REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 159 OF 2012

AISHA MOTOR DEALERS LIMITED...1st APPELLANT/APPLICANT

GILBERT GALOGALO.....2nd APPELLANT/APPLICANT

-VERSUS-

WANZA KISULI & PETER NZANGI (Suing as a legal representatives of the Estate of the NTHONY KISULI-Deceased).....RESPONDENT

RULING

1. By a Motion on Notice dated 5th March, 2018, the applicants herein seek, in the main, an order that this appeal be reinstated and admitted to hearing in the normal way.

2. According to the applicants, on 2nd May, 2017 the appeal was fixed for directions before **Nyamweya, J** but the applicants were not present as they were not served with the mention notice for the said purpose. Consequently, the applicants were unaware of the proceedings of the said day.

3. However, on 12th June, 2017, after the appeal had been dismissed on 2nd May, 2017, the applicants received a letter from the Deputy Registrar informing them that the lower court filed had been forwarded to the High Court. The applicants disclosed that they only got to learn of the fact of the dismissal of the appeal when they sent their representatives to fix the appeal for directions.

4. In the applicants' view, since they have already filed a record of appeal, there can be no delay in hearing of the appeal hence it is in the interest of justice that that appeal be allowed. In their view, unlike the Respondents, they stand to be prejudiced if the application is not allowed since the appeal challenges the issue of liability.

5. In their response the Respondents averred that since the filing of the appeal the applicants never followed up on the appeal hence its dismissal. In the Respondents' view the appeal was only intended to delay the fruits of their legally obtained judgement. They accordingly averred that this application is merely intended to embarrass and delay the finalisation of the suit.

Determination

6. I have considered the application herein, the affidavits in support thereof as well as in opposition to the application.

7. In this case, the record indicates that on 16th November, 2015 when the matter came up before **Nyamweya, J** the court was informed that the parties were at an advanced stage of negotiating the matter. The court therefore stood over the matter to 17th February, 2016 for directions on the mode of proceeding with the appeal. Nothing seems to have transpired on that day since the next minute on the file is on 17th February, 2017 when a date was fixed in the registry by consent for directions on 10th May, 2017. On that day however, the same was placed before the Deputy Registrar who directed that a fresh date be fixed in the registry. The next proceedings were those of 2nd may, 2017 when the matter was placed before the Hon. Judge for dismissal and the same was duly dismissed.

8. It is therefore clear that the applicants' contention that they were not aware that the appeal was fixed for dismissal cannot be faulted.

9. The Court of Appeal in **Murtaza Hussein Bandali T/A Shimoni Enterprises vs. P. A. Wills [1991] KLR 469; [1988-92]** held that there is inherent power to restore a case for hearing after it has been dismissed. However, the decision whether or not to reinstate a dismissed appeal is no doubt an exercise of discretion. This being an exercise of judicial discretion, like any other judicial discretion must be based on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. See **Gharib Mohamed Gharib vs. Zuleikha Mohamed Naaman Civil Application No. Nai. 4 of 1999.**

10. The Respondents have taken issue with this application which in their view is meant to delay them from enjoying the fruits of their judgement. Whereas if the conduct of a party in re-litigating issues already determined amounts to abuse of the court process, the court would not entertain such matters, the mere fact that a party makes applications which he is by law entitled to make, however numerous, ought not to be taken against him, As was held by **Madan, J** (as he then was) in **Official Receiver vs. Sukhdev Nairobi HCCC No. 423 of 1966 [1970] EA 243**:

> **"In a court of justice parties are entitled to be heard and to insist upon every possible objection. It would be wrong for this or any other court to refuse to hear an objection even if it appears meritless and tedious. Woe be to the day when this will be allowed to happen. It would be honourable to abdicate from the seat of justice than to allow such a performance of denial to take place. The court may disallow an objection, reject a motion or refuse a plea but it must never refuse to hear it. A court of law is for the preservation not usurpation of rights of the parties."**

11. It was however appreciated by the Court of Appeal in **J M Mwakio vs. Kenya Commercial Bank Ltd. Civil Appeal No. 156 of 1997** that:

