



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT EMBU**

**CIVIL APPEAL NO. 31 OF 2014**

**JOEL PHENEAS NYAGA**

**JOSEPH NYAGA NZAU** (Suing as the Chairperson & Treasurer

Kegamu Electrification Self Help Group).....**APPELLANTS**

**VERSUS**

**ALOYSIUS NYAGA KANYUA**.....**1<sup>ST</sup> RESPONDENT**

**JULIA GICUKU NYAGA**.....**2<sup>ND</sup> RESPONDENT**

**RULING**

**A. Introduction**

1. This is a ruling for the application dated 26<sup>th</sup> July 2018 in which the applicants are moving this court to stay, review and set aside the order dated 3/07/2018 which dismissed the instant suit for want of prosecution.
2. It is the applicants case that the final Notice to Show Cause dated 22/05/2018 was not served on the appellants and despite that, it was fixed for hearing on 15/06/2018 and not 3/07/2018 leading to the non- attendance of the applicant's advocate and as such the proceedings leading to the dismissal of the suit were erroneous.
3. The applicants further state that the respondent did not bother to serve the applicants with the mention notice as required by law and thus the dismissal of the appeal is without any justifiable cause further exposing the applicant to risk of execution of the subordinate court decree and the costs in the dismissed appeal.
4. In rejoinder the respondents state that the appeal was filed on the 14<sup>th</sup> October 2014 and admitted on 5<sup>th</sup> March 2015 but to date the applicants have not filed the record of appeal. Further, it is stated that despite numerous Notice to Show Cause issued on the applicants, no steps to prosecute their appeal have been taken.
5. The respondents further state that the notice was duly served upon the applicant's advocate Runyenjes office but they chose not to attend court. Further the respondents state that there is nothing on court record to show that the applicants attempted to finalize this suit.
6. The respondent state that the delay in prosecuting the suit by the applicants is inordinate and that they are entitled to enjoy fruits of their judgement in Runyenjes PMCC No. 51 of 2010 and as such the application by the appellants lacks merit.

**B. Appellants' Submissions**

7. The applicants submit that they were condemned unheard and this constitutes a strong basis for setting of the order of dismissal. They further submit that as such they were condemned unheard. They rely on the Court of Appeal case of **Kasturi Limited v Nyeri Wholesalers Limited [2014] eKLR** where the court interalia *that it is always prudent for litigation to come to an end when all parties have been heard on merit and substantive justice administered and that the overriding objective principles mandate this Court to act justly and fairly.*
8. The applicants further rely on the decision of the Court of Appeal in the case of **Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 Others [2013] eKLR** where it held interalia *that the right to a hearing has always been a well protected right in our constitution and is also the cornerstone of the rule of law this is why even courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.*

### **C. Respondent's Submissions**

9. The respondents submit that contrary to the applicants' allegations, it is the court that fixed the date when this matter was dismissed and as such the respondents were under no duty to notify the applicant of the date and in any case the appellants were duly notified by the court.

10. The respondents further submit that the applicants have not explained why they have delayed in prosecuting their appeal and as such are guilty of laches. Further the respondents submit that the applicants are denying the respondents right to enjoy the judgement delivered in their favour.

### **D. Analysis & Determination**

11. The issue for determination in the present application is whether there is a basis for the court to exercise its discretionary power to set aside the order of 3/07/2018 and reinstate this suit.

12. Section 3A of the Civil Procedure Act gives this court inherent power to make such orders as may be necessary for the ends of justice to be met. Order 51 rule 15 of the Civil Procedure Rules gives the court power to set aside any order made ex parte. The court's discretionary power should, however, be exercised judiciously, with the overriding objective of ensuring that justice is done to all the parties.

13. The guiding principle in the court's exercise of this judicial discretion was laid down in **Mbogo & Another Vs Shah EALR 1908**. The court's discretion to set aside an ex-parte order of the nature of a dismissal order is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error. In the same vein, this discretion is not intended to assist a litigant who deliberately seeks to obstruct or delay the course of justice.

14. **Order 17 Rule 2 (1) of the Civil Procedure Rules** grants the court power to dismiss a suit in which no step has been taken for one year. The Order also requires the court to give notice to the party concerned to show-cause why the suit should not be dismissed for want of prosecution, and if no cause is shown to the satisfaction of the court, the court may dismiss the suit.

15. 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. And those mediums will constitute sufficient notice for purposes of Order 17 Rule 2 (1) of the Civil Procedure Rules.** But nothing precludes the court from serving the notice as per Order 5 of the Civil Procedure Rules.

16. In this case, the appeal was filed on the 14<sup>th</sup> October 2014 and admitted on 5<sup>th</sup> March 2015. I do note that the record of appeal was not filed for over four (4) years since the appeal was admitted. Further, there is no evidence of any stay of execution having been granted over the judgement in Runyenjes PMCC No. 51 of 2010 delivered on 18<sup>th</sup> September 2014.

17. I also note that notice to show cause dated 22/05/2018 was issued and its hearing set for the 15<sup>th</sup> June 2018. From the court record there is nothing to show whether the file was taken to court on that date. The dismissal of the suit was done on the 3/07/2018. The respondent submits that they were served with the Notice to Show Cause for that date 3/07/2018 however there is nothing on the record to show a Notice to Show Cause emanating from this court with the hearing date 3/07/2018. Consequently, it is my opinion, as counsel for the appellants has pointed out, it is apparent that neither the appellants nor his lawyer were aware of this dismissal of the suit.

18. In **KENYA POWER & LIGHTING CO. LTD VS KENYA COLD STORAGE 1964 LTD HCCC NO.387 OF 2002 Hon. Lady Justice Hannah Okwengu** (as she then was) held as follows:

***"Nevertheless dismissal of a suit under OXV1 Rule 2(1) of the Civil Procedure Rules requires that notice be given to the parties to appear before the court to show cause why the suit should not be dismissed before any order of dismissal is made".***

19. This was clearly not done in the present case rendering the dismissal without notice prejudicial to the appellant. The rules of natural justice require that before an order averse to any party is made by a court, that party ought to be heard and be allowed to make representations. Conversely, it is rather evident that the appellants have failed to prosecute their appeal for a period of over 4 years thus denying the respondents the enjoyment of their judgement. The appellants have also not secured a stay of execution over the judgement in Runyenjes PMCC No. 51 of 2010.

20. In my view, the overriding objective is to achieve substantive justice to the litigants. If that be case indeed, there would be a basis for a hearing to determine the same. This view is informed by Article 50 of the Constitution of Kenya which secures the right to a hearing before the court. This court is obligated to safeguard that right. Conversely, I am also alive to the respondents' right to enjoy its judgement.

21. In the circumstances, it is my opinion that the dismissal of the suit was unprocedural.

22. The upshot of the above is that the following orders arise: -

a) ***The orders made on 3/07/2018 are hereby set aside and the suit reinstated.***

b) ***The appellants have thirty (30) days to file and serve the record of appeal failure to which the appeal stands dismissed***

c) ***That the applicants will meet the costs of this application.***

23. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 15<sup>TH</sup> DAY OF OCTOBER, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Njeru for applicants**

**Ms. Nzekele for Eddie Njiru for respondents**