



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO.648 OF 2011

FAUSTIN MWANGI.....APPELLANT

VERSUS

ERICK K. WAMITL.....RESPONDENT

(Appeal from the Judgment of Honourable S.A. Okato, Senior Principal Magistrate at Nairobi delivered on 29th February 2012 in CMCC No. 8147 of 2007)

RULING

The Appeal herein was listed on the 20th day of June 2016 for notice to show cause why it should not be dismissed for want of prosecution. Neither of the parties attended court and consequently it was dismissed.

The Appellant moved the court by way of a Notice of Motion dated the 4th day of September, 2017 seeking to set aside the order dismissing the Appeal and a further order for the reinstatement of the same. It has also sought for an order that the Record of Appeal annexed to the application be deemed as properly filed.

The application is made on the grounds that Counsel for the Appellant did not receive any notice inviting them to show cause, that the delay in typing and procuring the proceedings led to the delay and that the lower court file went missing for sometime which delayed the typing of the proceedings.

In the supporting affidavit sworn by Owino Opiyo on the 4th day of September, 2017, he depones that when they applied for proceedings, the same took long to type and they could not file a record of Appeal without them.

That the advocate did not receive a notice inviting them to show cause why the Appeal should not be dismissed. He avers that the Appellant is still interested in pursuing the Appeal and that the Appeal has high chances of success.

The Respondent has opposed the application by way of a Replying affidavit sworn by John K. Karanja on the 3rd day of November, 2017. It is contended that the Appellant has not shown any proof to the court that there was a delay in typing the proceedings. That the certificate of delay that has been annexed to the supporting affidavit is not genuine as it was issued to a different firm of Advocates and in a case that has no relation to this one. That, it is the Respondent who applied for certified copies of the proceedings and not the Appellant (a copy of that letter) is annexed and marked "JKK 1"

According to the Respondent, the proceedings were ready way back on the 23rd March 2013 which is well over four and a half years and the Appellant's Advocates were duly notified by the Executive Officer, Milimani Chief Magistrate's Court on the 23rd March 2013 and in the premises, the lengthy period of inactivity and delay remains unaccounted for by the Appellant.

That the Appellant went on deep slumber after he was granted the stay order. With regard to the notice, the Respondent states that he had written to the Deputy Registrar on 20th July 2015 seeking to have the matter listed for dismissal and it was not until the 20th June, 2016 when it was finally listed and dismissed. That the intended Appeal has no chances of success and the delay has prejudiced the Respondent in that, he cannot enjoy the fruits of his judgment.

The court has carefully considered the application together with submissions by the counsel. The Appeal herein was filed in 2011 and nothing much has been done since then. The Appellant filed an application dated 7th March 2012 seeking a stay of execution which application was heard and determined on the 15th May, 2012. Since then, the Appellant has not taken any other action in the Appeal.

The court on 20th June, 2016 listed the matter for notice to show cause why the Appeal should not be dismissed for want of prosecution. Neither party attended court and consequently, the Appeal was dismissed for want of prosecution. The Appellant has now moved the court

to set aside those orders and to reinstate the Appeal.

This Appeal was dismissed in the month of June, 2016 when the Civil Division had a service month to dismiss matters that had not been prosecuted for more than one year. The court is aware and I take judicial notice of the fact that the exercise of dismissal was widely advertised through the newspapers and the judiciary website. It is not therefore a good reason for counsel for the Appellant to say that he was not served with the notice to show cause.

However, I note that the Appeal has not been admitted because the lower court file has not been forwarded to this court. For that reason only, I will allow the application as prayed. This being an old matter, I do order that it be prosecuted within 90 days failing which it shall stand dismissed.

Dated, Signed and Delivered at Nairobi this 5th day of October, 2018

.....

L. NJUGUNA

JUDGE

In the presence of:

.....**For the Appellant**

.....**For the Respondent**