



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.38 OF 2017

PETER GACHERU NJOROGE.....APPELLANT

-VERSUS-

BENARD MWANGI.....RESPONDENT

(Being an Appeal from the Judgment/decree of Hon. B. Mararo, Principal Magistrate in Nakuru CMCC. 772 of 2015 delivered on 22nd February, 2017)

RULING

1. This is a ruling on the application dated 14th February 2019. It seeks review of order made on 6th February 2019 dismissing the appellant's appeal, reinstate the suit and allow the appellant to prosecute it.
2. Grounds on the face of the application are that, the appellant's Advocate failed to attend court due to inadvertent failure to diarize the matter and mistake of counsel should not be visited on the appellant.
3. The application is supported by the affidavit sworn by **Alwala Dorothy** Counsel for the appellant. She averred that on 26th September 2018, they sought to have the matter mentioned for purposes of directions but their clerk informed them that they would be served with mention date by the court; but they were not served with mention notice.
4. Counsel averred that, the appellant stand to suffer great prejudice if the application is not allowed as the appeal has high chances of success.
5. In response, the respondent filed replying affidavit sworn on 31st May 2019. He averred that the respondent has not demonstrated that he stand to suffer prejudice if this court decline to grant relief orders sought and has failed to give satisfactory explanation for the delay. He averred that litigation must come to an end in the interest of justice.

ANALYSIS AND DETERMINATION

6. I have considered averments by parties herein. I have also perused the court record. Record show that, after delivery of ruling to file appeal out of time was delivered on 4th May 2017, no action was taken by the appellant to prosecute this matter. It was listed by court for dismissal on 6th February 2019. The court noted that the appellant's Advocate was served with notice to show cause why the appeal should not be dismissed but failed to attend court on 6th February 2019 to explain the delay in prosecuting this matter.
7. The explanation given for delay by Counsel for the appellant is that, their clerk was informed the court would notify both parties once the appeal is ready.
8. I note from the record that, reminder for judgement/proceedings with court record was made to the trial court on 8th may 2018. Record of appeal was filed on 20th September 2018. The next process after filing record of appeal was admission of appeal to hearing. This is a process undertaken by the court. Record show that the Deputy Registrar confirmed that the record of appeal was in order on 1st October 2018 and **Justice Mulwa** admitted the appeal on 21st November 2018. This matter was listed for dismissal on 17th January 2019 two months after admission of appeal.
9. **Order 42 rule 13** provide that, on notice to the parties delivered not less than 21 days after the date of service of memorandum of appeal, the appellant shall cause the appeal to be listed for directions and **Order 42 rule 35** (1) gives the respondent the liberty to set down the appeal for hearing if the appellant fail to do so 3 months after directions have been given as provided in **Order 42 rule 13**. **Order 42 rule 35** (2) provide that the registrar may notify parties of dismissal of appeal if it's not set down for hearing one year after service of memorandum of appeal.

10. It is evident that directions had not been given at the time this matter was listed for dismissal. It was the primary responsibility of the appellant to list this matter for directions after admissions of appeal. The appellant however stated that they were not notified of the admission of appeal. As observed above, admission is a process undertaken by court. How a party is made aware that the process is admission has been done is not clear; but in view of the fact that the provisions places the duty of causing the matter to be listed for directions on the appellant, my view is that, the appellant should have followed up with the court to confirm if the appeal has been admitted and cause it to be listed for directions.

11. This matter as per record was admitted on 21st November 2018 and listed for dismissal on 17th January 2019. Whereas the one year period for dismissal had lapsed from time of service of appeal, I find time between admission of appeal and listing for dismissal short. It is also evident that by 8th May 2018 the lower court record had not been received by the High Court. Delay in filing record of appeal cannot entirely be attributed to the appellant. Action required on part of the appellant after admission of appeal cannot be said to have delayed to warrant dismissal of appeal. There is no indication that parties were made aware of admission of this appeal.

12. From the foregoing, I see merit in the application herein and proceed to allow it.

13. **FINAL ORDERS**

1. Order of 6th February 2019 dismissing this suit are set aside.
2. The appeal herein is reinstated.
3. Appeal to be listed for directions within 30 days from today's date.
4. Costs in the cause.

Judgment dated, signed and delivered at Nakuru this 11th day of July 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Schola/Jenifer Court Assistant

Mr. Gai holding brief for Alwala Counsel for Appellant

Mr. Kairu Counsel for Respondent