



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 54 OF 2017

JOSPAT MUTEMBEL.....APPELLANT

Versus

JAPHETH KIBUNJA MAGAMBO and

ALEX M.N. MANYARA (suing as legal

Representatives Of the deceased

PETER KIMATHI).....1ST RESPONDENT

IRUKI NAFTALY.....2ND RESPONDENT

R U L I N G

1. Before me are two Motions on Notice dated 4th and 6th June, 2018, respectively. The first Motion is brought under **Order 51 of the Civil Procedure Rules** which seeks an order that the monies deposited in the joint names of the advocates on record be released to the respondents advocates. The second application dated 6th June, 2018 is brought under **Order 10 Rule 11, Order 12 Rule 7, Order 51 Rule 15 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act**. That application seeks the setting aside of the proceedings of 30th May, 2018 and for the appeal to be heard on merit.

2. I propose first to consider the second application dated 6th June, 2018 as the outcome thereof has a direct consequence on the first application.

3. The grounds upon which that application was grounded were set out in the body of the application and the supporting affidavit of Mary Karanja, advocate sworn on 5th June, 2018. These were that; the firm representing the applicant had diarized the matter for 31st May, 2018; that the applicant has at all times been desirous of prosecuting the appeal; that the mistake was that of the advocate and not the applicant and that the applicant has a meritorious appeal.

4. It was deposed that when the matter came up for directions, an Advocate by the name Mr. Gichuki held Ms. Karanja's brief. That advocate advised that the matter was slated for hearing on 31st May, 2018, which date was diarized in Ms. Karanja's law firm diary. That the mistake of an advocate should not be visited upon a litigant.

5. Ms. Karanja further deposed that the applicant had obtained a stay upon depositing the entire decretal sum in an interest earning account in the joint names of the advocates on record for the parties as ordered by the court. That her law firm had applied for proceedings, judgment and decree. That whereas the proceedings were typed, the decree was not ready. That since the appeal has serious issues to be urged, the same should be re-instated.

6. The application was opposed vide the replying affidavit of Mutegi Mugambi, advocate sworn on 25th June, 2018. It was deposed that even if the law firm of the applicant had not mis-diarized the date of the hearing, the applicant would not have been able to prosecute the appeal on the 31st May, 2018 as no record of appeal had been filed as directed on 8th May, 2018. That the applicant had been allowed to file the appeal out of time yet he had not shown any effort to prosecute the same. Mr. Mutegi; therefore urged that the application be dismissed.

7. I have carefully considered the rival affidavits and the entire record. The record shows that when the matter came up for hearing on 30th May, 2018 Majanja J, dismissed the same for non-compliance with the order of Jaden J made on the 8th May, 2018.

8. In this regard, while the advocates for the applicant may have genuinely failed to attend court on 31st May, 2018 due to an inadvertent mistake, the question is if they had attended would they have advanced any good reason why the dismissal should not have been made. The reason advanced before me is that, while the proceedings had been typed, the decree had not been finalized because the original record had been transferred to the High Court. That the said file is required to be transferred back to the lower court for the decree to be drawn.

9. I have taken the liberty to peruse the entire record and the following is the sequence of events leading to the dismissal of the appeal. The being challenged was delivered on 10th May, 2017. On 16th June, 2017, this court granted leave to the applicant to file the appeal out of time which he did on 22nd June, 2017. He applied for typed proceedings, certified copy of the judgment and decree on 21st June, 2017.

10. On 31st August, 2017, the proceedings were ready and the lower court record was transmitted to this court. A mention notice dated 31st July, 2017 was issued by this court and served upon the parties for the mention of the matter before the Deputy Registrar on 26th September, 2017. On that day, none of the parties appeared.

11. On 3rd October, 2017, the appeal was admitted for hearing consequent upon which, the Deputy Registrar issued and served a Notice upon the applicant's advocates advising them that the appeal had been admitted and that they should proceed and file the record of appeal to enable the matter proceed for directions. That notice notwithstanding, there was no action from either the applicant or his advocates.

12. Tired of the applicant's inaction, the court issued another notice dated 9th April, 2018, for mention of the appeal on 8th May, 2018. On that day, the parties appeared before Jaden J who ordered that the applicant do file and serve the record of appeal within 14 days and that the appeal be heard on 30th May, 2018. The applicant was represented on that day by an advocate.

13. Despite such express direction, the applicant did not take any step whatsoever to comply with those directions. On 30th May, 2018 therefore, there was no record of appeal upon which any appeal could be heard. Majanja J had no other choice but to dismiss the appeal.

14. In view of the foregoing, was the dismissal merited? The reason advanced for the delay or failure to file the record is the alleged non-availability of the decree. There is no evidence that was produced to show that there was any follow up by the applicant after the letter to the Executive Officer on 21st June, 2017 for typed proceedings. Even after the Deputy Registrar had twice served the applicant with notices that the appeal had been admitted and for the mention of the matter for directions, The applicant and his advocate stayed put.

15. The irresistible conclusion this court makes is that, the applicant filed the appeal and packed it in this court, deposited the decretal amount in an interest earning account and went to slumber. I think it is now time that litigants are told boldly, clearly and in no uncertain terms that, the days when courts were packing bays for disputes between parties are long gone. Suits are filed in court for prosecution and not otherwise. That the courts will take active role in ensuring that suits that are brought before them are litigated and/or unpacked to clear the way for other deserving suits.

16. **Section 1B of the Civil Procedure Act** spells out the duty of the court as follows:-

“(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—

a) the just determination of the proceedings;

b) the efficient disposal of the business of the Court;

c) the efficient use of the available judicial and administrative resources;

d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

e) the use of suitable technology.”

17. The above provision enjoins the court to ensure that the available judicial resources (including human resource) is used efficiently. Further, the court is required to ensure timely disposal of cases. In the past, genuine litigants suffered because of delayed prosecution of cases. With the new Constitutional and legal dispensation, that is now a thing of the past. **Section 1B of the Civil Procedure Act and Article 159 of the Constitution** are apt about that.

18. This court ensured that within three months, June and September, 2017, the applicant's appeal had been processed and ready to be prosecuted. It advised the applicant as such way back on 6th October, 2017. He did nothing for 6 months forcing the court to list the matter for mention on 8th May, 2017. On that day, the court told the applicant what to do within 14 days. He did nothing. Can the court be blamed for helping him do away with the case on 30th May, 2017? I do not think so. When issuing and serving the aforesaid notices, the court was incurring expenses in terms of financial, time and human resources which the applicant did not appreciate.

19. In this regard, I am satisfied that the application dated 6th June, 2018 has no merit and the same is dismissed with costs to the respondent.

20. That leaves me with the application dated 4th June, 2018. In view of the dismissal of the appellant's application dated 6th June, 2018, the application dated 4th June, 2018 is meritorious and is hereby allowed as prayed.

It is so ordered.

Signed at Meru by me

A. MABEYA

JUDGE

DATED and DELIVERED AT MERU THIS 4TH DAY OF OCTOBER, 2018

F. K. GIKONYO

JUDGE