



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL APPEAL NO 15 OF 2018

PIUS NGUI KISWILIAPPLICANT

VERSUS

FESTUS TITUS KIMWELE.....RESPONDENT

R U L I N G

1. The Applicant herein **Pius Ngui Kiswili** and Another having been dissatisfied with the Judgment of the Lower Court appealed as provided by the law on the **18th day of July, 2012** in **Machakos High Court Civil Appeal No. 107 of 2013**. The matter was admitted to hearing on the **16th January, 2013**. On the **15th July, 2015** the Appeal was dismissed for want of prosecution.
2. On the **24th day of November, 2017**, the Applicant approached the Court by way of Notice of Motion seeking to set aside the order that dismissed the Appeal so as to be allowed to prosecute it.
3. The application is premised on grounds that the; the Applicant filed the appeal when the court's diary was full; the staff at the registry promised to fix a date and communicate; on the **20th November, 2017** he was shocked to be served with a Notice to Show Cause and an application for arrest and committal to civil jail; and that he is ready, able and willing to continue with the Appeal. He swore an affidavit where he reiterated what is stated on the grounds on the face of the application.
4. The Respondent filed a Replying Affidavit opposing the application where he averred that the appeal was admitted and the Appellant was ordered to comply with **Order 42 Rule 13** as soon as possible for early disposal of the same but he ignored and stayed for **four (4) years** until the court moved itself by dismissing the appeal. On the **10th March, 2017** the Applicant and his co- Appellant were served with a bill of costs which was followed by a certificate of costs on the **19th May, 2017**. On the **13th September, 2017** they were served with a notice of mention which was followed by a Notice to Show Cause and a warrant of arrest was issued on the **31st October, 2017** whereinafter the Applicant avoided arrest until **18th July, 2018** when he came up with the instant application.
5. At the hearing of the application **D. M. Mutinda**, learned Counsel for the Applicant relied on the grounds on the body of the application and averments on the affidavit in support of the application.
6. The Respondent opposed the application based on his averments in the affidavit. He emphasized the fact of the Applicant disappearing after issuance of the warrant of arrest.
7. The contention of the Applicant is that the Registry Personnel were to fix a date for hearing and notify him but they failed to do so. In his affidavit the applicant depones that he served the Respondent with the documents. He did not disclose the date of service.
8. The order sought by the Applicant for reinstatement of the appeal is discretionary. Therefore the Applicant must demonstrate that he has a plausible reason to have the order granted. In the case of **Utalii Transport Company Limited and 3 others vs NIC Bank and Another [2004] eKLR** the court stated that it is the primary duty of the person who brought the other to Court to take steps to progress the case. This therefore means that each case must be treated according to its own facts.
9. Although the Applicant did not disclose the date when the memorandum of appearance was served; on the **26th January, 2013** the Deputy Registrar wrote to him a letter in person notifying him of the fact of admission of the appeal and the need to comply with **Order 42 Rule 13** of the **Rules** which provides thus:-

“13. (1) on notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the appellant shall cause the appeal to be listed for the giving of directions by a judge in chambers.

(2) Any objection to the jurisdiction of the appellate court shall be raised before the judge before he gives directions under this

rule.

(3) The judge in chambers may give directions concerning the appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of any record or part thereof and any exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise.

(4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:

(a) the memorandum of appeal;

(b) the pleadings;

(c) the notes of the trial magistrate made at the hearing;

(d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;

(e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;

(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:"

10. In that regard the appellant was supposed to act within **21 days** of the date of service of the Memorandum of Appeal by causing the appeal to be listed for giving of directions before the Judge. This was not done. His explanation is that he went to the registry during a period that he does not disclose but was told to wait. Therefore he waited until **four (4) years** later when he was served with a Notice to Show Cause why he could not be arrested and committed to Civil Jail.

11. Having failed to act as notified by the Deputy Registrar the matter was dismissed pursuant to the provisions of **Order 42 Rule 35(2)** that provides thus:-

“(2) If, within 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.”

At the time of dismissal two and half years had lapsed from the time the matter was due for being set down for hearing. The Respondent herein on receiving the notice of dismissal turned up and urged the Court to award him costs therefore the Appeal was dismissed with costs. Subsequently the bill of costs was served upon the Applicant who disregarded it. A Certificate of Costs dated **10th May, 2017** was also served. Affidavits filed by the process server have not been challenged. The Notice to Show Cause why execution could not issue by way of arrest was served upon the Applicant **four (4) months** later. It was after the Court directed the **Officer Commanding Kabati Police Station** to effect arrest on the person of the Applicant that he filed the instant application.

12. The conduct of the Applicant does not demonstrate any intention on his part to progress the case. He was aggrieved by the decision of the Lower Court a finding that was in favour of the Respondent but he stayed for **four (4) years** until the court acted *suo moto* to send him a wakeup call. And even after it did so, he was reluctant in moving until it dawned upon him that there was impending incarceration.

13. As a result, I find the delay taken to be prolonged and indeed inexcusable, therefore I dismiss the application with costs to the Respondent.

14. It so ordered.

Dated, Signed and Delivered at Kitui this 9th day of January, 2019.

L. N. MUTENDE

JUDGE