



REPUBLIC OF KENYA

High Court at Eldoret

Civil Appeal 3 of 2005

EDWIN KIPTOO APPELLANT

V

ZAKAYO TALLAM 1ST RESPONDENT

MICHAEL TALLAM 2ND RESPONDENT

(Being an appeal against the judgment and decree of Hon. W. N. NJAGE (Principal Magistrate) delivered on 10th December, 2004 in Eldoret Chief Magistrate's Court Civil Case No. 688 of 2001)

RULING

Before this court are two applications. The first is the Notice of Motion dated 27th March, 2012 brought under Order 42 Rule 13 (1), Rule 35 (1) and (2) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

The Respondents seek two main prayers, namely:-

(1) That the appeal be dismissed for want of prosecution.

(2) That money deposited be released to the Respondent.

It is based on the following grounds:-

(i) That the Appellant's counsel has not made any effort to move the court since 12th January, 2005.

(ii) That the pendency of this appeal is undue, prejudicial and grossly unjust to the Respondents.

(iii) That in the premises it is only fair and just that this appeal be dismissed for want of prosecution.

It is supported by the affidavit of Robert K. Limo, Counsel for the Applicants. He depones that the Appellant has not taken any steps to prosecute the appeal since 12th January, 2005, that the money deposited in due performance of the decree is losing value and the Respondents may not benefit from it even if the appeal were dismissed, that the Appellant filed a record of appeal after Respondents filed an application for dismissal of the appeal 19th January, 2008, that no action was taken thereafter until 20th January, 2011 when another similar application was filed by the Respondent, that the ruling of the court in the latter application directed the Appellant to forthwith comply with Order 42 Rule 13 (1) of the Civil Procedure Rules, that again the Appellant has not taken any action to prosecute the appeal which is occasioning prejudice to the Respondent and that it is only fair that the appeal is dismissed.

In opposing this application is a Replying Affidavit sworn by the Appellant/Respondent on 12th April, 2012. He depones that it is not true that he has not taken any steps to prosecute the appeal, that the various applications previously filed by the Respondents seeking dismissal of the appeal were so filed prematurely, that the money deposited was taken from his business which has since suffered and should not therefore be released to the Respondents and that in the circumstances the application should be dismissed.

The second application is also a Notice of Motion by the Appellant dated 29th June, 2012 seeking orders that the court extends time within which the Appellant should comply with orders issued on 10th August, 2011. The request is made on grounds, inter alia, that, the time set for compliance with the order has lapsed and that the delay is due to inadvertence.

The same is supported by two affidavits, one by the Appellant sworn on 29th June, 2012 in which he depones that since the inadvertence of failure to comply with court's order was occasioned by his advocates, such mistakes of his advocates should not be visited on him. The second affidavit is by Duncan Chelashaw, an advocate working with the law firm of M/s Ledishah J. K. Kittony & Co. Advocates having the conduct of this matter on behalf of the Appellant.

Mr. Chelashaw depones that he took over the conduct of this matter after one Ms. Caroline Sang who left the law firm to join public service. That it is Ms. Caroline Sang who took the ruling in court of 10th August, 2011 but failed to indicate that the court had given time frame within which to comply with Order 42 Rule 13 (1) of the Civil Procedure Rules. That after the application dated 27th March, 2012 was served upon their law firm, he thought that a mention date had been taken by Ms. Caroline Sang for taking of directions. That he called on the Appellant to sign the Replying Affidavit to the first application believing that the date for mention had been fixed. That the time set by court to comply with Order 42 Rule 13 (1) lapsed without his knowledge due to a bona fide mistake which he urges court to excuse him for. That the Appellant has been keen to prosecute the appeal and that it is only fair that court allows him to ventilate his case.

The said application is opposed by way of a Replying Affidavit sworn by the 1st Respondent Zakayo Tallam on 15th October, 2012. He depones that the application has been filed as an afterthought upon realizing that the appeal would be dismissed in any event, that the Appellant, having failed to comply with court's order issued on 10th August, 2011 should not be further indulged by the court and that no reasons have been given by the Appellant for his or his counsel's failure to comply with the orders.

