



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 243 OF 2006

ALEX KARIUKI.....APPELLANT

VERSUS

DAVID KIPSANG SIRIA.....RESPONDENT

RULING

1. In the Notice of Motion dated 30th November 2018, the appellant *Mr. Alex Kariuki* prays for orders re-admitting his appeal and extending the time within which the appeal should be heard and determined. He also prays that if the court grants him the orders sought, the supplementary record of appeal dated 22nd October 2018 and filed on 23rd October 2018 and his further written submissions dated on 8th November 2018 be deemed as duly filed and they be admitted as part of the court record.

2. The Motion is premised on grounds that on 27th June 2018, the court reinstated the appeal and ordered that the same be prosecuted within 120 days in default of which it would stand dismissed with costs; that on 3rd and 26th September 2018, the court ordered the appellant to file and serve the respondent with the record of appeal together with written submissions before 10th October 2018 when the appeal was to be mentioned for further orders; that he complied with this order on 8th October 2018 which was within the time limited by the court for prosecution of his appeal; that unfortunately 10th October 2018 fell on a public holiday and on his prompting, the appeal was fixed for mention on 23rd October 2018 but as fate would have it, the appeal was not causerlisted on that day. It was subsequently fixed for mention on 19th November 2018 by which time the deadline for prosecuting the appeal had passed; that failure to prosecute the appeal within the time set by the court was not deliberate but was caused by circumstances beyond his control; that he has an arguable appeal and if the orders sought are not granted, his appeal will stand dismissed and he will suffer substantial loss.

3. The above grounds are expounded in the appellant's supporting affidavit sworn on 30th November 2018 to which he annexed letters he wrote to the court registry on various dates requesting for mention dates and evidencing service of mention notices on the respondent.

The appellant in addition deposed that in a bid to ensure that the record of appeal was complete in order to facilitate smooth hearing of the appeal, he filed a supplementary record of appeal on 23rd October 2018 albeit without leave of the court. He urged the court to note that the appeal is only pending judgment since both parties have filed their respective written submissions.

4. The motion is contested by the respondent. There is a replying affidavit sworn by the respondent on 23rd November 2018 in which he deposed that the appellant was unable to beat the deadline imposed by the court on 27th June 2018 for prosecution of his appeal not because of circumstances beyond his control but because of his indolence; that the appellant having failed to utilize the second chance given by the court to prosecute his appeal is not deserving of the court's discretion in his favour; that the delay in prosecuting the appeal is occasioning great prejudice to the respondent who is unable to enjoy the fruits of his judgment delivered on 21st March 2006; that the application is not merited and it should be dismissed with costs.

5. The application was argued orally before me on 28th January 2019. Learned counsel *Ms. Wanyonyi* represented the appellant while learned counsel *Ms. Cherono* appeared for the respondent. In their submissions, both learned counsel buttressed the positions taken by their respective clients in this matter.

6. I have carefully considered the application, its supporting affidavit and the annexures thereto; the replying affidavit as well as the oral submissions made in support and in opposition to the application. I have also perused the court record.

Having done so, I find that it is indeed true that on 27th June 2018, this court granted the applicant another opportunity to prosecute his appeal which had been dismissed on 18th June 2015. The appeal was to be prosecuted within 120 days of 27th June 2018 failing which it were to stand dismissed with costs to the respondent.

7. The court record confirms the respondent's arguments that for two months after the order reinstating the appeal was made, the applicant did not take any step to facilitate the hearing of his appeal despite being aware of the timelines given by the court. The hearing date of 3rd September 2018 was fixed by the court on its own motion though it is not clear whether the appellant was served with a hearing notice. To his credit however, I note that the appellant filed his record of appeal on 8th October 2018 whose service on the respondent is not disputed. He also filed his written submissions on 8th October 2018 in compliance with orders issued by the court on 26th September 2018.

8. From the annexures to the supporting affidavit, it is clear that though the appellant has failed to account for his inaction for the initial two months after his appeal was reinstated, he made commendable efforts in trying to facilitate hearing of his appeal before the time limited for its prosecution expired by filing and serving the record of appeal; obtaining a copy of the decree from the lower court; filing a supplementary record of appeal albeit without leave of the court and filing written submissions. The applicant had also written several letters to the registry requesting for an early mention date after the mention scheduled for 10th October 2018 for directions aborted due to declaration of the day as a public holiday.

9. Considering that all the documentation related to the appeal is already in the court record including the parties' written submissions and what is remaining is the court's determination of the appeal and considering also that the appellant is not wholly to blame for failure to prosecute the appeal on time, I find that the wider interests of justice would require that the appeal be reinstated so that it can be determined on merit.

In the circumstances, I am inclined to further exercise my discretion in favour of the applicant which I hereby do by allowing the application in terms of prayers 1 and 2. To ensure that there is no further delay in the determination of the appeal, I will grant the parties a mention date in court for further orders regarding the disposal of the appeal soon after the delivery of this ruling.

10. The respondent is awarded costs of the application.

It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI this 13th day of February, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Ms Wanyonyi for the appellant

Mr. Kurauka holding brief for Ms Cheronon for the respondent

Mr. Salach: Court Assistant