



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO 21 OF 2011

BETWEEN

KARAYA MWANGI.....APPELLANT/APPLICANT

AND

JOHN GITAHU KABUE.....RESPONDENT

RULING

The Notice of Motion before me dated 5th December 2016, is brought under sections 1A, 1B and 3A of the Civil Procedure Act, Order 22 rule 25 and Order 51 of the Civil Procedure Rules and all the enabling provisions of the law.

It seeks orders;

1. That the application be certified urgent....
2. That pending the hearing and determination of the application *interpartes* there be stay of execution of the decree given by this court on the 21st September 2016 and issued on the 10th November 2016.
3. That this Hon. Court be pleased to set aside the decree made on the 21st September 2016 and issued on the 10th November 2016 and reinstate the appeal for hearing and determination on merit.
4. The costs be in the cause.

The application is supported by the affidavit of OMBONGI. O DOUGLAS advocate for the appellant / applicant.

The grounds for the application as set out on its face are that;

- a) The decree that was issued was made without due regard to the circumstances that prevailed which were not of the making of the appellant
- b) The decree that was obtained *ex-parte* is one sided and is not merited.
- c) There is no remedy available to the appellant in the event that the appeal is not reinstated.

At the first instance the application was placed before Mshila J. On the 8th December 2016 the Judge

granted prayers 1. and 2.

The application is opposed through the replying affidavit sworn by JAMES K. KIHARA, advocate for the respondent.

The background to this application is that on the 21st September 2016, the Mativo J, dismissed an application brought by the respondent to have the appeal dismissed for want of prosecution.

In dismissing the application, the judge gave the following orders;

- a) That the respondent's application dated 4th May 2016 be and is hereby dismissed.
- b) That the appellant is directed to fix a date for directions before a judge within 30 days from the date of this order in default of which this appeal shall stand dismissed.
- c) No orders as to costs.

The appellant did not fix the appeal for directions and on the 10th November 2016, a decree was issued dismissing the appeal.

The reasons for this failure are set out in the affidavit sworn by Mr. Ombongi;

That on 22nd September 2016 he issued an invitation for fixing a mention date on the 29th September 2016 but the clerks at the registry insisted that the invitation required a 10 day run to enable the other party prepare and attend the registry for fixing of the date. The invitation letter is annexed to his affidavit.

That the clerks from his firm were also told that the Judge did not have near dates.

That the second invite was done on the 11th October 2016 for fixing a date but the date on the letter was 20th October 2016 which fell on a public holiday, which was discovered too late to do anything.

That the rest of the time was taken by the protests that followed Willy Kimani's murder.

That the appellant has deposited security for costs his title LR NO THENGENGE/KARIA/2038, and in the event the appeal is not reinstated the respondent will proceed to execute decree in CMCC 554 of 2007 to the detriment of the appellant.

In opposition to the application the advocate for the respondent swore a long affidavit responding to each reason given by the advocate for the appellant. The main point that he makes is that there was nothing to stop the counsel for the appellant from fixing a mention date and serving his firm with the same. Secondly that Mr. Ombongi's affidavit contains some untruths.

In his oral arguments Mr. Ombongi urged the court to find that what had transpired leading to the dismissal of the appeal was as a result of reasons beyond the appellants' control.

Mr. Kihara's position is that there is nothing at all upon which the court can grant the orders sought by the appellant. That three time the appellant has failed to comply with court orders and the court has been lenient to the appellant /applicant. That on 21st September 2016 the orders were clear; failure to abide the result would be an automatic dismissal of the appeal.

Neither party cited ant authority

I have carefully considered both the written and oral rival arguments.

I have considered the provisions of the laws cited.

Starting with Section 1A. of the CPA, it provides that the overriding objective of the Act and the rules there under is to facilitate is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. In the same breath it beholds litigants and their lawyers to assist the Court to further the overriding objective of the Act by participating in the processes of the court and complying with the directions and orders of the Court.

The record will show that the appellant had on several occasions been given orders and directions which he did not abide by. The question at this stage is whether the appellant /applicant can explain away the failure to get hold of the lifeline the judge gave him in the ruling of 21st September 2016. The judge gave very specific orders.