Both applications were canvassed before me on 26th February, 2013 by way of oral submissions. Mr. Limo advocate appeared for the Respondents while Ms. Kipseii for the Appellant. Each counsel reiterated the contents in the respective affidavits filed in support and opposition of each application. I need not duplicate them again save to add that I have considered them and I take the following view.

The order issued in the ruling delivered on 10th August, 2011 directing the Appellant to comply with Order 42 Rule 13 (1) was in express terms. It took effect from the date of the said ruling.

The court's concern is that neither Mr. Dancun Chelashaw nor Ms. Kipseii so far have disclosed to the court when Ms. Caroline Sang left the latter's law firm. That disclosure would aid the court in arriving at a finding as to whether, for the period she (Caroline) was in the law firm, she failed to act and therefore such delay is excusable. It did not require seven months for the Appellant's Counsel to be awoken that orders of the court had not been complied with. Clearly such delay if not supported by any good reason is inexcusable under all circumstances and the Respondents are justified in seeking for a dismissal of the appeal.

I note however that Mr. Limo for the Respondents has reiterated issues which were well and candidly addressed by the court in its ruling of 10/8/2011. That is to say, previous applications seeking the dismissal of the appeal were premature. In this respect, I would only address myself as to whether the failure to comply with the court's directives in the ruling is at all excusable. That I have done.

Be that as it may, I have seen a copy of notes purportedly taken by Ms. Caroline Sang advocate when she took the ruling in court. The copy is annexed to the affidavit of Duncan Chelashaw and marked DC1. I cannot doubt they are a representation of what she noted down. The notes clearly show she did not record that compliance with Order 42 Rule 13 (1) took effect from the date of the ruling. Whereas the indolence in prosecuting the appeal is inexcusable, the failure to note the duration from which time for compliance began running may have given an impression on Mr. Chelashaw that he had all the time to take directions

under the Rule. Rightly so, the failure to take the directions was obviously occasioned by the counsel for the Appellant. I will give that benefit of the mistake by the counsel to the Appellant and rule that the mistake of a counsel cannot be visited upon the party. This principle in civil practice has been settled in case law but just to cite one case, **BANYAMA -VS- ZAVAR (2002) 2 EA 325** in which the delay to file an appeal out of time was occasioned by the previous counsel for the Applicant on record. The court had this to say:-

“The chequered background of the case warranted the case to be given special consideration especially because the conduct of his two former advocates was disappointing. Mistakes, faults or dilatory conduct of counsel should not be visited on the litigant.”

It is for this reason I would rule in favour of the Appellant. I must however castigate his counsel on record who appears to have been woken up from sleep. She ought to have ventilated the issues raised in the second application in the first application. She now knows that time is of essence and no further delay in failure to comply as directed by the court on 10th August, 2011 will be condoned by the court. The Appellant will hereafter bear the consequences of such delay in terms of costs.

Moreso, the sum of money deposited by the Appellant was in due performance of the decree. Releasing it to the Respondents may render the appeal nugatory. It is for this reason I am disinclined to order for its release.

In the upshot, I give the following final orders:-

1. The Respondents' Notice of Motion dated 27th March, 2012 is hereby dismissed with costs to the Respondents.
2. The Appellant's Notice of Motion dated 29th June, 2012 is hereby allowed, again with costs to the Respondents.
3. The time within which the Appellant shall comply with orders given in the ruling delivered on 10th August, 2011 is extended by 10 days from the date of this ruling.
4. That if the Appellant fails to comply with order No. 3 above, the Respondents shall be at liberty to move the court for dismissal of the appeal

DATED and DELIVERED at ELDORET this 6th day of May, 2013.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

Miss Kipseii for the Appellant

No appearance for Limo Advocate for the Respondents