



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NUMBER 495 OF 2008

SWAN CARRIERS LIMITED. APPELLANT

VERSUS

EASTERN PRODUCE LIMITED. RESPONDENT

RULING

1. The Appellant/Applicant has approached this court by way of a Notice of Motion dated 11th November, 2015 wherein the following orders are sought.

(i) That the order of Honourable Justice Olga Sewe made on the 18th June, 2015 dismissing the appeal herein together with all other consequential orders be reviewed, varied and/or set aside.

(ii) The appeal be reinstated for hearing.

(iii) The cost of the application be provided for.

2. The application is expressed to be brought under Sections 1A, 1B, 3A and 80 of the Civil Procedure Act and Order 44 Rules 1 and 2 of the Civil Procedure Rules. It is premised on the grounds set out on the body of the same and it's supported by the affidavit of Gad Gathu sworn on the 11th November, 2015.

3. The gist of the application is that the Appellant is still interested in pursuing the appeal but its efforts have been frustrated by factors beyond its control. The Appellant avers that the appeal was filed on 17th November, 2008 and the record of appeal was subsequently filed on the 20th February 2009 after obtaining certified copies of the proceedings.

4. Since then, the Appellant has persistently sought to have the lower court record to enable the appeal be admitted for hearing and subsequently take directions. Several letters have been annexed to the affidavit in support as evidence that the appellant has been writing to the Deputy Registrar enquiring whether the lower court record has been forwarded.

5. In response to the said letters, the Deputy Registrar has also written three letters to the Principal Magistrate, Milimani Commercial Court's requesting, for the original file to be forwarded but the efforts notwithstanding, it is clear from the record that todate, the same has never be forwarded.

6. On 18th June, 2015 the appeal was dismissed by Honourable Olga Sewe J under Order 42 Rule 35 (2) of the Civil Procedure Rules for want of prosecution. The record shows that on the material date, there was no appearance by both parties. The matter had been listed for notice to show cause why it should not be dismissed.

7. On 9th day of March, 2015, the Appellant had sought to fix the appeal for directions and had done an invitation to the Respondent when its Advocate was informed that a date could not be given as the lower court record was not available. The said letter was received in the registry on 10th March, 2015 was duly stamped. It is marked as annexure “GG 7”.

8. Upon perusal of the court file on 30th October, 2015, the counsel for the Appellant found out that the appeal had been dismissed on the 18th June, 2015 hence this application. Mr. Gathu Advocate for the Appellant avers that he was shocked to learn of the dismissal in spite of the fact that failure to prosecute the matter had been caused by circumstances which were beyond his control and which had been brought to the attention of this Honourable court through the aforesaid letters.

9. Counsel for the Appellant further depones that in any event, the appeal had not been admitted and/or directions given and the appeal ought not to have been dismissed under Order 42 Rule 35 of the Civil Procedure Rules.

10. The application is unopposed as no grounds of opposition and/or a replying affidavit was filed in response to the same. When the application came up for hearing on 11th February, 2016 the Respondent’s advocate on record did not attend court though he had been served with a hearing notice. On the said date, I gave directions that the Appellant/Applicant do file written submissions to the application and I granted leave to the Respondent to file a replying affidavit and written submissions if need be, within 14 days thereof but this was not to be.

11. In his submissions, counsel for the Appellant, urged the court to reinstate the appeal and relied on the cases of **Real Ventures & Another vs Akiba Bank Limited & Another (2007) eKLR** in which the learned judge held: -

“The test to be applied in applications to dismiss suits for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay, if the court is satisfied that justice can still be done to the parties the action will be permitted to proceed to hearing.”

12. Counsel further relied on the provision of Order 42 Rule 35(2) and submitted that no notice was issued to the Appellant by the registrar to show cause why the Appeal should not be dismissed for want of prosecution. He argued that the fact that the matter was listed on the judiciary website did not constitute sufficient notice and to this end, he relied on the case of **Eastern Produce (K) Limited Vs Patrick Juma Maina [2016] eKLR** where the learned Justice Kimondo in allowing a similar application interpreted the provision of Order 42 Rule 35 in the following manner: -

“there must be some form of notice to parties. By employing the word shall it is clear the requirement of notice is mandatory. There can be no circumventing the requirement of notice.”

13. I have considered the submissions by the learned counsel for the Appellant and I have also perused the record. It does appear that the appeal herein was filed on 17th September, 2009 and five months later, a record of appeal was filed with the certified copies of the proceedings and the judgment contained from pages 116 – 162 of the same. This means that the proceedings were ready by 20th February 2009 when the record of appeal was filed.

14. Since the record of appeal was filed, the appeal has not been admitted for hearing under Section 79B simply because the lower court record has not been received by the court. There has been inordinate delay in admitting the appeal which cannot be attributed to the Appellant for the reasons I have clearly shown in this ruling. Failure to have the appeal prosecuted cannot be blamed on the Appellant. The same squarely lays on the court for failure to ensure that the lower court record was forwarded to the High Court. The Appellant was actively following up the issue with the Deputy Registrar vide a series of letters, copies of which have been annexed to the affidavit in support. The law is clear that unless the appeal has been admitted, it cannot be set down for hearing and therefore the Appellant’s hands are tied until such a time

that it is admitted.

15. On whether or not there was a notice issued to the Appellant before the appeal was dismissed; it is submitted that the fact that the matter was listed on the Judiciary Website did not constitute a sufficient notice. In this regard, I am persuaded by the findings by Justice Kimondo in Civil Appeal No. 129 of 2006 where in dealing with a similar application observed that there can be no circumventing the requirement of the notice and in my view the notice given by the Registrar in this case was wanting.

16. The upshot is that the application dated 11th November, 2015 is granted as prayed. The order made on 18th June, 2015 dismissing the appeal together with all consequential orders is hereby set aside and the appeal is reinstated for hearing. The costs of the application shall be in the cause.

17. For purposes of fast tracking the hearing of the appeal, I hereby order that the Executive Officer in Charge of Milimani Commercial Courts do forward to this court, the lower court file within the next fourteen (14) days from today. The order to be extracted and served by the Appellant forthwith and an Affidavit of service filed to that effect.

18. The matter to be mentioned in a fortnight to confirm receipt of the lower court file and for further directions.

Dated, signed and delivered at Nairobi this 2nd June, day of 2016.

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L NJUGUNA

JUDGE

In the presence of

..... ***For the Appellant***

..... ***For the Respondent***