**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK, JJ.A)**

**CIVIL APPEAL NO. 126 OF 2017**

**BETWEEN**

**PETER KEEN KIBOI.....APPELLANT**

**AND**

**TERENCE NAIBEI LUBUSI.....RESPONDENT**

***(An appeal from the Ruling of the High Court of Kenya at Bungoma (S. Mukunya, J.) dated 11th May, 2017***

**in**

**HCCA No. 132 of 2010)**

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**JUDGMENT OF THE COURT**

This is an interlocutory appeal arising from the ruling and order of the High Court of Kenya at Bungoma (**S. Mukunya, J.)** dated 12th May, 2017 in which the appellant's application dated 1st August, 2016 seeking to vary, review and set aside an order of dismissal of his appeal made on 26th March, 2014 was dismissed with costs.

The court had on that date dismissed the appellant's appeal for want of prosecution pursuant to the respondent's application dated 11th February, 2014. In that application, the respondent sought the dismissal of **Civil Appeal No. 132 of 2010** filed by the appellant against the respondent. Apparently, the High Court had on 19th October, 2011 issued an order in that appeal in these terms:-

> "*Leave granted to the appellant to file and serve and amended record within 15 days. Hearing on 21.3.2012."*

By the time the application was being made two years down the line, the appellant had neither filed the supplementary record of appeal nor set down the appeal for hearing. When the application came up for hearing on 26th March, 2014, neither the appellant nor his counsel was present in court to oppose the application. It was then that the court **(Omollo, J.)** dismissed the appeal with costs for want of prosecution.

The appellant appears to have rested on his laurels until about 22nd July, 2014, when he filed an application to reinstate the appeal aforesaid. Grounds in support of the application were that the application served on the appellant's advocate had no indication of the hearing date. Accordingly neither the appellant nor his advocate could have been aware that the application was scheduled for hearing on 26th March, 2014. It was further urged that failure of the appellant and his counsel to appear in court was inadvertent and that sins of counsel should not be visited on the appellant.

The application was opposed on the grounds that the appellant's advocate was served with the application which had been endorsed with a hearing date. Accordingly the appellant's application was frivolous and vexatious. That the appellant had been granted leave to file supplementary record of appeal within 14 days but failed to comply; that the application was calculated to delay justice and that litigation must come to an end.

Agreeing with the respondent the court held thus:-

> *"The Court finds itself in agreement with sentiment of Mr. Situma advocate. No valid reason has been given to warrant the court to set aside its own orders. The delay herein is inordinate. Dismissal by court on its own motion is definitive. It becomes a final judgment and the court becomes functus officio. The only avenue is to file appeal in the court of appeal. This application has no merit, the same is dismissed with costs…"*

Aggrieved, the appellant filed the instant appeal on the grounds that; the learned Judge erred in law when he failed to take into consideration the entire record when arriving at his decision; the learned Judge considered mere technicalities and not the substance and merits of the appeal; and that the decision of the learned Judge did not address the ends of justice.

At the plenary hearing of the appeal, **Mr. Ingosi,** learned counsel holding brief for **Mr. Khakula,** learned counsel appeared for the appellant whereas **Mr. Kundu,** learned counsel represented the respondent.

Mr. Ingosi relied on the appellant's written submissions in which it was submitted that had the learned Judge considered the record as a whole, then he would have arrived at a different conclusion. That the failure to comply with the order to file an amended record of appeal was not so fatal as to force the drastic action of dismissing the appeal and that the application upon which the dismissal was premised was based on non-existent rules. Counsel faulted the learned Judge for limiting himself to technicalities and failing to consider the merits of the appeal. Finally, counsel submitted that the learned Judge denied the parties the chance to argue their appeal. For this submission, counsel relied on the case of **George Gatere Kibata v George Kuria Mwaura & another [2017] eKLR**.

Opposing the appeal, Mr. Kundu submitted that there was inordinate delay as the appellant had waited for 2 years, 5 months to file an application for review. That if the appeal was allowed, it will do great injustice to the respondent and that litigation has to come to an end at some point.

We have carefully perused the record, rival submissions by counsel and the law. The issue for determination is whether the trial court was justified in dismissing the appellant's application to vary, review and set aside the order of dismissal of the appellant's appeal. The appeal arises from a decision of the trial court made on an interlocutory application for review in exercise of its judicial discretion. The circumstances under which this Court can interfere with the exercise of discretion by a lower court are circumscribed. This Court may only do so when, in the words of the predecessor of this Court in **Mbogo and Another v Shah [1968] EA 93,** it is satisfied that the decision of the lower court is clearly wrong:

> ***"…because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."***

In **National Bank of Kenya Limited v Ndungu Njau (1997) eKLR** this Court held further that:

> ***"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review".***

An application for review can only be allowed under certain circumstances. The main grounds for review are; discovery of new and important matter of evidence; mistake or error apparent on the face of the record; and any other sufficient reason and most importantly, the application has to be made without unreasonable delay. We note that none of these grounds were urged before the High Court by the appellant. He never even responded to the question of inordinate delay. Thus, the High Court cannot be faulted in approaching the application on the basis that no valid reason had been given to warrant the court to set aside its own orders of dismissal. That court cannot also be faulted for holding that the delay in bringing the application was inordinate and had not been explained. To our mind these were relevant considerations to take into account as the High Court did in deciding whether or not to exercise the discretion in favour of the appellant. The High Court cannot therefore be accused of misdirecting itself, or acting on matters it should not have or that it failed to take into consideration matters it should have or that it arrived at a wrong decision. We do not see how the High Court can be accused of limiting itself to mere technicalities and failing to venture into the substance and merits of the case given the reasons advanced by it in refusing the application. Justice cuts both ways. By dismissing the appellant's application, the High Court cannot be faulted as having denied the appellant a chance to argue his appeal. The respondent was equally entitled to justice.

In ***John Agina v Abdulswamad Sharif Alwi*** **(1992) LLR 5734 (CAK)** the court stated thus:

> ***"An unexplained delay of two years in making an application for review under Order 44 Rule I (now Order 45 Rule 1) is not the type of sufficient reason' that will earn sympathy from any court".***

From the foregoing, we have come to the inevitable conclusion that the learned Judge properly exercised his discretion in refusing to review, vary or set aside the order dismissing the appeal for want of prosecution. Judgments and orders of court are not reviewed merely because a losing litigant is unhappy with the outcome. The appellant failed to demonstrate to the satisfaction of the lower court that there was new and important evidence, mistake or error apparent on the face of record and/or give any other sufficient reason to enable the court to exercise its discretion in his favour

For these reasons, we find no merit in the appeal. We accordingly dismiss it with costs to the respondent.

**Dated and delivered at Kisumu this 31st day of January, 2020.**

**ASIKE-MAKHANDIA**

**.....**

**JUDGE OF APPEAL**

**P.O. KIAGE**

**.....**

**JUDGE OF APPEAL**

**OTIENO-ODEK**

**.....**

**JUDGE OF APPEAL**

I certify that this is

a true copy of the original.

**DEPUTY REGISTRAR**