Here is what he said,

“Though to my mind the delay has not been sufficiently explained I find nothing to show that the delay is intentional, contumelious, and therefore inexcusable, nor is there anything to suggest abuse of the court process.”

It is in the back drop of this that I must examine the excuses of invitations to fix dates. These explanations in my view once again fall in the category of insufficiency. They cannot wish away the gravity of the situation. This time the failure to comply is clearly inexcusable. Here was an edict, 30 days or you have no appeal. Your appeal will be gone, just like that. It is clear from the feeble efforts made to comply that only the respondent took the judge seriously.

- The appellant could have simply fixed a date and served the respondent.
- The appellant could have sought a mention before Deputy Registrar High Court or written to her to draw attention to the imminent danger of not losing the appeal for the simple reason that the registry was putting obstacles in the way of his getting a mention date.
- There could have been some evidence of a complaint to the registry about the manner they were responding to the Judge’s clear directions
- There could have been an affidavit from the clerk who went to this registry, with specific names of registry staff who refused to comply with the judge’s clear directions.

From the look of things, it is the appellant/ applicant who is in violation of the very provisions of the law under which he seeks refuge.

Section 1B of the CPA lays out the duty of the court in fulfilling the provisions of section 1A. The court is to do that which is necessary to achieve ,among others objectives, the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties. In all this the court has the inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court as saved under section 3A of the same CPA.

The applicant seeks refuge in ‘the Oxygen Principle.’ In Mativo J’s ruling these principles were eruditely explained and expounded and effected in favour of the appellant/ applicant.

Justice is a double edged sword and cuts both ways. The OO principle is not a panacea for all ills. In SAFARICOM LIMITED VS. OCEAN VIEW BEACH HOTEL LIMITED & 2 OTHERS CIVIL APPLICATION NO. 327 OF 2009 the court held inter alia;

“Expressed differently, the purpose of the “double O principle” in its application to civil proceedings is to facilitate the just, quick and cheap resolution of the real issues in the proceedings. Like oxygen, the principle has the potential to re-energise the civil system of justice and give the courts the freedom to attain justice in each case in a manner that is just, quick and cheap and above all in a manner which takes into account the special circumstances of each case or appeal and the best way of handling it... It is therefore apt to throw in a word of caution concerning the “O2”

principle”. It should be regarded as a double edged sword in that it is a powerful enemy of those litigants bent on frustrating the course of justice because it has the potential of stopping them at the earliest opportunity and it will also be a powerful ally of those litigants who want to attain justice in a manner that is just, quick and cheap. The “O2” principle has not come to us as a packaged product for application to all situations. Instead, its application and management will depend on the circumstances of each case...”

I agree with Odunga J in JOHN MAINA MBURU T/A JOHN MAINA MBURU & CO ADVOCATES v GEORGE GITAU MUNENE & 3 others [2012] eKLR when dealing with the application of the O2 principle cited the above case with and went on to state as follows;

What in effect the Courts are saying is that the overriding objective should not be used selectively. It should be used for purposes of attaining justice either by not unduly delaying a party from realising what was truly and justly due to him or by ensuring that a party is accorded an opportunity to present his case on the merits where he has shown that he has one. In other words, the plaintiff should not expect the Court to ignore his failure to comply with procedural requirements in order to assist him obtain his orders summarily.

The appellant through his counsel having failed to comply with a simple and straight forward direction of the court, has tried without success, to place the blame on unknown persons and processes, must now face the double edged sword of justice.

The decree issued on the 10th November was not obtained ex-parte, neither is it one sided. It was given in the presence of all the parties when the judge gave the appellant a chance to pursue his appeal. The respondent did not obtain the decree by means of any mischief. His counsel simply took the orders of the court seriously and even allowed a grace period of one month for the appellant to take necessary action in vain. If any prejudice is suffered by the appellant, he brought it upon himself. The appellant is not without remedy; he has a right of appeal.

This application has no merit and stands dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NYERI THIS 9TH MAY 2017

TERESIA MATHEKA

JUDGE

IN THE PRESENCE OF

COURT ASSISTANT: HARRIET