> **"Whereas litigants are perfectly free to bring any number of suits they may so desire, they must understand that in doing so, they are bound to stick to the rules governing the conduct of litigation in courts…The application before the Superior Court, as well as this appeal, are nothing but subtle attempts by the appellant to re-open the matter of the sale of the suit property. The suit was heard and determined by the Superior Court and an appeal against its judgement was heard and determined. The Court of Appeal cannot sit on appeal on its judgement for there is no power for a Court to sit on appeal against itself in the same proceedings. The Court of Appeal, when it delivers its judgement, that judgement is, so far as the particular proceedings are concerned, the end of the litigation. It determines in respect of the parties to the particular proceedings their final legal position, subject to the limited**

application of the slip rule…The appellant, no doubt, lost a substantial property. The loss arose out of operation of the contract of mortgage freely executed by him and the respondent bank. The court should not be seen to lack sympathy for him. But, no consequence that flows out of the enforcement of law can be said to cause injustice. Moreover, it is a cardinal principle in the administration of justice that it is in the interest of all persons that there should be an end to litigation…The appellant must be told in no uncertain terms that no matter how many applications and suits he may institute in the courts seeking to recover the suit property, such attempts by him would be futile and a waste of resources since the dispute relating to the suit property has been heard and finally determined by competent courts. This appeal is indeed vexatious and amounts to an abuse of the process of the court and it is dismissed with costs."

12. In **James Mwashori Mwakio vs. Kenya Commercial Bank Ltd. Civil Appeal No.147 of 1986**, the same Court dealing with the same litigant held that:

"The learned Judge conscious of the appellant's handicap went into great trouble not only to understand his case but virtually prompted him to state his real grievance so he can understand and pronounce on it. In the process the learned Judge threw procedural rules to the winds and himself attempted to draft issues for him. All these came to nought as the appellant denied him his co-operation. It seems to the court ironical that this self-same appellant whom the Judge bent over backwards to assist should charge him with judicial or any sort of impropriety. The charge is found baseless and the court does not scruple in dismissing it…The plain truth is that the appellant who has been unable to pay his just debt has used the machinery of the court to postpone, what to him, must be the day of reckoning. That day has now come and the court has the duty to tell him so in plain terms."

13. Therefore, if this Court were to find as the Respondent contends that the Appellant is engaging in legal wrestling with everyone including the courts, the Court would not hesitate in bringing to an end such conduct.

14. In this case, the Appellant's case is that her appeal was dismissed without her being afforded an opportunity of being heard. The general position was restated in ***Halsbury's Laws of England Fourth Edition Vol. 1 page 90 para 74*** as follows:

"The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice..."

15. This was the position in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** where the Court of Appeal expressed itself as follows:

"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard... *A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...Denial of the right to be heard renders any decision made null and void ab initio.*" [Emphasis mine].

16. This was a restatement of **Lord Wright's** decision in **General Medical Council vs. Spackman [1943] 2 All ER 337** cited with approval in **R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007** that:

"If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision."

17. In **Ridge vs. Baldwin [1963] 2 All ER 66** at 81, **Lord Reid** expressed himself as follows:

> **"Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void."**

18. However, in **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998** the Court of Appeal held that:

> **"Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."**

19. In this case, I have perused the Court file and I have not been able to find any notice to the Appellant or her Counsel intimating that the matter would be dismissed. In the premises whereas I agree that the Appellant has been indolent in setting down the appeal for hearing, that did not relieve the Court from the obligation to notify the Appellant of its intention to terminate the appellate proceedings.

20. In the premises, I find merit in the application, set aside the order dismissing the appeal and reinstate the same to hearing on condition that the appeal is listed for hearing within the next 60 days and in default the appeal shall stand dismissed with costs.

21. It is so ordered.

Read, signed and delivered in open Court at Machakos this 14th day of June, 2019.

G V ODUNGA

JUDGE

Delivered in the absence of the parties

CA Geoffrey