



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL NO. 43 OF 2017

ALBERT MUCHIRA KIGORO.....APPELLANT/APPLICANT

VERSUS

LEONARD NJUE NJAGI.....RESPONDENT

RULING

A. Introduction

1. The applicant, being dissatisfied with the judgement in **Siakago PMCC No. 14 of 2015** delivered on 20/07/2017 filed the memorandum of appeal herein dated 17/08/2017.
2. The appeal was admitted for hearing on the 23/01/2018 but the applicant did not take any action towards the hearing of the appeal. On the 16/10/2018, the Deputy Registrar issued a notice to dismiss under **Order 17 Rule 2 (1) of the Civil Procedure Rules 2010** to the parties in this suit.
3. On the 26/10/2018 the appeal was dismissed for want of prosecution. The applicant subsequently filed an application dated 1/3/2019 in which he asks the court to set aside the order of dismissal and reinstate the appeal for hearing on merit.
4. It is the applicant's case that he was not served with the notice to show cause and subsequently that he only became aware of the dismissal after being served with the respondent's bill of costs. The applicant insists that he was thus condemned unheard contrary to the rules of natural justice.
5. In response, the respondent in a replying affidavit dated 16/3/2019 depose that the delay by the applicant is inordinate and the applicant has not given any reason for it and thus should not be allowed to re-litigate the suit as the same should be dismissed with costs.
6. The parties agreed to dispose of the matter through written submissions but the applicant his.

B. Applicant's Submission

7. The applicant submits that his advocates were not served with the notice to show cause as to why the matter should not be dismissed. It is argued that there was no affidavit of service filed in court to confirm service upon his advocates and as such he was condemned unheard contrary to the rules of natural justice. He further submits that the respondent has not indicated that he shall suffer any prejudice if the appeal is reinstated and due to the aforementioned reasons, he urges the court to exercise its discretion and reinstall the suit.
8. The applicant relied on the cases of **Kihuyu Ndirangu v Reuben Kinyanjui [2003] eKLR** and **Stephen Boru Elisha v Habiba Mohamed Said & 2 Others eKLR** where the court reinstated the dismissed suits in cases where the notices to show cause had not been served on the applicant's advocate. He further relied on the case of **Pan African Paper Mills Limited v Silvester Nyarango Obwocha [2018] eKLR** where the court in reinstating the appeal emphasized the need to serve substantive justice.

C. Analysis & Determination

9. The legal basis for dismissal of suits for want of prosecution is the requirement of expediency in the prosecution of Civil Suits and can be found in **Article 159(2) (b) of the Constitution** that justice shall not be delayed. Equally, **Section 1A and 1B of the Civil Procedure Act** gives the courts unlimited power to ensure fair and just administration of justice and to economically utilize judicial resources. Under **Section 63 (e) of the same Civil Procedure Act**, which is the statutory basis for all interlocutory applications, courts are assigned the unfettered discretion where it is so prescribed, in order to salvage justice from defeat, to make such interlocutory orders as appear to the court to be just and convenient.

10. The courts are also empowered by Sections 1A and 1B of the Civil Procedure Act to ensure that the overriding objectives of the Civil Procedure Act and Rules are attained in the administration of justice in a just, fair and expeditious manner.

11. The procedural underpinning to the above substantive provisions of the Constitution and the law in regard to appeals is Order 42 Rule 3 of the Civil Procedure Rules which allows the Deputy Registrar to forward an appeal file to the judge for action.

12. In **ET Monks & Company Ltd Vs Evans [1985] 584** the court made it clear that public policy interest demands that the business of the court be conducted with expedition. The flipside of it was as held in **Agip (K) Ltd V Highlands Tyres Ltd [2001] KLR 630**. Visram J (as he then was) stated:

“It is clear that the process of the judicial system requires that all parties before the court should be given an opportunity to present their cases before a decision is given. It is, therefore, not possible that the rules Committee intended to leave the plaintiff without a remedy and to take away the authority of the court when it made Order IV1 Rule 5 of Civil Procedure Rule.”

13. The above decision by Visram J (as he then was) no doubt echo the provisions of Article 48 of the Constitution that access to justice should not be impeded, as well as Article 50(1) of the Constitution on the right to a fair hearing.

14. Nonetheless, Article 159 of the Constitution and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay. This is what the case of **Ivita V Kyumba [1984] KLR 441** espoused that:

“The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff’s excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court.”

15. From the above decision, it is trite law that the power to dismiss a suit or an action is discretionary which discretion must be exercised judiciously.

16. The applicant seeks the setting aside of that order of dismissal on the basis that his advocate was not served with the requisite notice before the matter was dismissed. That the applicant stands to be condemned unheard contrary to the rule of natural justice if the order of dismissal is not vacated and the suit reinstated. Finally, it was submitted that the respondent stood to suffer no prejudice upon the reinstatement of the suit.

17. **Order 42 Rule 13 of the Civil Procedure Rules** provides: -

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:

Provided that—

(i) a translation into English shall be provided of any document not in that language;

(ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).

18. I wish to point out that the issue of the notice by the Deputy Registrar under Order 17 rule 2(1) instead of under Order 42 Rule 13 is not fatal to the orders by the judge. The contents of the notice were very clear that no action had been taken in the appeal for more than one (1) year. The principle of expeditious disposal of cases applies across the board for efficient administration of justice.

19. The notice to show cause to the appellant's counsel Mithega Kariuki & Co. Advocates was sent by EMS as item 110 among others and receipt issued by the service provider vide receipt No. EE0039521.

20. Under Order 42 Rule 13, the appellant was required to serve the record of appeal and fix the appeal for directions. On 24/01/2018 the notice to file the record of appeal was sent to the same counsel but no action was taken until 20/05/2019 after the appeal had been dismissed. This was about one and half years (1½) after the admission of appeal as opposed to the twenty one (21) days allowed by the rules.

21. The appellant seems to have lost interest in his appeal for him to take that long without any action. The matter was then placed before the judge after serving the notice of dismissal. The court noted the undue delay in filing the record of appeal and ordered dismissal of the appeal.

22. I am of the considered opinion that the delay has not been satisfactorily explained and do further find that delay is a source of prejudice to the respondent as it affects the fair administration of justice. Article 159 of the Constitution provides that justice shall not be delayed. Failure to file the record of appeal within the requisite time was a clear infringement of Article 159 of the Constitution of Kenya, 2010 as the failure delayed justice in this matter. Having earlier established that adequate notice was duly served on the applicant's advocate, it is my finding that the application lacks merit.

23. The upshot of the above is that the application dated 1/03/2019 is hereby dismissed with costs to the respondent.

24. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 8TH DAY OF JULY, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Wanjiru for Mithega Kariuki for Appellant

Mr. Ithiga for Ogweno for Respondent