



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 447 OF 2015**

**HIGHLAND MINERAL WATER CO. LTD.....APPELLANT/APPLICANT**

**-VERSUS-**

**JOSEPH KAGIA**

**SUSAN NYAMBURA KARIUKI**

**AND MONICA WAMBUI KAGIA**

**(Suing on behalf of the estate of Maina Ndungu Mwangi.....RESPONDENTS**

**RULING**

1. The Notice of Motion dated 11<sup>th</sup> July, 2018 is brought by the appellant/applicant under Sections 1A, 1B and 3A of the Civil Procedure Act and Order 51, Rule 1 of the Civil Procedure Rules; it is supported by the grounds set out on the body thereof and the facts deponed to, in the sworn affidavit of **Alfred Nceebere Michuki**. The appellant seeks the following orders:

***i) Spent.***

***ii) Spent.***

***iii) THAT the dismissal order made on 2<sup>nd</sup> July, 2018 in respect of the application dated 6<sup>th</sup> November, 2017 be set aside.***

***iv) THAT this Honourable Court be pleased to reinstate CIVIL APPEAL NO. 447 OF 2015 and give a hearing date on priority basis.***

***v) THAT upon reinstatement of the appeal, there be a stay of execution of the decree and judgment in CMCC NO. 1844 OF 2012 pending hearing and determination of the appeal.***

***vi) THAT the costs of the application be provided for.***

2. In his supporting affidavit, Alfred Nceebere Michuki, who is the advocate seized with the conduct of the matter, averred that the memorandum of appeal and record of appeal were filed on 17<sup>th</sup> September, 2015 and 18<sup>th</sup> April, 2016 respectively but that, attempts to have the matter listed for directions were futile. Eventually, the respondents applied for a dismissal of the aforesaid appeal. In the end, the court dismissed the respondents' application vide its ruling delivered on 29<sup>th</sup> June, 2017 and ordered the appellant to cause the appeal to be prosecuted within 120 days failing which it shall stand dismissed.

3. The deponent further stated that the earliest date it could obtain fell outside the timelines given by the court. Resultantly, the appellant filed an application seeking extension of time within which to list the appeal for directions, and the appellant given a further 120 days to comply with the orders made on 29<sup>th</sup> June, 2017, failure to which the appeal shall stand dismissed.

4. Fidelis Maithya Mutisya, the advocate for the respondents herein, opposed the abovementioned application by way of a replying affidavit. Largely, he argued that there has been a delay in prosecuting the appeal and that such delay has been caused solely by the appellant and without excuse. The deponent in turn contended that the application is an abuse of the court process and a mere afterthought since no evidence has been adduced by the appellant to support its averments.

5. In its oral submissions, the appellant's advocate essentially argued that the appellant has always been ready to prosecute the appeal and that efforts have been made to that effect.
6. On the other hand, counsel for the respondents reiterated that the appellant has not taken any steps to prosecute the appeal and that the reasons given are inexcusable. Further, the advocate contended that the appellant has not complied with the orders made by the court as concerns prosecution of the appeal.
7. This court has taken into consideration the application, reply and arguments by the parties. The issues to be considered are whether or not the appeal ought to be reinstated and whether or not a stay of execution should be granted.
8. This court will first address the question of setting aside of the relevant order and reinstatement of the appeal. It is noteworthy that the order of 2<sup>nd</sup> July, 2018 relates to the application of 6<sup>th</sup> November, 2017 filed by the appellant seeking an extension of time to list the appeal for directions. The court appreciated that a previous order had been made granting the appellant 120 days within which to prosecute the appeal and which order was not complied with. It is also well noted that the aforementioned application was filed after the strict timelines had lapsed and it is on this basis that the court refused to grant the prayers sought vide its ruling of 2<sup>nd</sup> July, 2018. It is important to clarify that contrary to the position set out by the appellant, the court did not grant the appellant a further 120 days to comply with the order of 29<sup>th</sup> June, 2017; rather, it determined that there was no appeal pending.
9. Further to the above, the record confirms that the appeal had previously been fixed for directions on 27<sup>th</sup> October, 2017. As the appellant correctly submitted, it would appear the court was not sitting on that day and hence the matter was rescheduled to 24<sup>th</sup> November, 2017 by consent of the parties. Subsequently, the appellant brought the application seeking an extension of time. While the court appreciates that the appellant made some effort towards obtaining a date for directions, there is nothing to indicate that the court diary was full and there were no earlier dates available. If that were truly the case, the appellant would have been reasonably expected to file the application for reinstatement prior to the expiry of the 120 days but this was not done. In this sense, the court would agree with the Respondents that the motion is a mere afterthought.
10. To add on, the court has observed that the appellant submitted that it filed an application dated 17<sup>th</sup> August, 2018 seeking extension of time for listing the appeal for directions. The appellant contended that the same was not heard. The court has looked at the file and confirmed that the motion was indeed filed. That notwithstanding, the appellant did not seek a hearing date for that application.
11. This court is not satisfied that the appellant has either given sufficient reasons or presented new evidence to warrant a setting aside of the order made on 2<sup>nd</sup> July, 2018 and a reinstatement of the appeal. In any event, the mere fact that there were challenges in having the appeal listed for directions does not adequately explain the delay in seeking an extension of time. In the court's view, the appellant was favoured with time to comply but did not respond proactively. In view of this, the court would be hesitant to reinstate the Appeal.
12. As concerns the second issue on a stay of execution, the court opines that since it has declined to reinstate the appeal, the prayer for a stay of execution pending determination of the appeal is rendered superfluous.
13. The upshot is that the motion lacks merit and is consequently dismissed with costs to the respondents.

**Dated, signed and delivered at NAIROBI this 13<sup>th</sup> day of December, 2018.**

**L. NJUGUNA**

**JUDGE**

In the presence of:

.....for the Appellant/Applicant

.....for the Respondents