REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

(CORAM: A.K. NDUNG'U)

CIVIL APPEAL NO. 75 OF 2018

TOM NYAGWACHI T/A

MOANY SUPPLIES & GENERAL MERCHANTS......................APPELLANT

VERSUS

B.O.M. NYABIMWA SECONDARY SCHOOL..........................RESPONDENT

RULING

1. On 30th November 2018, this court, differently constituted, ordered that a record of appeal be filed within 14 days, failure to which the appeal would stand dismissed with costs. By the time the matter was mentioned for directions on 19th December 2018, the record of appeal had not yet been filed.

2. The appellant has now moved this court vide an application dated 5th February, 2020 seeking the following orders:

a. That this application be certified urgent and be heard on priority basis;

b. That the orders made on 19.12.2018 dismissing this appeal be set aside and the appeal be reinstated to hearing on merits;

c. Costs.

3. The application is based on Order 43 of the Civil Procedure Rules and supported by the grounds set out in the body of the application and the affidavit of Josiah Abobo sworn on 5th February, 2020.

4. The deponent of the supporting affidavit avers that he is an advocate seized of the appeal. He claims that when the matter came up for mention on 19th December 2018 he indicated that he had not filed the record of appeal as the decree in the court below had not been endorsed. Since a decree is a primary document in an appeal, the advocate argues that his failure to file the record of appeal was excusable. He urges that his sins should not be visited upon the innocent litigant. That his failure to file the record of appeal within the stipulated time was not out of recklessness or negligence and therefore this court ought to exercise its discretion to extend time to file the record of appeal.

5. The respondent's advocate, Jeremiah Onsare Soire, swore an affidavit on 6th March 2020 in response to the application. He contends that the applicant seeks to set aside the orders of 19th December 2018 yet there was no order made by the court on that day. He avers that the orders made on 30th November 2018 were conclusive and the only way this application could be granted was if the applicant had made an application for extension of time before the mention on 19th December 2018 when the appeal was marked as dismissed. He also points out that no reason has been proffered by the appellant's advocate for the delay in filing the application and it is thus an abuse of the process of the court.

6. I have had regard to the rival depositions and the submissions for and against the application. The gravamen of the appellant's application is the dismissal of his appeal before hearing and determination on merit.

7. The appellant filed a memorandum of appeal on 7th September 2018 against the judgment of Hon P. Wamucii Nyotah dated 10th August 2018. The gist of the appeal as gathered from the memorandum of appeal is that the appellant is aggrieved by the decision of the trial magistrate to dismiss his claim against the respondent for a sum of Kshs. 612,465/= and has challenged that decision in this appeal. The appeal now stands dismissed pursuant to the orders of this court made on 30th November 2018. On that day, Hon. Majanja J. ordered the appellant to file a record of appeal within 14 days failure to which the appeal would stand dismissed.

8. The appellant did not file the record of appeal within 14 days as directed. His learned counsel in his submissions as well as his affidavit in support of the application stated that he was unable to file the record of appeal since the decree had not been endorsed by the trial court. The record shows that when the matter came up for mention on 19th December 2018, counsel intimated as much to the court. He also urged the court to extend the period within which he could file the record of appeal and the court directed him to file a formal application to reinstate the appeal.

9. The appellant's counsel argues that the decree is a vital document in an appeal and if it is not part of the record of appeal, the trial judge can on his own motion dismiss the appeal on that score. Hence, the record of appeal could not be filed in the absence of a duly endorsed decree.

10. This line of argument by counsel does not impress me for two reasons. The first is that counsel could easily have filed a record of appeal containing the memorandum of appeal, pleadings, proceedings, affidavits, documents put in evidence and the judgment appealed from as set out in **Order 42 Rule 13 (4)** of the **Civil Procedure Rules** and later on filed a supplementary record of appeal when the decree was endorsed by the trial court.

11. The second reason is that the courts are, in the current constitutional dispensation, not inclined to summarily dismiss an appeal for failure to include a certified copy of the decree when the record of appeal contains a certified copy of the judgment. This position was pronounced by the Court of Appeal in the case of **Emmanuel Ngade Nyoka v Kitheka Mutisya Ngata CIVIL APPEAL NO. 63 OF 2016 [2017] eKLR** thus;

> "*According to the Judge, the record of appeal before him had a certified copy of the judgment of the trial court. Consequently, he reasoned, the record of appeal was competent notwithstanding the fact that a formal decree had not been included in the record.*
>
> *We entirely agree with the reasoning of the learned Judge on this aspect. In any event, this was a mere technicality that could not have sat well with the current constitutional dispensation that calls upon courts to go for substantive justice as opposed to technicalities. Further holding otherwise would have run counter to the overriding objective as captured in* ***sections 1A*** *and* ***1B*** *of the Civil Procedure Act. Finally, one would ask what prejudice did the appellant suffer with the omission of the certified copy of the decree in the record of appeal. We do not discern any."*

12. Is the appellant's application merited? The respondent's counsel argues that it is not. He contends that the application has been brought after a long unexplained delay and under the wrong provisions of the law. He also faults the appellant for seeking to set aside the orders of the court of 19.12.2018 which is not the date when the dismissal order was made.

13. The law is that the court has unfettered discretion to set aside an *ex parte* order where sufficient cause has been demonstrated. According to the Court of Appeal in the case of ***CMC Holdings Ltd v James Mumo Nzioki Civil Appeal No. 329 of 2001 [2004] eKLR*** this wide discretion of the court is intended to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. In that case the Court held;

> *It would in our mind not be a proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle… the answer to that weighty issue was to advise the appellant of the recource open to it, as the learned magistrate did here. In our view, in doing so, she drove the appellant out of the seat of justice empty handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate.*

14. The respondent is right in his argument that the application is based on the wrong provision of the law. He is also right in his contention that the appellant sought to set aside the wrong order in his application. On 19th December 2018, the court simply noted that the appeal stood dismissed after 14 days as per the order of the court of 30th November 2018 and directed the appellant to file a formal application to reinstate the appeal. The appellant ought to have sought orders to set aside the orders of 30th November 2018.

15. He also filed his application after an inexplicable delay. From when the court directed him to file a formal application on 19 th December 2018, the appellant only filed the application to reinstate his appeal on 13th February 2020 which was more than year later. As I have already indicated above, the absence of a certified copy of decree was not sufficient reason for the appellant not to file the record of appeal within time.

16. I however note that the appellant has since compiled a record of appeal which he filed in court on 9th September 2020. The appellant's counsel argues that his filing of the appeal within 30 days was a clear testimony that the appellant was ready, able and willing to have his appeal hear and determined on merits. Dismissing the application to reinstate the appeal would be tantamount to driving the appellant from the seat of justice unheard and for an inadvertent error by his advocate.

17. Apaloo JA in ***Philip Keipto Chemwolo & Another v Augustine Kubende Civil Appeal 103 of 1984 [1986]eKLR*** observed that;

> "*Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit ... the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."*

18. For the foregoing reasons, I will allow the application to reinstate the appeal. I hereby set aside the orders of this court made on 30th November 2018 and direct the appellant to file a record of appeal within 14 days of this ruling.

19. The Appellant shall pay to the Respondent throw away costs in the sum of Kshs 15,000/= within thirty (30) days from the date of this ruling.

Dated and Delivered at Kisii this 11th day of November, 2020.

A. K. NDUNG'U

JUDGE