



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NUMBER 165 OF 2010

BRUSH MANUFACTURERS LIMITED.....1ST APPELLANT

PETER NGIGE MANDE.....2ND APPELLANT

VERSUS

GRACE WACHERA IRUNGU AND NELSON NDINDI IRUNGU

(Suing As Legal Representatives of The Estate of John Irungu Wasikwa (Deceased)).....
RESPONDENT

RULING

The Appellant/Applicant has filed the Notice of Motion dated 1st September, 2010 seeking that the order made by the court dismissing the appeal be set aside and/or varied and the appeal be re-admitted to hearing.

In the supporting affidavit sworn by Jackson Omwenga Advocate, it is averred that, on or about 29th August, 2016, he was informed by the Appellants that auctioneers were at their premises to attach their property. That on perusal of the court file, he found out that the appeal was dismissed without notice to show cause upon the Appellant.

That before the matter was dismissed, the court had directed the Deputy Registrar to place the file before the Judge for admission and thereafter issue notices for directions which have not been issued to date. He further avers that the Appellant is ready and willing to have the appeal heard on merit.

The Respondents have opposed the application vide grounds of opposition filed on the 14th October, 2016. They state that the appeal was dismissed for want of prosecution during the judiciary civil service week whose notices had been widely circulated by radio, television, newspapers, judiciary websites and on all courts notice boards. That the rule of law under which the appeal was dismissed does not permit re-admission, that the Appellant had been dilly-dallying always blaming the court for the long delay in prosecuting the appeal, that it is a Cardinal Rule of Law that litigation must come to an end and in this case the loss must lie where it fell and that execution has been effected fully and to re-open the case would be unjust.

In his submission, counsel for the Appellant/Applicant submitted that the facts in his affidavit have not been challenged or denied by the Respondent since there is no affidavit in reply.

He argued that the original file was forwarded to the High Court pursuant to an order by Aburili J, who summoned the Executive Officer to appear before her and explain why the file had not been forwarded.

That after the file was forwarded, the court directed the Appellant to obtain typed proceedings and file a record of appeal which was filed on 26th June, 2015.

He submitted that no notice was issued upon the Appellants before the Appeal was dismissed. He referred to Order 42 rule 35(2) of the Civil Procedure Rules and argued that since directions had not been taken, then the court cannot dismiss the appeal for want of prosecution without first issuing notices. He relied on the case of **Rosavie (EPZ) Limited Vs Stanlex Mbithi James**, Civil Appeal No. 161 of 2005 and that of **China Jiangsu International Limited Vs Henry Adema Arigula**, Civil Appeal No. 505 of 2012.

On his part counsel for the Respondent submitted that under Order 42 there is no provision for reinstatement of an appeal that has been dismissed for want of prosecution. On assertion by the counsel for the Appellant that notices were not issued, he wondered how the Respondent got to know about the notice to show cause if notices had not been issued.

In his further submissions, he averred that the form of the notice is not prescribed. That under the overriding objective, the court is enjoined to use technology and it does not mean that physical notices have to be delivered to the offices of the Advocates.

On the contention that an appeal cannot be dismissed before directions have been taken, he submitted that a party is not supposed to sit pretty and wait without taking any action as by doing so, it would not assist in the administration of justice. He urged the court to consider the provisions of Section 3A, 1A and 1B and strike a balance between the parties. He also urged the court to consider the kind of a notice that should be given to the parties.

The court has considered the material before it with regard to the application herein. The appeal was dismissed on 6th June, 2016 during the service month in the Civil Division which was meant to dispose off the old matters and especially where no sufficient cause was shown why the matters should not be dismissed. As rightly submitted by the counsel for the Respondent, notices were given through the media and the newspapers and that must have been how the Respondent learnt about the dismissal otherwise, if no notices had been issued, even the Respondent would not have attended court.

Then what form of notice should the court give to the parties in a case like this? Order 42 Rule 35(2) under which the appeal was dismissed provides: -

“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”

My own understanding of that rule is that the form of notice is not prescribed. The rule only provides that the Registrar shall issue notice to the parties.

I am aware that for a long time, court registries used to serve notices physically on parties and/or advocates in their offices but in this day and age, courts are now enjoined to embrace technology for faster dispensation of justice. The courts have on many occasions advertised through the media of their intention to dispose off old matters, after which such matters are listed for notice to show cause.

It is not, therefore, a good reason for a party to rely on non-service of a notice upon it physically, as a reason for non-attendance when such a matter is scheduled to come up for notice to show cause.

The reason given by the counsel for the Appellant why the appeal has not been prosecuted, is that directions have not been given. A perusal of the court record shows that when the matter was last in court on 1st December, 2014 the court ordered that it be mentioned on 29th January, 2015 to confirm if proceedings had been typed.

The record does not show what happened on the said date but it is noted that the Appellant filed a record

of appeal on the 26th June, 2015 but thereafter went to sleep. Under the new procedure rules 2010, the appellant is enjoined to be pro-active and cause an appeal to be listed for directions and not just sit pretty and do nothing about it. The Appellants have not produced any evidence before this court to proof that they had taken steps to fix the matter for directions. However, I note that the appeal has not been admitted under Section 79(B) and since the Appellants made an effort to file the record of appeal, I will give them the benefit of doubt and reinstate the appeal for hearing under Sections 1A, 1B and 3A of the Civil Procedure Act which gives the court the inherent jurisdiction to make orders in the interest of justice.

The court notes that the matter herein is old and for faster disposition, the following orders are made: -

- 1) The order made on 6th June, 2016 dismissing the appeal is hereby set aside and the appeal is readmitted to hearing.**
- 2) The appeal is admitted under section 79B of the CPA.**
- 3) It is certified ready for hearing, to be heard at Nairobi for half a day.**
- 4) The appeal to be prosecuted within 120 days from today, failing which it shall stand dismissed.**

Dated, signed and delivered at Nairobi this 16th day of February, 2017.

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L NJUGUNA

JUDGE

In the presence of

..... *for the applicants*

.....*for the Respondents.*