



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO 118 OF 2002.

PAN AFRICAN PAPER MILLS LIMITED.....APPELLANT/APPLICANT

VERSUS

SILVESTER NYARANGO OBWOCHARESPONDENT

RULING.

Introduction

1. This appeal was filed in court on 8th October, 2002 by **PAN AFRICAN PAPER MILLS LIMITED** against the Respondent **SILVESTER NYARANGO OBWOCHA**. The appeal arises from the judgment and decree passed by Honorable Solomon Wamwayi, Chief Magistrate delivered on 11th October 2002 in Eldoret CMCC No. 1004 of 2001. The appeal was dismissed on 11th July, 2017 under the provisions of **Order 42 Rule 35 (2)** of the **Civil Procedure Rules** for want of prosecution after the court issued Notice to Show Cause why the appeal should not be dismissed for want of prosecution and the Appellant did not attend court to show cause.
2. On 17th July 2017, the Appellant approached this court vide a Notice of Motion dated the same day seeking for reinstatement of the dismissed appeal and to be heard on merit and seeking for a date for judgment of the appeal.
3. The application for determination before the court is for reinstatement of the appeal. The application is predicated on grounds, inter alia, that the Appellant had been constantly pursuing a date for judgment from the court but that all along dates were unavailable.
4. The Appellant urges that when its advocates were served with Notice to Show Cause why the appeal herein should not be dismissed, scheduled for 11th July 2017, they filed a response to the said notice. Their advocate did not however hear the matter being called out to enable him address this court. He only noticed that the appeal had already been dismissed for want of prosecution. Their non-attendance to show cause was therefore not intentional.
5. The application was supported by the affidavits sworn by Anne Halwenge Odwa Advocate. Counsel contended that on the 11th July, 2017 when this appeal was due for Notice to Show Cause for which they were duly served with Notice, she was in court. She did not however hear the matter called out. Counsel averred that the failure to address court when the appeal was called out was inadvertent and purely an oversight on her part for which the Appellant should not be punished.
6. The Appellant urged the court to exercise its discretion to restore the appeal and give directions and/or a date for judgment since parties had duly filed their submissions and the matter was only pending for judgment.
7. The Appellant further states that it is the court which gives judgment dates and that they were unable to get a mention date in order to cause the appeal to be placed before the judge to give a judgment date. Due to the failure to obtain a date from the registry, the Appellants state that on 30th January, 2016 their office wrote a letter to the Deputy Registrar requesting her to have the matter placed before the judge for purposes of securing a judgment date which letter did not elicit any response.
8. Lastly, the Appellant states that it is willing to abide by any other conditions or directions that this court may impose on it for the appeal to be reinstated. It is also noted that the Respondent did not file a response to the stated application.

Issues for Determination

9. The major issue for determination is whether the Appellant/ Applicant has given good reasons on the basis of which this court can exercise its discretion in its favour, to set aside the orders dismissing this appeal. The appeal was dismissed under **Order 42 rule 35 (2)** which 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.”

Disposition

10. Under the foregoing sub rule, the Registrar is obligated to give notice to the parties before an appeal can be dismissed. However, the rule does not specify the nature of the notice that ought to be given to the parties. It is clear from the court records that a notice was served on the Appellant before the suit was dismissed and the Appellant duly filed a response on the said notice to show cause.

11. On the issue of the delay, it is evident that the matter was last in court on 29th September, 2015 when the court gave directions and a mention date for 27th October, 2015 to confirm compliance. Thereafter, no action was taken in the matter by either party until the dismissal on 11th July, 2017. On her part, counsel for the Appellant/Applicant lays blame on the court for failing to give them a judgment date on account of unavailability of dates.

12. The law governing dismissal of suits is well settled and courts have pronounced themselves in many of their determinations on this. In the case of **Utalii Transport Company Limited & 3 Others Vs NIC Bank & Another, [2014] eKLR** the court stated and correctly so, that:

“When the applicant states and correctly so, that:

“It is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court.”

Then exhorts that:

“Over one year has lapsed without the plaintiffs taking any step to progress their case.”

And makes a strong conclusion that:

“The plaintiff’s inertia runs contra to the overriding objective of the court stipulated in section 1A, 1B, 3A of the CPA.”

The first intuitive feeling one gets is that the offending proceeding should quickly be removed out of the way of the innocent party, but the law prohibits a court of law from such impulsive inclination, and requires it to make further enquiries into the matter under the guide of defined legal principles on the subject of dismissal of cases for want of prosecution a view which is undergirded by the fact that dismissal of a suit without hearing the merits is a draconian act which drives the plaintiff from the judgment seat. It is, therefore, a matter of discretion by the court.”

13. The decision whether a suit should be reinstated for trial is a matter of discretion and depends on the facts of the case. See the case of **Ivita Vs Kyumbu [1984] KLR 441**, Chesoni, J as he then was stated thus:

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite the delay. Justice is justice to both the plaintiff and the defendant; so both parties to a suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced by the delay. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged, if the court is satisfied with the plaintiff’s excuse for the delay, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time.”

