REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 151 OF 2010

ELDORET STEEL MILLS LTD …….. APPELLANT

VERSUS

PATRICK ONTITA MOKUO ……. RESPONDENT

RULING

1. The first two prayers in the appellant/applicant's Notice of Motion dated 22nd July, 2016 are now spent. The only three prayers remaining for this court's determination are as follows;

> **(i)** That the order made on 7th July 2015 dismissing the appeal for want of prosecution be reviewed and/or set aside.
>
> **(ii)** That upon grant of prayer 3 above, the court be pleased to admit the appeal to hearing and give directions on how to proceed with the appeal.
>
> **(iii)** That costs of the application be provided for.

2. The motion is premised on grounds stated on its face which are largely replicated in the depositions dated 22nd July 2016 made by *Ms Abigael Lusinde Khayo*, learned counsel for the applicant.

3. In the main, the applicant contends that the orders dismissing the appeal for want of prosecution on 7th July, 2015 were made in error as no notice was issued or served on the applicant or its counsel requiring them to attend the court on 7th July, 2015 to show cause why the appeal should not be dismissed; that the dismissal proceeded on the mistaken premise that the appeal was ripe for hearing while infact it was not as the same had not been admitted and no directions had been issued; that the delay in prosecuting the appeal was not deliberate but was caused by factors beyond the applicant's control which included lack of hearing dates; that the dismissal orders ought to be set aside in order to give the applicant an opportunity to canvass the appeal on merit; and, that the applicant is ready to comply with any directions the court may issue towards the speedy prosecution of the appeal.

4. The motion is contested by the respondent through a replying affidavit sworn by *Mr. Francis Omondi*, learned counsel for the respondent. Counsel deposed that the appeal was dismissed pursuant to the *"justice at last"* initiative which was a highly publicized national event in the media and the court registries; that the court should take judicial notice that parties to suits or appeals were directed by the judiciary to visit their respective court registries to ascertain whether their matters were affected by the initiative; that the application has been made after undue delay; and, that the application is misconceived and is an abuse of the court process since it is not provided for in law.

5. The application was orally argued before me on 14th March, 2017. Learned counsel *Mr. Isiji* represented the applicant while learned counsel *Mr. Omondi* appeared for the respondent. Learned counsel for both parties made brief submissions in support of their clients' respective positions which I have carefully considered.

6. I have also perused the court record. The record confirms that indeed the appellant's appeal was dismissed under *Order 42 Rule 35 (2)* of the *Civil Procedure Rules* during an initiative of the judiciary styled *"Justice @ last"*. *Order 42 rule 35(2)* is in the following terms;

> *"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".*

7. Under *Order 45 Rule 1* of the *Civil Procedure Rules* (*CPR*), the court has jurisdiction to review and set aside its orders if the conditions stipulated under the rule are satisfied. These are if it is demonstrated that there are new and important matters which the applicant had discovered which were not within his knowledge when the impugned order was made or if there is a mistake or error apparent on the face of the record or for other sufficient reason. The rule also requires that the application for review should be filed without unreasonable delay.

8. Given the above provision, I am unable to agree with *Mr. Omondi's* submission that the instant application is bad in law and amounts to an abuse of the court process as it is allegedly not anchored on any law. An order of dismissal of a suit or an appeal is subject to review just like any other court order provided that the applicant meets the conditions precedent to a review as enumerated under *Order 45 Rule 1* of the *CPR*. I therefore find that the application is properly before this court.

9. Turning to the merits of the application, *Order 42 Rule 35 (2)* which I have reproduced earlier makes it clear that the court on giving notice to the parties through its Deputy Registrar may dismiss an appeal for want of prosecution if it is satisfied that the appeal had not been set down for hearing within one year after service of the memorandum of appeal. Unlike in *Order 42 rule 35 (1),* the dismissal is not pegged on timelines after the taking of directions on the mode of hearing of the appeal which presupposes that the appeal would have been admitted for hearing before becoming a candidate for dismissal.

10. *Order 42 Rule (35) (2)* in my view is meant to take care of dormant appeals which are simply abandoned after they are filed such that no interest is demonstrated by the appellant in taking any single step towards progressing it for admission, directions or hearing for a minimum period of one year.

In view of the foregoing, I am not satisfied that the dismissal of the instant appeal was premature allegedly because it had not been admitted for hearing and directions had consequently not been taken. In the premises, its dismissal did not constitute a mistake or an error on the face of the record.

11. On the issue of notice, the applicant has admitted that the appeal was listed in the cause list of 7th July, 2015 as one of the many appeals that were due for dismissal for want of prosecution. I take judicial notice that during the justice @ last initiative, all matters scheduled for dismissal were published in the judiciary's website and all causelists containing all cases and appeals scheduled for dismissal were pinned on the court's notice board well in advance before the dates fixed for hearing of the notices to show cause why the matters should not be dismissed. As I held in ***Vishva Builders Ltd V Moi University HCC No.51 of 1999***, the two modes of publication aforesaid constituted sufficient notice to the parties in the affected cases or appeals. The applicant cannot therefore validly argue that no notice was issued to it before the appeal was dismissed.

12. Having said that, my perusal of the court record reveals that the appellant had made several attempts to cause the appeal to be placed before a judge for directions on admission and for directions under *Order 42 Rule 13 Civil Procedure Rules* without success. There is a Notice of Motion dated 23rd June 2011 filed by the appellant's advocates on record seeking that the appeal be listed for directions and letters dated 30th June, 2011 and 14th August 2014. It is also apparent that despite several requests by the

Deputy Registrar, the lower court's original record has todate not been forwarded to this court by the lower court.

13. In the premises, the applicant cannot be entirely blamed for having not set down the appeal for hearing before it was dismissed since it could not have been fixed for hearing before it was admitted and directions issued as requested by the applicant. Granted, there appears to have been some lack of diligence on the applicant's part and or its advocates in following up the matter. But it cannot be said that the appellant had totally lost interest in prosecuting the appeal given it's efforts to have the appeal listed for admission and directions that did not bear fruit owing to the unavailability of the lower court's original record – a matter that was beyond the appellant's control.

14. For the foregoing reasons and considering that the court is enjoined to administer substantive justice to parties before it, I find that there is sufficient reason in this case to warrant a review of the dismissal order made on 7th July 2015. I am thus inclined to allow the application. But because justice is a two way street and it would obviously be prejudicial to the respondent to have the appeal hanging over his head indefinitely, i will balance the scales of justice by allowing the application and reinstating the appeal on one condition: that the applicant shall follow up with the Deputy Registrar on the availability of the lower court's record and cause the appeal to be admitted and listed for mention for directions within the next 120 days of today's date in default of which the appeal shall stand dismissed with costs to the respondent for want of prosecution.

15. Costs of the application shall be borne by the applicant.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 6th day of April, 2017

In the presence of:

Mr. Isiji for the Appellant/Applicant

Mr. Kapere for the Respondent

Mr. Lobolia court clerk