Provisions of **Section 79C** relates to the mode of hearing and directions.

20. The Provisions of **Order 42 Rule 11** presupposes that a decree has been drawn and certified with a view to the same being placed before the Judge for directions as envisaged under **Section 79B** as clearly seen above. The decree be issued from the lower court as per the records before me indicates that it was issued on 23rd July, 2020 after the **Applicant** applied for it *vide* her letter dated 6th Jul, 2020.

21. The Provisions of **Order 42 Rule 11** can only kick in after the decree and indeed the record from the lower court has been forwarded to the High Court. Where there is a delay in the typing of proceedings or issuance of decree and forwarding of the lower court file to the High Court for directions under **Section 79B** of the **Civil Procedure Act**, the **Appellant** cannot be punished unless the reasons for the delay can be attributed to her/him.

22. In this matter I am not persuaded that the delay placing the file before the judge was inordinate. The **Appellant** should have done better but dismissing the appeal before the lapse of one year was harsh and premature.

23. On the question of service or notice to the **Appellant** regarding the Notice to Show Cause I am also not satisfied that there was proper service on the basis that the Notice to Show Cause was pinned on the Notice Board. The Notice to Show Cause can be pinned on the Court's Notice Board in the precincts of the court but where the advocate appearing for the litigant does not ordinarily practice in this court, it is not fair to assume that the advocate is duly served upon notice being pinned on the Court's Notice board. In this era of digital technology, I believe the best way of service is *via* email, whatsapp or even sms to the litigant or his advocate. In my view service through registered service thought good served can cause delays. The **Applicant's** Counsel claim, that she received the Notice to Show Cause on 7th October, 2019 three days after the scheduled date of the Notice to Show Cause and though she could not show sufficient proof I am prepared to give the benefit of doubt because of the fact that the Notice to Show Cause was premature in the first place and secondly it is in the interest of justice to give her a second chance.

In the end this court finds merit in the Notice of Motion dated 17th October, 2019 the dismissal Order dated 4th October 2019 is hereby set aside. The appeal is reinstated and the same shall be placed before court for purposes of **Order 42 Rule 11 Civil Procedure Rule**. Cost shall be in the main appeal.

Dated, Signed and Delivered at Kitui this 7th day of October, 2020.

R. K. LIMO

JUDGE