



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAJIADO
CIVIL APPEAL NO. 2 OF 2016

PRAMID HAULIERS LTD.....APPELLANT

VS

JAMES OMINGO NYAAGA.....1ST RESPONDENT

VINCENT KINYUA.....2ND RESPONDENT

GEORGE OLANDO.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

RULING

This is an application filed by the appellant in civil appeal no. 2 of 2016 pursuant to Section 3A of the Civil Procedure Act order 22, Article 27 and 48 of the constitution seeking an order to set aside the ruling delivered on 5th April, 2018 pending the hearing and determination of the appeal.

Genesis leading to the present application was the respondent claim filed before the Senior Resident Magistrate court reported as SRMCC No. 11 of 2007 in a judgment delivered on 14th December, 2015. The appellant was awarded the claim assessed at Kshs.510, 000 with costs and interest at court rates.

Being aggrieved with the entire judgment a notice of appeal soon after was filed on 22nd January, 2016. The notice of appeal was also followed with a letter to the executive officer dated 14th January, 2016 applying to be forwarded with typed proceedings and certified copies of judgment and decree. As the record of appeal was awaited from the lower court the first respondent/plaintiff in the primary suit filed a notice of motion on 10th April, 2017 seeking an order of this court that the appeal be dismissed for want of prosecution.

In a ruling delivered on 18th September 2017 the following orders were granted

- (a) That the Deputy Registrar of the High court supplies the trial court record to the appellant within 21 days from the date of the ruling.**
- (b) That the record of appeal be served upon the applicant/respondent within 14 days from the 21 days allowed for its preparation.**
- (c) That the parties appear before the Deputy Registrar to confirm compliance with the order.**
- (d) That the file was to be placed before me in chambers for directions on or before 10th November, 2017.**
- (e) The order that the record of appeal be prepared and served within 21 days was mandatory to be complied with by the Deputy Registrar.**

The above orders remained unexecuted.

There is no evidence that the Deputy Registrar briefed the court or the appellant any challenges being faced in supplying the record and the

subsequence orders. In un-precedent move the applicant once again filed a second notice of motion dated 16th May, 2018 seeking dismissal of the appeal for want of prosecution.

The appellant in the main appeal through legal counsel Mr. Chigiti filed a replying affidavit detailing the grounds why the order sought cannot be granted. In essence Mr. Chigiti deposed that the appeal is still alive save that he cannot take further steps under order 42 of Civil Procedure Rules unless he is supplied with certified record of the lower court.

On 5th April, 2018 this court delivered a ruling touching on this stated application which was apparently not opposed.

Submissions by the applicant counsel

Mr. Chigiti for the applicant adduced several grounds why this court should exercise discretion on this motion. Mr. Chigiti argued that the intended appeal is meritorious as can be deduced from the memorandum of appeal. Further Mr. Chigiti contended that on their part the filing and prosecution of the appeal has been hampered by non-availability of the primary record in terms of the provisions of order 42 of the Civil Procedure Rules. Mr. Chigiti argued and submitted that the stipulated time set by this same court for the lower court to comply in supplying the certified copy of the record has not been obeyed to date. Mr. Chigiti further submitted on the circumstances which led to his non-attendance in court on the day an ex-parte dismissal order was granted in favour of the respondent.

It was also Mr. Chigiti contention that if the application to vary or set aside the dismissal order is not granted the appellant is likely to suffer prejudice and or injustice. Mr. Chigiti submitted that the provisions of the law and the guiding principles in the cases relied upon are in favour of the appellant to enable his appeal to be heard on the merits. He placed reliance on the following provisions of the law and authorities. *The constitution of Kenya, 2010, Article 48, The Civil Procedure Rules, 2010, order 12 Rule 7 Mohamed & Another v. Shoka [1990] KLR 463, Sanzu Investments Ltd v Commissioner of Lands Civil Appeal No. 100 of 1993, National Bank of Kenya Owino Bala (2017) eKLR, paragraph 12, James Wanyoike & 2 Others v CMC Motors Group Ltd (2015) eKLR, paragraph 79.*

Counsel urged this court to find that the applicant has satisfied the conditions for grant of the orders sought in the notice of motion.

The respondent submissions

Mr. Mbaka for the respondent submitted on his part that the application has no merit on grounds that the appellant is guilty of laches. Learned counsel further submitted that the applicant has been given an opportunity to prosecute the appeal but as we speak no positive steps have been taken so far. According to counsel the delay has occasioned prejudice to the respondent who has in his possession a valid judgment of the court to be enforced in order to enjoy the fruits of his judgment. Counsel further argued and submitted that reasons adduced by the applicant for not attending court and filing the appeal are unmeritorious.

