



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

HIGH COURT CIVIL APPEAL NO. 147 OF 2014

ELDORET GRAIN LIMITED.....APPELLANT

VERSUS

RICHARD MAKOKHA SIMIYU.....RESPONDENTS

RULING

The Appellant filed the appeal against the Judgment of the Lower Court in Eldoret CMCC No.676 of 2013 and the same was set for directions on 10th April, 2018. The Court was not sitting on that date. The appeal was dismissed on 6th September, 2018 for non-attendance. The Appellant then filed the present appeal seeking that the dismissal be set aside and the appeal be set down for hearing.

APPLICANT'S CASE

The Applicant contended that the appeal was dismissed during the service week and he was never served with a hearing notice. He further submitted that the service week was to deal with issues that had been pending for 5 years but the present appeal had not been pending for 5 years. He never saw the notice listing the matter for hearing during the service week. Directions had not been taken on how the appeal was to proceed even though the Respondent had put in submissions.

RESPONDENT'S CASE

The Respondent submitted that there was a notice issued that the matter was to come for hearing on 6th September, 2018. It came before Hon. Justice Okwany who was satisfied of service before she dismissed it. The notice had been addressed to both parties and the Appellant failed to attend court. The Respondent had filed submissions in May, 2018. The Applicant had taken no action since the institution of the appeal. The Respondent prayed the application be dismissed.

ISSUES TO BE DETERMINED

- a) Whether the Applicant was served with the hearing notice.
- b) Whether the Appeal was pending for 5 years before dismissal.
- c) Whether the orders dismissing the appeal should be set aside.
- d) Whether the orders for stay should be granted.

WHETHER THE APPLICANT WAS SERVED WITH A HEARING NOTICE

The Respondent submitted that the Appellant was served with a hearing notice but could not provide any evidence of the same. He provided a hearing notice that was served upon him and had the stamp of his firm. This is not sufficient proof that the Applicant received the hearing notice. In the absence of proof of service, it is probable that the Applicant did not receive the hearing notice.

WHETHER THE APPEAL WAS PENDING FOR 5 YEARS BEFORE DISMISSAL

The Appellant submitted that service week was for cases that had been pending for 5 years and above. Further, that the case had not been pending for 5 years before it was dismissed. The appeal was filed in 2014 and given the mention date for directions on 29th September, 2017. The same was dismissed on 6th September, 2018. It is clear that even from the time of filing to the time of dismissal 5 years had not lapsed.

WHETHER THE ORDERS DISMISSING THE APPEAL SHOULD BE SET ASIDE

The Respondent has failed to prove that the Applicant was aware of the hearing date of the Appeal. Further, from the record of the Court, the Honourable Judge who dismissed the suit did not state anything in relation to service despite the Respondent claiming she was satisfied that there had been service on the Appellant.

The power to dismiss a suit should only be exercised sparingly as was held in the Court of Appeal decision of D.T. Dobie & Co. (K) Ltd -vs- Joseph Mbaria Muchina CA 37 of 1978 where the Court stated that:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit has shown a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a Court of Justice ought not to act in darkness without the full facts of a case before it.”

Given that the Respondent has filed submissions, all that remains is for the Appellant to file submissions. The Court sets aside the orders and do direct that the Appellant file submissions within 2 weeks.

The stay had been granted in the Lower Court, I opine that it would be of no prejudice to the Respondent to wait a little longer to enjoy the fruits of Judgment. The Decretal Sum is already deposited in a joint interest earning account and the successful party will be able to obtain the fruits of their Judgments at the conclusion of the appeal. I therefore find the application merited and is granted as prayed

Dated and Delivered at Eldoret this 13th day of March, 2019

S. M. GITHINJI

JUDGE