



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 66 OF 2013

1. NATION CARRIERS LTD

2. JOSEPH NDUNG'U NG'ETHE.....APPELLANT

VERSUS

AHMED SALAT KULMIYE.....RESPONDENT

J U D G M E N T

Outline and background historical facts

1. On the 12/6/2017, an application dated 22/2/2015 came before court for consideration on whether or not the appeal would be dismissed for want of prosecution, the court on own motion gave the following orders:-

I. THAT the Appellant shall compile and file a Record of Appeal within 30 days from today.

II. Within 10 days after filing and serving the Record of Appeal the appellant shall cause the file to be placed before a judge for perusal.

III. Matter be mentioned on 24/7/2017 to confirm compliance and for directions on hearing the appeal.

IV. If the Appellant shall fail to comply with any of the two conditions, this appeal shall stand dismissed on the date the default shall have occurred.

V. Costs in the cause.

2. When the file came to court on the 24/7/2017 as directed, the appellant had not complied with the directions and therefore the court said:-

“I have perused the file and noted that condition 2 in the Order of 12/6/2017 was not complied with and therefore the default clause (4) took effect with the consequence that the appeal stands dismissed. Let the parties move as may be appropriate”.

3. The appellant then filed the application dated 28/8/2018 on 30/8/2018 which was opposed by the Respondent by the grounds of opposition dated 20/9/2018 and filed on 21/9/2017.

4. Subsequently parties agreed to canvass the application by way of Written submissions which were then filed by the Applicant/Appellant on 10/01/2018 and by the Respondent on 6/11/2017.

5. Once again the Applicant did not file submissions within the time directed of 7 days. Nothing however turns on that infraction as no objection was raised by the Respondent.

6. When parties attended court to highlight the filed submissions the applicants counsel was reported to be engaged in a Busia court and was seeking to have the matter adjourned unless the court was prepared to render a ruling based on the submissions filed. The two counsel then requested court to determine the application on the submissions filed without any of them highlighting the same. The court acceded to that request.

7. This court has not determine whether or not the appellant is deserving of orders to set aside orders of 24/7/2017 which deemed the appeal dismissed for failure to comply with the directions of the court.

8. Since *Shah vs Mbogo [1968] E.A. 93*, the law on setting aside has been settled in the words to the effect that; “*the discretion is wide and unfettered and purposed to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice*”.

9. In this matter, the judgment appealed against was delivered on 28/2/2013 and the memorandum of appeal filed on the 20/6/2013 out-time but with leave granted on 11/6/2013. What is critical however is that having filed the appeal and an application for stay dated 11/6/2017, as aforesaid, and having been granted an interim stay with the leave, the appellant took no steps at all to pursue the appeal till the Respondent filed the application dated 25/2/2015 on the same date.

10. That to this court was an inordinate and inexcusable delay that may be seen as an evasive act designed to delay the expeditious disposal of the appeal and contrary in furtherance of the overriding objectives of the court. It is deemed an ordinate delay because under the Rules, it was the appellants singular duty to have the appeal perused for admission within 30 days of the date of filling and to seek directions thereafter^[1]. That notwithstanding the court did on own motion give to the Appellant the opportunity to prosecute the appeal by taking specific steps but the appellant still persisted on dilatory conduct by failing to take a hearing date.

11. More still, after the appeal was deemed dismissed on the 24/7/2017 in the presence of counsel, no immediate steps were taken till the 30/8/2017 when an application to set aside was filed. It is also on record that even submission in support of that application having been order to be filed within 7 days from the 21/9/2017 were never filed till the 10/01/2018 some, 110 day or so out of time.

12. It cannot be said that the Appellant has acted within and towards the discharge of its duty to court under Section 1A (3) Civil Procedure Act. It has evidently acted in a manner that if not evasive, is otherwise obstructive to the fair, expeditious and proportionate disposal of the appeal as demanded by law. Such conduct is deprecated upon and disapproved by court and if one was to set aside on the face of such, it would be seen as aiding a party who has set out to obstruct the cause of justice.

13. I refuse to reward evasion as well as lack of discharge of duty owed to court and I order that the application dated 28/8/2017 and filed in court on 30/8/2017 be dismissed with costs.

Dated and delivered at Mombasa this 16th day of November 2018.

P.J.O. OTIENO

JUDGE

^[1] Order 42 Rule 11 and 13(1) Civil Procedure Rules.