



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 440 OF 2013

JOSEPH PATRICK WANG'ANG'A.....APPELLANT/APPLICANT

VERSUS

PATRICK N. KIMETHU.....RESPONDENT

RULING

1. The Appellant/Applicant filed a notice of motion dated 26th September, 2018 brought under Article 159 of the Constitution, Section 3A of the Civil Procedure Act and Order 51, Rule 1 of the Civil Procedure Rules; supported by the grounds set out on the body thereof and the facts deponed to, in the sworn affidavit of **Stephen Oyugi Okero**. The Applicant seeks the following orders:

i) Spent.

ii) THAT this Honourable Court be pleased to set aside the order made on 20th July, 2018 thereby dismissing the suit.

iii) THAT this Honourable Court be pleased to make such orders as it may deem fit in the circumstances.

iv) THAT costs be in the cause.

2. In his supporting affidavit, Stephen Oyugi Okero largely deponed that the appeal was not fixed for hearing due to the fact that the lower court file had not been availed to the Appeals registry. The deponent in turn stated that upon receipt of the notice to show cause, the advocate who had received the same forgot to note the date and as such, when the matter came up in court, the advocate for the Applicant was not present and hence the fault was on the part of the counsel.

3. The aforesaid motion is opposed. The Respondent filed both grounds of opposition and a replying affidavit sworn by **Nimrod Karionji Mbae** on 18th October, 2018, basically arguing that the application lacks merit, the Applicant has shown little interest in prosecuting the appeal and the appeal has been rendered nugatory since the orders previously made by the lower court have already been executed.

4. Drawing from the above, this court has noted that the Applicant should in fact be seeking orders for reinstatement of the appeal and not the suit as indicated in prayer ii) of the Motion. In the same manner, the Motion has not cited the specific provisions under which the orders sought lie. As such, prayer ii) of the motion is improperly drafted. That notwithstanding, the court will address its mind to the substance of the application.

5. Having considered the arguments presented by the Applicant, the court has taken note that the fundamental issue to be decided on, is whether it should set aside the order made on 20th July, 2018 and reinstate the appeal.

6. To begin with, it is imperative for the court to determine whether the application has been timeously filed. The court record confirms that the appeal was dismissed on 20th July, 2018, whereas the motion was filed on 26th September, 2018. To the court's mind, the same has been brought without undue delay.

7. Having established the above, the court will now address its mind to the real issue. In this instance, the appeal was dismissed under *Order 42, Rule 35 (2)* of the Civil Procedure Rules which expresses the following:

“If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.”

8. Drawing from the above, the court has noted that the memorandum of appeal was filed on 15th August, 2013. It is unclear precisely when the said memorandum was served and hence the court is left to assume that this was done soon after filing. The Applicant submitted that the

appeal was never set down for hearing but went ahead to explain that this was due to the fact that the lower court file has not been availed to the High Court.

9. The Respondent on the other hand argued that the Applicant was not keen on prosecuting the appeal. The court has perused the file and noted with curious interest that it is indeed the Respondent's advocate who persistently wrote to the Deputy Registrar to follow up on the lower court proceedings and status of the appeal. It appears there was no follow up on the part of the Applicant. Resultantly, the Respondent filed an application on 22nd January, 2016 seeking to have the appeal dismissed for want of prosecution. In opposition thereto, the Applicant contended that the lower court file had not been transferred to the appeals court and that directions were yet to be given in respect of the appeal. Eventually, the parties entered into a consent and the court on 14th April, 2016 ordered the Applicant to file the necessary documents within 45 days.

10. Having taken the above into account, this court is satisfied that there was compliance in terms of filing the record of appeal on 1st December, 2016, albeit outside of the timelines given by the judge. To add on, there is nothing to indicate that directions were given in respect of the appeal. The Applicant was insistent that this was because the appeals court did not have the lower court file. Whereas the court acknowledges that this is a fairly old matter which has been pending in court for the last five (5) years, it certainly appears that the lower court file was not forwarded to this court.

11. As concerns the notice to show cause, there is no doubt that the same was issued by the Deputy Registrar prior to the dismissal of the appeal. The Applicant's advocate confirmed that a copy of the said notice was received but admitted that the matter was not diarized. The Applicant argued that the mistake of counsel should not be visited upon the client. The Respondent orally submitted that it is not the court's duty to cover an advocate's negligence and that in any case, the delay was unjustified. The court is very much alive to the principle that a client should not be made to suffer for the mistakes or omissions of his advocate. In this instance, the mistake was obviously on the part of counsel, who received the notice but failed to diarise the same. It would be contrary to the interest of justice to cause the client to suffer for his advocate's mistake.

12. In the end, the court finds that the explanation given by the Counsel for the Applicant for non-attendance is plausible. The court has taken into account the fact that the record of appeal has already been filed and the lower court file has not been availed as yet. In the circumstances therefore, the court will allow the Motion in terms of prayer ii). Consequently, the Applicant is ordered to prosecute the appeal within 90 days with effect from 15th January, 2019, failure to which the appeal shall stand dismissed. Costs of the application shall abide the outcome of the appeal.

Dated, signed and delivered at **NAIROBI** this **6th** day of December, 2018.

L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the Respondent