



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CIVIL APPEAL NO. 77 OF 2014**

**John Kabanga Kinuyua.....1<sup>st</sup>Appellant/Respondent**

**Lucy Muriithi.....2<sup>nd</sup>Appellant/Respondent**

**Versus**

**Susan Ngunge Mwanja (Suing as the legal**

**Representative of the estate of Josha Ndirangu Ndich(Deceased).....**  
**.....Respondent/Applicant**

**RULING**

The Respondent/Applicant seeks have this appeal dismissed for want of prosecution mainly because the appellants have never served the record of appeal upon the Respondents since it was filed on 17<sup>th</sup> November 2014 nor have they taken steps to place the matter before a judge for directions, a position the applicant states is aimed at frustrating the applicant and deny the applicant the enjoyment of the fruits of her judgement and that it is in the interests of justice that the application be allowed.

The Applicant states that the judgement was entered on 24<sup>th</sup> October 2014 in her favour, that the Respondent/appellant filed the memorandum of appeal on 18<sup>th</sup> November 2014, that certified court proceedings have been ready, that there has been inordinate delay in prosecuting this appeal, a position the applicant construes to mean that the appellant has lost interest in prosecuting this appeal. The applicant further avers that she is entitled to a speedy disposal of her case under the constitution.

In her replying affidavit, the Respondent/Appellant avers that she has not lost interest in this appeal, that she could not compile the record of appeal without a decree and that the said decree was sealed on 17<sup>th</sup> August 2016 and that she has since filed and served the record of appeal.

In her reply to replying affidavit, the applicant maintains that no action was taken prior to her filing the present application, hence the Respondent/Appellant was awoken by her application, that the decree was applied for and further court fees paid on 17<sup>th</sup> August 2016 as evidenced by the receipt exhibited by the Respondent.

At the hearing of the application, counsel for the applicant pointed out that the appeal is yet to be admitted, that the reasons offered by the Respondent are not sufficient, that the delay is inordinate and that the decree was not applied for or paid for in time. In fact the decree was paid for and obtained after they filed the present application, hence, there were no earlier attempts to obtain the decree. Counsel also pointed out that the proceedings were ready as early as 14<sup>th</sup> October 2015. Counsel also submitted that

the Respondent has been enjoying stay orders, that even though the decretal amount was deposited in a joint account, currently the same is not earning interests. He urged the court to exercise its discretion and dismiss the appeal. Counsel also relied on the three decisions in his list of authorities filed on 4<sup>th</sup> October 2016 and urged the court to allow the application.

Counsel for the Respondent/Appellant relied on her replying affidavit and attributed the delay to the lower court. She however submitted that they have since filed the appeal but the same is yet to be admitted.

Regarding the delay in filing the record of appeal on the part of the Appellant, I find it fit to recall the words expressed by the court in *Utalii Transporters Co. Ltd & Others vs NIC Bank & Another*[1] where it was stated *inter alia* that:-

*"the first intuitive feeling one gets is that the offending proceeding should quickly be removed out of the way of the innocent party. But, the law prohibits a court from such impulsive inclination, and requires it to make further inquiries into the matter under the guide of defined legal principles on the subject of dismissal of cases for want of prosecution; a view which is undergirded by the fact that dismissal of a suit without hearing the merits is draconian act which drives the plaintiff from the judgement seat.*

*It is, therefore, a matter of discretion by the court.....Accordingly, I will discern the principles which the law has developed to guide the exercise of discretion by the court in an application for dismissal of suit for want of prosecution.*

*These principles are:-*

- a. Whether there has been inordinate delay on the part of the plaintiffs in prosecuting the case;*
- b. Whether the delay is intentional, contumelious and, therefore, inexcusable;*
- c. whether the delay is an abuse of the court process;*
- d. whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the defendant;*
- e. what prejudice will the dismissal occasion the plaintiff?;*
- f. whether the plaintiff has offered a reasonable explanation for the delay;*
- g. Even if there has been delay, what does the interest of justice dictate; lenient exercise of discretion by the court?*

Section 3A of the Civil Procedure Act[2] provides that 'Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.'