Analysis and resolution:

I have considered the application, entire history of this case docket, both affidavits and brief submissions by counsels representing the applicant and the respondent. This court is vested with power pursuant to Section 1A, 1B of the Civil Procedure Act on the **overriding objective which emphasizes the court to facilitate the just, expeditious, proportional and affordable resolution of Civil disputes governed by the Act.**

Section 3A **nothing in this Act shall limit hence or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court.** Further in order 12 Rule 7 the power of the court to set aside an ex-parte judgment or order dismissed for non-attendance is provide for under such terms as the court may direct.

In relation to order 50 Rule 6 of the Civil Procedure Rules the process to enlarge time or upon such terms as the justice of the case may require is also applicable to the present notice of motion.

The discussion whether or not to grant the relief of setting aside an ex-parte order is no doubt an exercise of discretion by the court. The guiding principles within which that judicial discretion is exercised has been discussed in various cases: In *Patel v EA Cargo Handling Services Ltd 1974 EA 75 and 76* held:

“There is no time or restrictions on the Judge’s discretion except that if he does vary the judgement he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose limitations on itself to fetter the wide discretion given to it by the rules. This discretion is intended so to avoid injustice or hardship resulting from accident, inadvertent or excusable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice”

In addition the case of *Belinda Murai & Others v Amos Wainaina 1978 KLR 278* provide as follows:

“A mistake is a mistake, it is no less a mistake because it is on the fortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel the court might fell compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whether is necessary to rectify it if the interest of justice so dictate”

From the above principles the law has been made crystal clear.

In this case the applicant through affidavit evidence has explained that the date for an inter-parties hearings was not convenient with his diary. That in compliance with the court directions he did send another counsel to hold brief but on arrival found the matter already dealt with by the court and dismissal order granted. Further the affidavit evidence discloses that if the dismissal is left to stand it would render the intended appeal nugatory.

In answer to all these the respondent solely argued and urged this court to consider the past conduct and subsequent evidence of the applicant for lack of diligence to prosecute the appeal. Crucial in this application is the emphasis of the delay in setting down the appeal for hearing and disposal.

In the instant matter there are relevant factors that needed to be weighed against the fact that there has been delay precipitating the notice of motion by the respondent. In considering the application I have given due regard to the failure by counsel to comply to attend the hearing as scheduled. **Secondly** whether the failure was due to negligence or common mistake. **Thirdly**, whether in the state of affairs denial of the motion will occasion prejudice or a miscarriage of justice. In light of the above a good explanation has been offered by the applicant for his non-attendance on the material day when the application was dismissed. There is an appeal pending to be heard so that the decision can be made on merits. This right of appeal and access to court by the appellant cannot be realized if the dismissal order is allowed to stay. As reiterated in the Patel and Belinda case cited above, the sum total of any judicial discretion is to serve the interest of justice.

Taking a reference point from the constitution the discussion on this motion cannot be complete without delving into the issue of the record of the trial court.

The constitution has declared under Article 50(4) that the accused has a right to a copy of the record of the proceedings within a reasonable period after they are concluded, in turn for a reasonable fee as prescribed by law. Correspondingly in my view Article 50(4) is applicable to civil proceedings on the grounds that copy of the record contains the authentic proceedings and judgment of the tribunal or court from which the appeal is preferred. An appeal court decisions relies on the record. It is this record which comprises of pleadings, combines pleadings, documentary evidence, the decision or witness evidence and what transpired at the trial. The failure by the applicants and his counsel to file that appeal on time has been occasioned by non-supply of the entire record by the registrar of the trial court.

In this regard it is worth noting that the appellant does not have the power to determine the period the preparation of the record will take to satisfy the legal requirements of order 42 of the Civil Procedure Rules.

Responding to all this submissions I am satisfied that there is sufficient cause for this court to exercise discretion to allow the notice of motion by the applicant. In view of the history of this matter the following orders shall abide.

- (1) That the executive officer of the court to supply the applicant certified copies of proceedings and judgment within 21 days from today's date.**
- (2) This order be extracted and to be served upon the executive officer to comply.**
- (3) That in default each party be at liberty to apply.**
- (4) The costs of this application to abide the outcome of the appeal.**

Dated and delivered on this 16th day of May, 2018.

R. NYAKUNDI

JUDGE

In the presence of:

Mr. Chigiti for the respondent

Mr. Mbaka for the applicant