



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 125 OF 2004

PAUL KIPKEMEI KOREI.....APPELLANT

VERSUS

CHEBUT TEA FACTORY LIMITED.....RESPONDENT

RULING

1. The Notice of Motion dated 26th February 2018 seeks that the order dismissing the appellant's appeal dated 16th June 2015 be set aside and that costs of the application be provided for.

2. The motion is premised on grounds that the appellant's advocates were not served with a notice of the intended dismissal and that they were thus not granted an opportunity to show cause why the appeal should not be dismissed; that the firm of *S.M. Keyonzo Advocates* who are on record for the appellant had previously made efforts to have the appeal listed for mention for directions but its court clerk was advised that the court file was not available in the court registry but when learned counsel *Mr. Keyonzo* visited the registry on 15th January 2018, the file was traced but he discovered that the appeal had already been dismissed for want of prosecution. Those grounds are among other averments contained in the depositions made in the supporting affidavit sworn on behalf of the appellant by his learned counsel *Mr. Keyonzo*. Counsel also deponed that the appeal arose from a judgment in CMCC No. 10882 of 2001 whose hearing proceeded *ex parte* as the defendant chose not to defend the suit.

3. In his submissions during the hearing of the application, *Mr. Keyonzo* urged the court to allow the application and reinstate the appeal as in his view, the appellant has demonstrated his interest in pursuing the appeal by annexing correspondence to the court requesting to have the appeal listed for directions which was not done by the time the appeal was dismissed. He reiterated that the appellant was not served with any notice of the intended dismissal.

4. The application is not opposed. *Mr. Keyonzo* indicated that they did not find it necessary to serve the application on the respondent since the respondent did not participate in the hearing in the lower court as the suit was undefended. I have perused the original record of the lower court and note that the respondent did not enter appearance or file a defence in the suit in the lower court.

5. I have carefully considered the application as well as the depositions in the supporting affidavit and the oral submissions made by learned counsel for the appellant. I have also perused the court record.

The record confirms that indeed the appeal was dismissed under *Order 42 Rule 35 (2)* of the *Civil Procedure Rules* by *Hon. Olga Sewe J* on 16th May 2015. *Order 42 Rule 35 (2)* of the *Civil Procedure Rules* state as follows:

“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.” (Emphasis added)

6. From the above provision, it is clear that the court has power to dismiss appeals for want of prosecution if after one year of service of the record of appeal, the appeal had not been set down for hearing. But such dismissal must be done with notice to the parties.

In this case, though the order dismissing the appeal indicates that the parties to the appeal had been given notice to show cause why the appeal should not be dismissed, there is nothing in the court record to prove or confirm that indeed the appellant was served with a notice to show cause why his appeal should not be dismissed.

7. The above notwithstanding, I find that the appellant does not appear to have been sufficiently proactive and diligent in seeking to facilitate expeditious disposal of his appeal given that the appeal was filed on 25th February 2004 and the annexures to learned counsel's supporting affidavit show that the first letter he wrote to the Deputy Registrar seeking to have the appeal listed for directions was on 14th November

2011 about seven years later. The last letter was written on 16th December 2013 one and a half years before the appeal was dismissed. The appellant had not taken any steps to progress the hearing of the appeal for the period mentioned above.

8. Given the foregoing, it is my finding that the appeal merited dismissal by the court only that the procedure prescribed by the law for dismissal of appeals on the courts own motion was apparently not followed considering that there is no evidence on record to confirm that due notice of the intended dismissal was served or given to the appellant.

9. Since the right to be heard before any adverse decision or action is taken against any party is a constitutional and valued right which right was not availed to the appellant before his appeal was dismissed, I am inclined to allow the application but on one condition which I will state shortly aimed at ensuring that the appeal is expeditiously prosecuted.

10. Since the record of appeal has already been filed and the original record of the lower court has been forwarded to this court, I have decided to reinstate the appeal on condition that it is prosecuted within 120 days from today's date failing which it will stand dismissed with no orders as to costs.

It is so ordered.

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

C. W. GITHUA

JUDGE

In the presence of:

Mr. Amulyoto holding brief for Mr. Keyonzo for the appellant/applicant

No appearance for the respondent

Mr. Salach: Court Assistant