REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 272 OF 2009

BETWEEN

IMPERIAL PRIMARY SCHOOL LIMITED..........................APPELLANT

AND

DAVID K. OYOGO..RESPONDENT

(Being an appeal from the judgment and decree of Hon. Mr. C.M. Mbogo, Chief Magistrate, dated and delivered

by Hon. M.N. Gicheru, Chief Magistrate, Kisii on the 26th November 2009 in Kisii CMCC No.186 of 2007)

RULING

1. The appellant/applicant (applicant) has moved this court by way of a Notice of Motion dated 28th June 2012 seeking two substantive orders namely an order for stay of execution pending the hearing and determination of the application and secondly an order to vacate and set aside the dismissal orders granted on 25th June 2012 and to reinstate the appeal for admission and determination. The applicant also prays that costs of the application be provided for.

2. The application is supported by the grounds on the face and by the affidavit in support sworn by Samuel Odhiambo Kanyangi advocate on 28th June 2012. The main ground of the application is that the applicant was unable to take directions in the appeal due to a lapse on the part of the Deputy Registrar of this Honourable Court to place the matter before a Judge in chambers for rejection or admission while bearing in mind the fact that the Memorandum of Appeal was filed way back on 19th May 2010 and that therefore no directions could have been taken in the appeal without notification from the Deputy Registrar as to whether or not the appeal had been admitted. Further that the grounds upon which the appeal was dismissed on a date when the matter had been fixed merely for mention did not warrant such harsh orders.

3. The Notice of Motion is opposed vide a Replying Affidavit dated 30th July 2012. The deponent of the Replying Affidavit avers that there has been inordinate delay in prosecuting the appeal and that in the circumstances, the applicant does not deserve the orders sought. The deponent also avers that the delay in prosecuting the appeal has caused the respondent untold financial problems and anxiety as he is unable to reap the fruits of his judgment. The other reason why the respondent wants the application dismissed is because (as at 3rd April 2013) there was no Record of Appeal on the file. The respondent prays that the application be dismissed with costs.

4. The application proceeded by way of written submissions, both sets of submissions being on record. I have carefully read through the same together with the authorities supplied. The only issue that arises for determination is whether the applicant is entitled to the orders sought.

5. In the written submissions, the applicant avers that every effort was made to have the appeal admitted and further that since the applicant has already compiled and served the Record of Appeal, it ought not to be denied its inalienable right to prosecute its appeal on merit. The applicant relied on the following authorities:-

a. ***Simon Muragu Kaigi & another –vs- Kamau Kaigi – Nyeri HCCA No.31 of 2003*** *– for the proposition that to refuse leave to be heard due to an inadvertent error on the part of counsel would essentially amount to the appellant being condemned unheard.*
b. ***African Highlands Produce Company Ltd. (2004) –vs- Collins Moseti Ontweka – Kericho HCCA No.38 of 2002*** *- for the proposition that where an appellant has prepared, filed and served a Record of Appeal, and (as in the said case) made an appropriate application for Directions, shows clearly that the appellant is interested in prosecuting the appeal and ought to be allowed to do so.*
c. ***Eunice Njeri Kimani –vs- Muiruri Kariuki - Nakuru HCCA No.179 of 200****3 – for the proposition that where an appeal has not been admitted to hearing, the court should be slow to order dismissal and should instead grant the appellant more time to enable him/her take all necessary steps to lead to the prosecution of the appeal.*
d. ***Gabriel Wanyonyi & 2 others –vs- Hudson N. Walela – Bungoma HCCA No.108 of 2000*** *– for the proposition that where an appellant has taken some steps towards having the appeal prosecuted, albeit after a long period of slumber, he should be given a limited period of time within which to prosecute the appeal, failing which the appeal would stand dismissed with costs to the Respondents.*
e. ***Gerald Muchiri Ndirangu & another –vs- Charles Ndumu Wanyoike – Nyeri HCCA No.52 of 2003*** *– for the proposition that where the Deputy Registrar of the Court has not taken requisite steps so as to require the appellant to serve the Memorandum of Appeal, then the appeal ought not be dismissed.*
f. ***Sony Sugar Company Ltd. –vs- Nyamoko Okoth – Kisii HCCA No.175 of 2003*** *– for the proposition that where the appellant has demonstrated a willingness to prosecute the appeal, the court ought not to take away the appellant's constitutional right to appeal but give the appellant strict time lines for prosecuting the appeal and subject to payment of costs to the Respondent.*

6. After perusing all the above authorities, I would like to state, as I did in the Sony Sugar Company Ltd case (above) that **"the right of appeal is a constitutional right which cannot be taken away without good reason. The Record of Appeal is already filed and served. This is, in my view, an indication that the appellant is keen on prosecuting the appeal."** It is also clear to me after perusing the record that the applicant's failure to prosecute this appeal is not due to its deliberate act. I am persuaded that the delay was to some extent caused by a lapse on the part of the Deputy Registrar of this honourable court. The Deputy Registrar ought to have placed the file before a judge pursuant to the provisions of **Section 79B** of the **Civil Procedure Act, Cap 21 of the Laws of Kenya**, for the judge to peruse it, and consider whether there was sufficient ground for admitting or rejecting the appeal summarily. In the **Simon Muragu Kaigi & another case** (above) the Court held, and I wholly agree with the holding, that a mistake committed by a party other than the party seeking the order of the court, shall not be held against the party applying, and especially if the mistake giving rise to the default is attributed to counsel, as appears to be the case in the instant matter.

7. Further, and from the facts before me, I am satisfied that this application to readmit the appeal has been made without undue delay. It is also not lost to this court that the provisions of the old **Order XLI Rule 31** (now **Order 42 Rule 35 (1)**, apply to appeals which have already been admitted to hearing under **section 79B** of the **Civil Procedure Act** and where directions have been given. In the instant case, and without appearing to sit on appeal over the orders made by this Honourable Court (differently constituted) the appeal is yet to be admitted to hearing and directions are also yet to be given. This is not to say that the hands of this court are tied from making such orders as would meet the ends of justice as provided

under **Section 3A** of the **Civil Procedure Act**.

8. In the premises and for the reasons above stated, I allow the applicant's application dated 28th June 2012 in terms of prayer (c) thereof. The orders made on 25th June 2012 dismissing this appeal be and are hereby set aside and the appeal herein is reinstated for admission and determination in accordance with the rules. In order to avoid any further delays in the prosecution of this appeal, the applicant is given ninety (90) days within which to prosecute this appeal. In default, the appeal shall stand dismissed with costs to the respondent.

9. The respondent shall have the costs of this application to be agreed or taxed and paid before the appeal is set down for hearing.

10. It is so ordered.

Dated and delivered at Kisii this 13th day of February, 2014

R. N. SITATI

JUDGE.

In the presence of:

Mr. Minda & Odhiambo Kanyangi for Appellant/Applicant

Mr. Nyamweya for Mr. Omwega for Respondent

Mr. Bibu - Court Clerk