



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 627 OF 2008

PETER NJENGA THAIRU.....APPELLANT/APPLICANT

-VERSUS-

BARCLAYS BANK OF KENYA.....RESPONDENT

RULING

1. The appellant/applicant has taken out the Notice of Motion dated 11th January, 2019 and supported by the grounds presented on its face and the affidavit sworn by the applicant. Therein, the applicant is seeking the following orders from this court:

(i) THAT this Honourable Court be pleased to set aside the orders issued on 21st June, 2016 dismissing the appeal for want of prosecution.

(ii) THAT this Honourable Court be pleased to reinstate the appeal.

(iii) THAT costs be in the cause.

2. In his affidavit, the applicant asserted that following the dismissal of his suit, CMCC NO. 8522 OF 2004 vide the judgment delivered by the trial court on 22nd October, 2008, he lodged the appeal through the firm of Nyaberi & Co. Advocates, his erstwhile firm of advocates; but that the said firm failed to have the appeal set down for hearing, thereby leading to the dismissal of the appeal on 21st June, 2016.

3. The applicant explained that he had no knowledge that his suit was scheduled for dismissal, neither was he made aware at the time it was dismissed, but only came to learn of its status sometime in September, 2018 upon visiting the court registry to peruse the court file.

4. Furthermore, the applicant faulted his erstwhile advocates for not only failing to have the appeal set down for hearing but for returning his file without offering any explanation regarding the dismissal of his appeal, adding that the appeal has high chances of success.

5. In opposing the Motion, *Milkah Maina* swore the replying affidavit on 6th February, 2019 on behalf of the respondent, stating that the applicant has not explained why he took 3 years from the time of dismissal to lodge the application; further stating that the applicant has clearly lost interest in pursuing his appeal and is only trying to shift blame to his former advocates whereas he has not shown any steps taken to ensure the prosecution of his appeal.

6. In reiterating the averments made in the Motion, *Mr. Kogi* counsel for the applicant urged this court to administer substantive justice.

7. In contrast, *Mr. Mungai* advocate for the respondent contended that the parties were notified that the matter had been listed for dismissal.

8. I have taken into consideration the grounds laid out on the face of the Motion, the facts borne in the affidavits in support of and in opposition to the same, and the rival oral arguments.

9. I have established that the memorandum and record of appeal were filed on 18th November, 2008 and 23rd July, 2009 respectively. Going by the record, no action was taken in the appeal since then.

10. The record indicates that the appeal was listed for dismissal pursuant to **Order 42 rule 35 (2)** of the **Civil Procedure Rules** which provision empowers the deputy registrar to give notice to parties regarding such listing in instances where an appeal has not been set down for hearing within one (1) year of service of the memorandum of appeal. The record does not indicate the manner in which the notice was issued to the parties, though the respondent's counsel elucidated that this was done on the notice board and on the Kenya Law website. In addition to this submission by counsel for the respondent, this court was involved in the dismissal at the material time and I take judicial

notice of the fact that the exercise was widely publicized via every available method including advertisement in the local dailies, newspaper and more particularly Nation newspaper. In the absence of any response to the notice, the appeal was dismissed on 21st June, 2016.

11. I noted the applicant's position that his former advocates failed him and that he only came to learn of the dismissal in September 2018. He has annexed to his affidavit the letter dated 10th September, 2018 from his advocates pointing out that since the applicant did not follow up on the appeal from the time of filing the memorandum of appeal, they would not be proceeding with the matter on his behalf. The applicant did not explain the reason as to why he had to wait until January 2019 to bring the application.

12. Moreover, it would appear from the contents of the abovementioned letter that the applicant did not take any steps to ensure the prosecution of his appeal. On this note, I am of the reasoned opinion that while the courts have appreciated that a client should not be punished for the mistake of his or her advocate, the same courts have acknowledged that at the end of the day, it remains the duty of a party to ensure the prosecution of his or her appeal.

13. Given that this is quite an old appeal, one would expect the applicant to have shown specific steps taken in prosecuting his appeal, but he has not. On that basis I am not convinced that the explanation provided by the applicant is sufficient enough to warrant the granting of the orders being sought.

14. The upshot is that the Motion is dismissed with costs to the respondent.

Dated, signed and delivered at NAIROBI this 21st day of November, 2019

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the Respondent