



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 71 OF 2006

PAUL MURUNGA.....APPELLANT

VERSUS

NELSON KABURU FELIX.....RESPONDENT

RULING

1. The Notice of Motion dated 21st January 2019 filed by the appellant/applicant principally seeks three substantive orders namely; that the order made on 16th June 2016 dismissing the appeal for want of prosecution be reviewed or set aside; that upon granting of that prayer, the court be pleased to admit the appeal for hearing and give directions for its disposal and lastly, that the court be pleased to grant orders of stay of execution of the decree dated 10th November 2005 and all consequential orders pending the hearing and determination of the appeal.

2. The application is anchored on grounds stated on its face and in the depositions made by the applicant in his supporting affidavit sworn on 21st January 2019. The applicant contends that he was not aware of the notice to show cause why his appeal should not be dismissed for want of prosecution as during the period the notice was issued, he was out of the country and his then advocate *Mr. A.N. Ngunjiri* of *A.N. Ngunjiri & Company Advocates* had passed away; that he only became aware of the dismissal of the appeal when he was served with a notice dated 15th October 2018 asking him to show cause why execution should not issue; that he has an arguable appeal which seeks to challenge the validity of an ex parte judgment and he should be given an opportunity to prosecute the same.

3. The application is opposed. The respondent's learned counsel *Mr. Nelson Kaburu* who appears in person in this appeal swore a replying affidavit on 30th March 2019. He averred that the applicant was not deserving of the orders sought because there has been unreasonable delay in the prosecution of the appeal; that the appeal was filed on 10th February 2006 and to date no steps had been taken to have it prosecuted including the most basic step of filing the record of appeal; that though *Mr. Ngunjiri* passed away in 2012 and not year 2014 as alleged by the applicant, his firm was still a going concern and he should have prompted it to prosecute the appeal or change advocates or opt to act in person; that the applicant has not availed any evidence to prove that he was out of the country when his appeal was dismissed; that he was entered into a consent on how to settle the decretal amount whose terms he has failed to honour and is therefore not deserving of the court's protection.

4. By consent of the parties, the application was prosecuted by way of written submissions which I have duly considered. I have also perused the court record.

5. The court record shows that the appeal was dismissed by the court on 16th June 2015 under *Order 42 Rule 35 (2)* of the *Civil Procedure Rules*. This provision is in the following terms:

“If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.” (Emphasis added)

6. A reading of this rule shows that the Deputy Registrar is supposed to list appeals before a judge for dismissal for want of prosecution if they have not been set down for hearing for one year but this must be done with notice to the parties. The applicant has contended that he was not notified of the notice to show cause that led to the dismissal of his appeal since he was out of the country and his advocate could not also have been notified of the same since he was deceased at the time. *Mr. Kaburu* has contended that though it is true that *Mr. Ngunjiri* passed away in the year 2012, his firm continued to function as a going concern but he has not availed any evidence to that effect.

7. The court record shows that on 16th June 2015 when the notice to show cause was scheduled for hearing, none of the parties attended the court. There is no evidence in the court record to confirm that either of the parties was actually served with the notice to show cause. Though it is true that the applicant has not adduced any evidence to support his claim that he was out of the country at the time, the fact that there is no evidence in the court record to show that he was served with the notice either in person or through his advocate and the fact that none of the parties attended the court on the day the notice to show cause was scheduled for hearing makes it more probable than not that the appeal was listed for dismissal without notice to the parties.

8. I fully agree with the submissions made by *Mr. Kaburu* that there has been inordinate delay in the prosecution of this appeal and that the delay has not been adequately explained. But this cannot be a good ground for the court to refuse to exercise its discretion to reinstate an appeal which was apparently dismissed before the applicant was given an opportunity to be heard on why his appeal should not be dismissed for want of prosecution. Given the circumstances in which the appeal was dismissed, I am persuaded to find that the interests of justice requires that the applicant's prayer for reinstatement of the appeal should be allowed so that the appeal can be determined on merit. Consequently, the dismissal order made on 16th June 2016 is hereby set aside.

9. I have taken note of the fact that this appeal was filed over ten years ago and todate the applicant has not initiated any step to facilitate its hearing. He has not even filed his record of appeal. In order to prevent the applicant from going back to sleep, the reinstatement of his appeal is ordered on condition that he files and serves his record of appeal within the next 60 days failing which the appeal will stand dismissed with costs to the respondent.

10. Regarding the applicant's prayer that upon reinstatement of the appeal the same be admitted for hearing and directions for its disposal be given, it is my view that this prayer is misconceived and premature given that the applicant is yet to file his record of appeal. The record of the lower court has also not been forwarded to this court. The Deputy Registrar is hereby directed to immediately call for the lower court file and ensure that it is availed to this court as soon as it is practically possible.

11. The applicant had also sought for stay of execution of the decree of the lower court pending the hearing and determination of the appeal. The record however shows that there are orders of stay of execution pending the disposal of the appeal that were issued by *Ang'awa J* on 18th May 2006. These orders are still in force as there is no evidence to show that they have been varied or set aside. The applicant's prayer for stay of execution pending appeal is therefore superfluous and is incapable of being granted. In the end, the Notice of Motion dated 21st February 2019 is only allowed in terms of prayer 2.

12. Costs of the application will abide the outcome of the appeal.

13. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 18th day July, 2019.

C. W. GITHUA

JUDGE