14. A party should always take steps to progress his case to the logical conclusion. Where an Appellant commits acts of inordinate delay, he occasions injustice to the Respondent. Dismissal of a case is however a draconian judicial act and should be done sparingly and employed only in cases where dismissal is the feasible and just thing to do. Courts should strive to sustain rather than dismiss suits especially where justice would still be done and fair trial had, despite the delay. The respondent herein has not shown any prejudice that is likely to be suffered if the appeal is reinstated.

15. The Appellant has approached the court seeking for the reinstatement of the appeal and a date for judgment. The application was filed almost immediately after the dismissal on 11th July, 2017.

16. It is apparent from the affidavit evidence by the Appellant’s counsel, that there is ample evidence to show that they have not been indolent in prosecuting this appeal. Immediately after filing the appeal, directions were taken that the appeal be canvassed by way of written submissions. The Appellants indeed filed their submissions on 28th September, 2015.

17. Further, the explanation given by Miss Odwa was that she was in court but did not hear this file being called out since the court was calling out the files randomly and not according to the cause list. She only came to know that the appeal had already been dismissed upon inquiry from the court clerk as to why her matter had not been called out.

18. It is clear that where a party files an appeal and goes to sleep, delay defeats equity. The court in such circumstances would invoke its

inherent jurisdiction under **Section 3A** and the overriding objectives under **Sections 1A** and **1B** of the **Civil Procedure Act**, as well as **Article 159(2)(b)** of the Constitution which abhors delayed justice and dismiss the appeal.

19. Nonetheless, in the circumstances of this case, the Appellant is not wholly to blame for the delayed justice, which delay has been sufficiently explained. The court must therefore, not oust the Appellant from the seat of justice for no absolute fault of its own.

20. **Sections 1A and 1B** of the **Civil Procedure Act** commands parties to the civil proceedings and their advocates to assist the court in achieving the overriding objectives of the Act and in ensuring that justice is administered expeditiously, proportionately and in a cost effective manner.

21. However, the court must weigh the prejudice that is likely to be suffered if this appeal is not reinstated. The injustice of dismissing this Appeal is graver than the justice thereof. The court is conscious of the constitutional imperatives that the right of appeal and therefore the right to be heard on appeal as exercised by the Appellant herein is a constitutionally guaranteed right. That right should not be taken away by the strike of a pen, where sufficient cause has been shown. The delay in prosecuting the appeal and the failure to address court on 11th July 2017 by the Appellant's advocate to show cause why the appeal could not be dismissed for want of prosecution, have been explained.

22. In **Richard Ncharpi Leiyagu vs IEBC & 2 Others CA 18/2013** the Court of Appeal was categorical that:

“We agree with the noble principles which go further to establish that the court’s discretion to set aside an ex parte judgment or order for that matter is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.”

23. The pertinent question is whether the Appellant's failure to attend court on 11th July, 2017 to show cause why the appeal should not be dismissed under **Order 42 rule 35(2)** of the **Civil Procedure Rules**, constituted an excusable mistake, or it was meant to deliberately delay the cause of justice. The Appellant's advocate contended that she attended court but did not hear the appeal being called out. It was upon inquiry from the court clerk that she noticed that the court had already dealt with the Notice to Show Cause and the appeal had been dismissed.

24. The mistake of not being attentive and failing to address the court lies squarely with the Appellant's counsel. However, in the case of **Belinda Murai & Others vs Amoi Wainaina (1978) KLR 2782 (CALL)** Madan JA (as he then was) described what constitutes a mistake in the following words:-

“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel, though in the case of junior counsel the court may feel 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 have known better. The court may not condone it but it ought to certainly do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which are politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule.”

25. The reason for what was thought to be non-attendance at the hearing of the Notice to Show Cause as deposed by Miss Odwa advocate is candid and excusable. In **Phillip Chemwolo & Another vs Augustine Kubede (1982-88) KAR 103 at 1040**, Apaloo JA (as he then was) held that:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made, a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to over reach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of parties and not the purpose of imposing discipline.”

In **Richard Ncharpi Leiyagu case (Supra)** the Court of Appeal stated 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 if the 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.”

Conclusion

26. This court exists to serve substantive justice for all parties to a dispute before it. Both parties deserve justice and their legitimate expectation is that the appeal be expedited so that they can know who will reap and, or enjoy the fruits of the lawfully obtained judgment. It is for the above reasons that I am persuaded that the Appellant's application for reinstatement of the appeal dismissed on 11th July, 2017 has merit and consequently it is hereby allowed.

Costs be in the cause.

DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF JUNE 2018.

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L. A. ACHODE

HIGH COURT JUDGE

DELIVERED, DATED AND SIGNED IN OPEN COURT AT ELDORET THIS 5TH DAY OF JULY 2018.

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HELLEN OMONDI

HIGH COURT JUDGE