



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 94 OF 2007

PETER KURIA MURAYA.....APPELLANT

VERSUS

JOHN KIPKEMOI KOECH.....RESPONDENT

RULING

[1] Before the Court for determination is the Appellant's Notice of Motion dated **26 April 2017**. It was filed herein on **28 April 2017** pursuant to **Article 50(1)** of the **Constitution of Kenya, 2010, Sections 1A, 1B and 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, Order 10 Rule 11 and Order 51 Rule 1 of the Civil Procedure Rules, 2010**, for the setting aside the dismissal order made herein on **6 July 2015**, and for the reinstatement of the appeal for hearing. It was also sought that the costs of the application be provided for.

[2] The application was predicated on the grounds that, although the Court directed the Appellant to set down the appeal for hearing within 45 days from **6 July 2015**, the Appellant was unable to find a date upon numerous visits to the Court registry as he was informed on each occasion that the court's diary was full. It was consequently the contention of the Appellant that, since his inability to procure a hearing date was not deliberate but was partly caused by the Court's Registry, it would only be fair, just and expedient, and in the interest of justice that his application be allowed. The application was supported by the affidavit annexed thereto, sworn by the Appellant on **26 April 2017**, to which was annexed a copy of one of the letters that his Counsel wrote to the Deputy Registrar of the Court over the unavailability of dates.

[3] The application was opposed by the Respondent, **John Kipkemoi Koech**. He relied on his Replying Affidavit sworn on **14 July 2017**, in which he averred that the appeal herein was filed way back in **2007**; and that it is now 10 years since, and that no justification has been shown as to why the dismissal order should be set aside. According to him, the Appellant's plea for the setting aside of the dismissal order would not further the interest of justice and fairness and therefore ought to be disallowed with costs.

[4] The application was disposed of by way of written submissions, following the directions to that effect dated **18 July 2017**. Thus, the Appellant filed his written submissions on **21 May 2018**, and urged the Court to consider whether a reasonable explanation had been made for the delay; and whether the delay was excusable. Counsel relied on **Mwangi S. Kimenyi vs. Attorney General & Another [2014] eKLR** and **Richard Ncharpi Leiyagu vs. Independent Electoral & Boundaries Commission [2014] eKLR** to support its submissions that the Appellant has made out a good case to warrant the issuance of the orders prayed for in the application dated **26 April 2017**.

[5] Having carefully considered the application, the response thereto by the Respondent and the written submissions filed herein as well as the record of the proceedings herein, there is no dispute that this appeal was indeed filed on **31 July 2007** and that, on account of unjustifiable delay in its prosecution, it was listed for dismissal on **6 July 2015**, pursuant to the provisions of **Order 42 Rule 35 of the Civil Procedure Rules**. The record further confirms that upon the undertaking by the Appellant's Counsel to have the appeal fixed for hearing without delay, the Court directed that the appeal be admitted for hearing and that the same be set down for hearing within 45 days; in default, the appeal to stand dismissed.

[6] It is further manifest from the court record that the appeal was not set for hearing forthwith, or within 45 days as stipulated; and that the appeal therefore stood dismissed as ordered by the Court. The explanation now being offered for that situation is that there were no dates available. Thus, the issue for my determination is whether sufficient cause has been shown for the exercise of the Court's discretionary powers to set aside the dismissal order; bearing in mind the holding in **CMC Holdings Limited -vs- Nzioki [2004] 1 KLR 173** that:

“In law, the discretion that a Court of law has, in deciding whether or not to set aside an ex-parte order...was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would...not be proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error...”

[8] The Appellant has exhibited a copy of one of the letters his Counsel wrote to the Deputy Registrar in that regard; and it does raise the issue about non-availability dates for the appeal. The original version of that letter is on the court file; and therefore the Appellants explanation is not unfounded. The record further confirms that the Appellant's request for a mention for the purpose of taking a hearing date

was made on **9 July 2015**, only two days following the order of **6 July 2015**. In the premises, it cannot be said that the intention of the Appellant is simply to obstruct or delay the course of justice. Indeed, in **Philip Chemwolo & Another vs. Augustine Kubende [1982-88] KAR 103**, it was observed that:

"...the broad equity approach to these matters is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs..."

[9] In the premises, I find merit in the application dated **26 April 2017** and would grant the orders prayed for therein, namely:

[a] that the dismissal order which took effect 45 days after the orders dated **6 July 2015** be and is hereby set aside;

[b] That the appeal be and is hereby reinstated for hearing and determination on the merits;

[c] That the costs of the application to abide the outcome of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 8TH DAY OF JUNE 2018

OLGA SEWE

JUDGE