REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

CIVIL APPEAL NO. 36 OF 2016

LAWRENCE KAMUGANE.....1ST APPELLANTS/APPLICANT

FAHARI CARS LIMITED.....2ND APPELLANTS/APPLICANT

VERSUS

STEPHEN MWANGI MUGO.....RESPONDENT

R U L I N G

A. Introduction

1. This is a ruling of the application dated 14th January 2019 in which the applicants seek for orders that this court sets aside the orders made on the 26/10/208 dismissing the applicants' appeal for want of prosecution.

2. The applicants, being dissatisfied with the judgement and decree of the trial magistrate in Embu CMCC No. 240 of 2015 dated and delivered on 31/5/2016, filed this appeal which was admitted for hearing on the 15/8/2017.

3. The record shows that after the appeal was admitted, the applicant did not take any action specifically to file and serve the record of appeal. On the 16th October 2018, the Deputy Registrar issued a notice to dismiss the appeal under Order 17 Rule 2 (1) of the Civil Procedure Rules 2010 to the parties and on the 26/10/2018, the appeal was dismissed for want of prosecution.

4. It is the applicants contention that they were not served with the notice to show cause why the appeal should not be dismissed and subsequently only became aware of the dismissal by the court after being served with the respondent's bill of costs. The applicants insist that the dismissal action was thus harsh, oppressive and punitive against them for a fault not of their own making.

5. In response, the respondent in a replying affidavit dated 11/2/2019 depose that the application by the applicants was unmerited as it was intended to hoodwink the court into setting aside the dismissal order which was not deserved. The respondent further deposes that the advocate for the applicants was duly served via their postal address that the firm still uses to date.

B. Applicants' Submission

6. The applicants submit that they were never served with the notice to show cause why their suit should not be dismissed and that the delay in prosecuting their suit was due to the delay in processing proceedings in EMBU CMCC No. 240 of 2015. The applicants quoted the case of **Ibrahim Athman Said v Ibrahim Abdille Abdullah & Another [2014] eKLR** where the court stated that where cause was not shown, dismissal was not mandatory as the rule was permissive.

7. It was further submitted that it would be unjust and a miscarriage of justice to deny the applicants the chance to prosecute the appeal.

C. Respondent's Submission

8. He submitted that the applicants were duly informed of the Notice to Show Cause vide their postal address which they had not denied as it appears in all pleadings filed in this matter. He further submitted the current application was brought three months after orders of dismissal were made.

9. The respondent further submits that the applicant has failed to demonstrate what substantial loss they will incur and as such stay of execution should be declined. He relies on the cases of **Antoine Ndiaye v African Virtual University** and that of **Machira t/a Machira &**

Co. Advocates v East African Standard (No. 2) (2002) KLR 63 where it was held that it was not merely enough for an applicant to merely state that substantial loss would occur but they must demonstrate specific details failure to which stay would not be granted. The applicant asked the court to apply the principle in the said cases herein.

10. He also submits that the application was made with unreasonable delay that is 3 months after the orders dismissing the appeal were a bit too long.

D. Analysis & Determination

11. 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 3A of the Civil Procedure Act** gives the courts unlimited power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court. 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.

12. The courts are also empowered by **Sections A 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.

13. The procedural underpinning to the above substantive provisions of the Constitution and the law is **Order 17 Rule 2 of the Civil Procedure Rules** which allows the court on its own motion or on notice to the parties, where no action in a suit has been taken for one year to either have the suit set down for hearing or apply to have it dismissed for want of prosecution.

14. 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."***

15. 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.

16. Nonetheless, Article 159 of the Constitution and Order 17 Rule 2(3) gives the court the discretion to dismiss suits 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."***

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

18. 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. It is argued 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.

19. **Order 17 Rule 2(1) of the Civil Procedure Rules** provides: -

> **"2(1) in any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may …miss the suit".** [emphasis provided]

20. **Order 17 Rule 2 (1) of the Civil Procedure Rules** *does not require service of notice; it uses the word ''give notice''***.** The court may give notice of dismissal through its official website or through the cause-list.

21. **The provision for dismissal of appeals is contained in Order 42. 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).”

22. **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 for dismissal. 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 in all cases for efficient administration of justice.**

23. The notice to show cause to the appellant’s counsel Mithega Kariuki & Co. Advocates was sent by Post vide receipt number M60100-10184304726 issued by the service provider.

24. In my view the appellant seems to have lost interest in his appeal for him to take that long without any action. 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.

25. The upshot of the above is that the application dated 14/01/2019 is hereby dismissed with costs to the respondent.

26. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 23RD DAY OF JULY, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Muriuki for Kariuki for Appellant/Applicant

Mr. Mugendi for Respondent