



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO.288 OF 2010

KAVILI MBITI.....APPELLANT/APPLICANT

VERSUS

ACADEMIC SERVICES LIMITED.....RESPONDENT

(Appeal from the Judgment of Chief Magistrate's court

at Nairobi by the Honourable S.N. Riech (CM)

dated 20th July 2010 in CMCC No. 5964 of 2005)

RULING

The application before the court for determination is the Notice of Motion dated the 18th day of October, 2017 and amended on the 10th July 2018.

It is brought under Article 159 of the Constitution, Sections 1A, 1B and 3A of the Civil Procedure Act seeking orders;-

- (1) Spent
- (2) This court be pleased to review its orders issued on 28th June, 2017 by extending time for the Appellant/Applicant to prosecute its appeal.
- (3) This court be pleased to grant a hearing date for the appeal on priority basis.
- (4) The costs of this application be in the cause.

It is based on the grounds set out therein and its supported by the affidavit sworn by Hellen Wambui Advocate, who is in conduct of the matter on behalf of the Appellant. In the said affidavit, it is deponed that, when the matter came up in court on 5th April, 2017 to confirm filing of submissions for the application dated 29th June 2016, it was given a date for ruling on 15th June 2017 but on the said date the court was on leave and she was advised by the clerk that the ruling would be delivered on notice. That, for purposes of follow up, she wrote a letter dated the 15th June, 2017 enquiring the position with regard to the delivery of the ruling but he was informed that it would be delivered on notice as the Judge was on leave.

That, she wrote another letter dated the 29th September, 2017 requesting the court to advise on the scheduled ruling date for the matter and it then that she was informed that the ruling was delivered on the 28th June, 2017. She avers that notice was not served upon their firm. That, upon perusal of the ruling, she discovered that the court had ordered that the Appeal be prosecuted within 90 days and she requested for a mention before the Deputy Registrar for directions who, directed her to make a formal application. She avers that failure to prosecute the Appeal within the time ordered by the court was due to circumstances beyond their control in that, the ruling was delivered in their absence and only got to know about the order when time had already run out.

The Respondent filed grounds of opposition dated the 27th day of November, 2017 on the following grounds:

- a) That the court on 28th June 2017 issued an order directing the Appellant/Applicant to prosecute the Appeal within 90 days failure to which it would be dismissed.
- b) The Appeal stood dismissed on 27th September 2017 for failure of prosecution as ordered.
- c) The application herein is thus incompetent, bad in law and incurably defective, the Appeal having abated.
- d) The application is an abuse of court process.

In addition to the grounds of opposition, the Respondent also filed a replying affidavit sworn by Mumo Ikui Mwendwa in which, he avers that in its ruling delivered on the 28th June 2017, the court ordered that the Appeal be prosecuted within 90 days failing which It would stand dismissed. It is averred that since the Appeal was not prosecuted as ordered by the court, it stood dismissed.

The Respondent contends that the Appellant has not satisfied the conditions for review as set out in Order 45 of the Civil Procedure Rules, in that, he has not shown that there are new and important matters or evidence which after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed, he has also not shown that there was a mistake or error apparent on the face of the record or there is a sufficient reason to justify the review. That, he has also not shown that he has brought the application without undue delay.

The Respondent contends that the Appellant has lost interest in the Appeal and that, reinstating it may not serve any purpose in that, the applicant has failed to prove that the letter dated 15th June 2017 was received by the Honourable Court.

The court has considered the application and the material before it. This court delivered a ruling on the 28th June, 2017 in which it ordered the Appellant to prosecute the Appeal within a period of 90 days failing which it would stand dismissed. The Appellant contends that they were not aware of the said ruling and only got to know about it in the month of September 2017. That, his Advocate wrote a letter dated 15th June 2017 enquiring about the ruling but he was informed that the Judge was on leave and that the same would be delivered on notice.

Thereafter, the only other letter that the advocate wrote is dated 29th September 2017 and the same was received at the registry on 3rd October, 2017 by which time, the ruling had long been delivered. He avers that he was unable to comply with the order of prosecution of the Appeal within 90 days from 28th June, 2017 because it came to his attention too late in the day.

The court has perused the record and it reveals that indeed the matter was in court on 5th April 2017 to confirm filing of submissions and on the said date it was given a date of 15th June 2017 for ruling when the same was not delivered as the Judge was on leave. It was not until the 28th June 2017 when the ruling was delivered in which, the Appellant was ordered to prosecute his Appeal within 90 days from the date

thereof.

On the date the ruling was delivered, it is clear that the Appellant was not in court. Notices of the delivery of the ruling were supposed to be issued by the registry and there is nothing on record to show whether Counsel for the Respondent was served or not. While I concur with Counsel for the Respondent that the Appellant took too long to follow up with the court and find out whether the same was delivered, this court cannot lay all the blame on the Appellant as there is no evidence that Counsel had been notified of the date of the ruling.

In those circumstances, it's only fair and just that the Appellant be granted the last chance to prosecute his Appeal. The same to be prosecuted within 45 days from the date of this ruling failing which it shall stand dismissed.

Costs of the application shall abide the outcome of the Appeal.

It is so ordered.

Dated, Signed and Delivered at Nairobi this **11th** day of **October, 2018**

.....

L. NJUGUNA

JUDGE

In the presence of:

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

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