

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 379 OF 2006

ELIUD KIMANI MWANGI.....APPELLANT

VERSUS

BRITISH AMERICAN INSURANCE CO. LTD.....RESPONDENT

RULING

On 31st July, 2014 Bwononga J dismissed this appeal for want of prosecution. It was apparent notices had been issued to both counsel to appear before the court on that day but the record shows there was no appearance by both of them.

There is now before me an application by way of Notice of Motion under Order 12 Rule 7, Order 17 Rule 2 of the Civil Procedure Rules and Sections 3A and 63E of the Civil Procedure Act seeking to set aside the dismissal order and reinstate this appeal.

The main reason that appears among the grounds set out on the face of the application is that, counsel for the appellant was never served with the notice to show cause and therefore was not aware that the matter had been listed for that day. It is also the appellant's position that there is an arguable appeal with high chances of success.

There is a supporting affidavit sworn by the appellant reiterating the position of the advocate. The application is opposed and there is a replying affidavit sworn by the advocate for the respondent. The thrust of the respondent's case is that no explanation has been offered for the delay in preparation of the record of appeal, the delay in filing the same and the discovery of the dismissal order, after about two years from the date of that order.

It is also the respondent's position that the delay is inordinate and in the event the appeal succeeds, interest payable on the judgment sum will be quite high and in the event the appeal is reinstated the decretal sum should not attract any interest at all. Counsel have filed submissions which I have read. The order sought is discretionary which discretion should be exercised judicially.

This appeal arises from the proceedings of the lower court determined by a judgment delivered on 28th November, 2006. The record of appeal was filed in October, 2010. To date the appeal has not been prosecuted. There is an allegation by the appellant that at some stage the court file was misplaced and could not be traced for quite some time. Whereas it is true that there is no letter inquiring the whereabouts of the file or by the Deputy Registrar in reply thereto, there has been a systemic challenge relating to misplaced files in the registry.

The court record shows that directions were given on 19th May, 2014 where Waweru J made an order among others that the hearing date would be taken at the registry. It is instructive that this matter was placed before the judge for dismissal only two and half months, that is 31st July, 2014 from the date directions were given.

The provisions of the Civil Procedure Rules cited by counsel for the appellant in this application are not applicable because what was dismissed was not a suit but an appeal.

Order 42 Rule 35 (1) provides that unless within three months after the giving of directions under rule 13

the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty to either set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution. Sub rule (2) provides that 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.

Order 42 Rule 35 (1) of the Civil Procedure Rules cited above could not apply because the directions were given on 19th May, 2014 and the dismissal ordered on 31st July, 2014, a period of less than 3 months. On the other hand, sub rule (2) required proof of service of the Memorandum of Appeal which is not on the court record. If anything, the notice containing the date of 31st July, 2014 is headed "Hearing Notice".

On the date the appeal was dismissed both counsel did not appear. The respondent cannot take advantage of a void that exists in the circumstances of this case. I am persuaded that the dismissal order should be set aside and the appeal reinstated. The application therefore succeeds and each party shall bear their own costs. Directions having been given, this appeal shall be prosecuted within 120 days from today failure of which it shall stand dismissed.

Orders accordingly.

Dated, signed and delivered at Nairobi this 1ST Day of March, 2018.

A. MBOGHOLI MSAGHA

JUDGE