In my view, the court is not powerless to grant relief when the ends of justice and equity so demand, because the powers vested in the court are of a wide scope and ambit.[3] The inherent power, as observed by the Supreme Court of India[4]"has not been conferred on the court; it is a power inherent in the court by virtue of its duty to do justice between the parties before it." **Lord Cairns**[5] stated as follows:-

*"One of the first and highest duties of all, Courts is to take care that the act of the court does no injury to any of the suitors and when the expression 'Act of the court' is used it does not mean merely the act of the primary court, or of any intermediate court of appeal, but the act of the court as a whole from the lowest court which entertains jurisdiction over the matters up to the highest court which finally disposes of the case."*

The fundamental duty of the court is to do justice between the parties. It is, in turn, fundamental to that duty that parties should each be allowed a proper opportunity to put their cases upon the merits of the matter. It is fundamental principle of natural justice, applicable to all courts whether superior or inferior, that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case. If this principle be not observed, the person affected is entitled, *ex debito justitiae*, to have any determination which affects him set aside. Discussing the nature and objects of the inherent powers of the court, *Sir Dinshah Mulla*[6] observes that:-

*"..... The court has, therefore, in many cases, where the circumstances so require, acted upon the assumption of the possession of an inherent power to act **ex debito justitiae**, and to do real and substantial justice for the administration, for which alone, it exists. However, the power, under this section, relates to matters of procedure. If ordinary rules of procedure result in injustice, and there is no other remedy, they can be broken in order to achieve the ends of justice....."*

Discretion vested in the court is dependent upon various circumstances, which the court has to consider among them the need to do real and substantial justice to the parties to the suit.[7] Discretion must be exercised in accordance with sound and reasonable judicial principles.

The King's Bench in *Rooke's Case*[8] stated as follows:-

*"Discretion is a science, not to act arbitrarily according to men's will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity is by the constitution entrusted with."*

As was held in *Agip Kenya Ltd vs Highlands Tyres Ltd*[9] the process of the judicial system requires that all parties before the court should be given an opportunity to present their cases before a decision is given. The following observation by the Privy Council[10] has been consistently accepted by the courts as correct statement of law. The Privy Council observed:-

*"All rules of court are nothing but provisions intended to secure the proper administration of justice, and it is therefore essential that they should be made to serve and be subordinate to that purpose,....."*

In the leading English case of *Cropper v. Smith*,[11] *Brown*, L.J. stated as follows:-

*"It is a well established principle that the object of the courts is to decide the rights of the parties and not punish them for mistakes they make in the conduct in their cases by deciding otherwise than in accordance with their rights ... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct if it can be done without injustice to the other party. Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy,....."*

Writing on judicial power, Chief Justice *John Marshall* wrote the following on the subject:-

*"Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law."*[12]

I am persuaded by the principles laid down in the case of *Utalii Transporters Co. Ltd & Others vs NIC Bank & Another*[13] cited above. True, *there has been inordinate delay on the part of the appellant in prosecuting the appeal*; but on the other hand the record of appeal has already been filed and that shows that the appellants have woken up from their slumber and are ready to be heard.

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. I hold the view that dismissing the appeal without affording the appellants an opportunity to be heard will occasion serious prejudice to the appellants and will amount to driving a litigant from the seat of justice without a hearing. I have already stated that the delay has not been satisfactorily explained, but the interests of justice dictate lenient exercise of the discretion of the court in favour of the appellants.

I hold the view that it would be unjust and indeed a miscarriage of justice to deny a party who has expressed the desire to be heard the opportunity of being heard especially so when the party has expressed a desire to be heard. In this regard I find useful guidance in the decision rendered in the case of *Richard Nchapai Leiyangu vs IEBC & 2 others*[14] as follows:-

*“The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality”*

A similar position was held by the court of appeal in the case of *Cecilia Wanja Waweru vs Jackson Wainaina Muiruri*[15] where the court allowed an application to reinstate an appeal that had been dismissed for want of prosecution.

I also find help in the position held by the court of appeal in the case of *Wenendeya vs Gaboi*[16] where the court in reinstating an appeal that had earlier been dismissed for non-attendance stated that disputes ought to be determined on merits and that lapses ought not necessarily debar a litigant from pursuing his rights.

I find it disturbing that the Respondents only paid further court fees after they were served with the present application. It is safe to conclude that they only woke up after being served with the present application. For this unexplained delay, though not excusable, I am persuaded that disputes ought to be determined on merits and that lapses ought not necessarily debar a litigant from pursuing his rights. However, the Respondents/Appellants will pay the costs of this application to the applicant.

In conclusion, I find that this is a proper case for this court to exercise its discretion in favour of the appellants. Accordingly, I refuse the application dated 26<sup>th</sup> July 2016 and make the following orders:-

- a. That the Respondents application dated 26<sup>th</sup> July 2016 be and is hereby dismissed.**
- b. That the appellants be and are hereby 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. That the appellants be and are hereby ordered to fix this appeal for hearing and determination within 30 days from the date of taking directions.**
- d. That the appellants shall pay to the Applicants the costs of this application.**

Orders accordingly. Right of appeal **30** days

Signed and Dated at **Nyeri** this **14<sup>th</sup>** day of **November** 2016

**John M. Mativo**

**Judge**

Delivered at **Nyeri** this **14<sup>th</sup>** day of **November** 2016

**Hon. Justice Jairus Ngaah**

**Judge**