REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NUMBER 231 OF 2009
JULIUS KIMEMIA MWATI & PAULINE WAIRIMU *KIMEMIA (suing as the legal representative of* NAHASHON MUNGAI KIMEMIA....APPELLANT
VERSUS
JOSEPH NZAU KIOKO.....1ST RESPONDENT
EPCO BUILDERS LTD.....2ND RESPONDENT
R U L I N G

On 21/9/2016, the court made an order to the effect that the appeal stood dismissed by virtue of the court orders of 2/2/2016.

The orders of 2/2/2016 had reinstated the appeal on the terms that:-

i) The appellant pays thrown away costs of Kshs.20,000/- within 30 days from that date.

ii) Appellant to take steps within 90 days from the said date.

iii) In default of compliance with the foregoing terms the appeal would stand dismissed.

iv) Mention on 7/6/2016.

It would thus appear that the court was convinced that there had been a default to comply with the terms hence the default clause had taken effect. The issue for definition in this application is therefore only one; whether there had been a default on the part of the appellant as obligated by the court order.

The application seeks that the orders of 21/9/2016 be set aside and appeal be reinstated. The main reason advanced was that the respondents counsel mislead the court by failure to disclose that the ordered thrown away costs had in fact been paid within the time dictated by the parties consent and that he deserves being granted an opportunity to prosecute the matter. In the affidavit in support, the applicant gave details of the steps taken towards meeting the terms of the consent order including payment of the thrown away costs on the 15/2/2016 and attempts to take mention date so to confirm compliance with the court order so that a hearing date could be taken.

That application was opposed by the respondent on the basis of grounds of opposition dated 24/10/2016 and a Replying Affidavit sworn on the 25/10/2016. The gist of the grounds of opposition are the usual assertion that the application is vexatious, frivolous, abusive of court process, lacking on merits, flouts the undisclosed provisions of the Civil Procedure Rules, 2010, is otherwise defective and fundamentally flawed and an afterthought brought in bad faith. On the other side the Replying Affidavit briefly reiterated the events in the file up to the 2/2/2016 and concludes that there was no basis to warrant the orders being reviewed.

In urging the application parties filed written submissions which submissions I have taken regard of in line with the papers filed and the court records availed. In seeking to determine the application the only issue that begs determination is whether the appeal stood dismissed on 21/9/2016 an account of failure to comply with the orders of 2/2/2016.

The two affidavits filed by both sides agree that the thrown away costs was paid on 18/2/2016. Whether or not there was compliance with that condition is not due for determination, a fact that leaves the question whether or not the other condition of taking steps to prosecute the appeal had been met. The determination of that must come from the perusal of the Record and what parties have said in the affidavit. The court record says that day the order was made the parties agreed on a mention date. No reason is revealed for the mention but the appellant says the mention was to confirm compliance while the Respondent says nothing about the purpose of a mention. That date evidently falls outside the 90 days, the appellant was to take steps to prosecute the appeal. I take it to have been the only date available in the court's diary. I have equally noted that record of appeal was filed back on 9th October, 2009 thus setting the stage for the appeal to be heard after the same was admitted on the 3rd January, 2012.

I have asked myself what steps towards prosecution could have been taken by the respondent between 2nd February, 2016 and the 2nd May, 2019 when the court had fixed the matter for mention on 7th June, 2016 and I do find that it is untidy to have two dates in a court file were so where a date is given in court with the consent of the parties. I, therefore, find that there was no step the Respondent could have taken that he failed to take to constitute a default so as to make the appeal stand dismissed.

I do find that the purpose of the court system is to determine parties disputes by bring according them the chance to be heard and that the mere occurrence of a default even if it be by a litigant should not be the only reason to shut such a party out unless it be shown that the deferment was designed to defeat the interest of a course of justice.

I thus invoke the courts inherent powers to do justice and find that on the 21st September, 2016, there was no default on the part of the appellant that made the appeal stand dismissed.

In the end, I do allow the Notice of Motion dated 12th October, 2016, set aside the orders of 21st September, 2019 and reinstate the appeal for hearing on the merits. Since the Respondent's counsel moved the court to have the orders now set aside to be made, and appellant having succeeded in its quest for setting aside, I award the costs of the application to the Appellant.

Dated, signed and delivered in Nairobi this 1st day of July, 2019.

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P J OTIENO

JUDGE