



IN THE COURT OF APPEAL

AT NYERI

(CORAM: NAMBUYE, KOOME, ODEK, JJ.A.)

CIVIL APPEAL NO. 188 OF 2010

BETWEEN

KIMANI MUHORO.....APPELLANT

AND

JOHN WAIGANJO MBUTHIA.....1ST RESPONDENT

MARK GITUKU GICHUHI.....2ND RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya at Nyeri (Sergon, J.) dated 21st May, 2007

in

H.C.C.A. No. 100 of 2007)

JUDGMENT OF THE COURT

The scanty background information gathered from the record of appeal before us is that the subordinate court in **Nyeri CMCC No. 47 of 2004 -John Waiganjo Mbuthia versus Mark Gituku Gichuhi and Kimani Muhoro**, vide a judgment delivered by **Mr. Serem**, (SRM) on the 18th day of September 2007, found for the respondent. The appellant, **Kimani Muhoro**, was aggrieved with that decision and filed **Nyeri H.C.C. A No. 100 of 2007**, vide a memorandum of appeal filed on the 16th day of October, 2007.

The appellant then moved the High Court for an interim order of stay pending appeal, which order, we have been informed was granted to the appellant unconditionally and has been operational since then. Apparently, the appeal was not processed speedily for its hearing and disposal on merit. This led to the respondent moving the Deputy Registrar of the High Court to issue a notice under the then **Order XLI Rule 31 (2) of the Civil Procedure Rules** requiring the appellant to show cause as to why **H.C.C.A No. 100 of 2007** should not be dismissed for want of prosecution. Both parties appeared before the learned trial Judge, **J. K. Sergon, J.** on 21st May, 2010 and made representations for and against the request for dismissal of the appeal for want of prosecution. The record of what transpired is very brief. It reads:-

“No appearance for Lucy Mwai for 2nd respondent”

Nderi – we have explained in our replying affidavit why there was a delay.

Karweru – Mr. Muhoro and his client slept until this notice provoked them.

Court- I have seen the steps taken by the appellant to have the appeal ready for hearing. What is evident is that the appellant made frantic efforts to have the appeal spared only after a Notice to show cause was served upon him. There is no explanation as to what happened from the year 2008 to 2010. I am satisfied the appellant has been indolent. The appeal is ordered dismissed for want of prosecution. I will award the respondent half the costs of the appeal in view of the fact that he provoked the Deputy Registrar to have the appeal placed before this court for dismissal”

The appellant was aggrieved by that order, and has now appealed to this Court citing four grounds of appeal namely:-

1. ***THAT*** the learned Judge erred in Law and fact in failing to consider the evidence on record in its entirety.
2. ***THAT*** the learned Judge erred in law and fact in failing to consider and appreciate the affidavit by the appellants sworn on 19th May, 2010 and filed on 20th May 2010 and thereby through the said failure and or omission arrived at an erroneous decision.
3. ***THAT*** the learned Judge erred in Law and fact by holding that the appellant was indolent in having his appeal ready for hearing and had provided no explanation for the same from the year 2008 to 2010.
4. ***THAT*** the learned Judge erred in Law and fact in considering extraneous matters thereby arriving at an erroneous decision.

On the date fixed for the hearing of the appeal, **Mr. Kimani Muhoro** the appellant appeared in person, whereas **Mr. Karweru C. M. and Lucy Mwai** appeared for the 1st and 2nd respondents respectively.

In his oral submissions to us, **Mr. Muhoro**, urged us to allow the appeal on the grounds that he is not responsible for the delay in making the appeal ready and setting it down for hearing and disposal as he had all along been making frantic efforts to secure the proceedings from the High Court registry to no avail; that it is the court registry which is to be blamed for the delay and the appellant should not be blamed for the same.

It is the appellant's further contention that he had given sufficient explanation for the delay to the learned trial Judge, on the basis of which his appeal should have been spared; that this court should overturn the decision of the learned trial Judge of the High Court, restore to the appellant the right to exercise his undoubted right of appeal and enable him to get justice.

In response, **Mr. Karweru**, learned counsel for the 1st respondent, on the one hand, and **Lucy Mwai**, learned counsel for the 2nd respondent, on the other hand, both urged us to dismiss the appeal on the grounds that the learned trial Judge of the High Court was justified in dismissing the appellant's appeal for want of prosecution because the appellant went to sleep upon being granted an unconditional order of stay of execution pending appeal; that it was only when the appellant was served with the notice to show cause that he made frantic efforts to make the appeal for hearing and disposal; that it was evident from the facts that had been placed before the learned trial Judge of the High Court that the appellant failed to explain the efforts he had made to fast track the appeal in the period between 2007 and 2009 before he was prompted.

In his response to the respondents submission, the appellant reiterated his earlier submissions and

maintained that he had taken a keen interest in the appeal and had been following the progress keenly and personally; that the case whose judgment gave rise to the dismissed appeal had been taken as a test case; that there are suits in waiting which are awaiting the meritorious disposal of the appeal sought to be restored and it is only proper that the appellant be given a chance to have the issues in controversy in the High Court appeal heard on their merit; that such a mode of disposal will be in the best interest of both the appellant and respondents as well as those parties (persons) who are likely to be affected by the outcome of the appeal intended to be restored.

This being a first appeal, we are reminded of our primary role as a first appellate court, namely to re-evaluate, re-assess and re-analyse the facts as they were before the learned trial Judge of the High Court and arrive at our own conclusions either confirming or upsetting the High Court decision and give reasons either way.

See the case of **Kenya Ports Authority versus Kusforn Kenya Limited (2009) 2EA 212** wherein the Court of Appeal held inter alia that:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has not seen nor heard the witnesses and should make due allowance in that respect”

We have on our own revisited the content of the record as it has been placed before us and considered the same in the light of the rival arguments presented to us.

We are in agreement with the submissions of the respondents and as conceded by the appellant that the dismissed **H.C.C.A No.100 of 2007** had not been processed and made ready for hearing and disposal on merit as at the time it was dismissed for want of prosecution.

We are also in agreement that the first respondent acted within the applicable rules when he prompted the Deputy Registrar to issue a notice to the appellant to show cause under **Order XLI rule 31(2)** of the **Civil Procedure Rules**. It reads:

“If within one year after the service of the memorandum of appeal the appeal shall not have been set down for hearing the Registrar shall on notice to the parties list the appeal before a Judge in chambers for dismissal”

Compliance with the prerequisites of the above provision is not in dispute. It is the manner the learned trial Judge exercised his judicial discretion in curtailing the appellants’ right to exercise his undoubted right of appeal which we have been called upon to interfere with by the appellant, and to confirm by the respondents. In exercising his right of interpretation and application of **Order XLI rule 31(2)** of the **Civil Procedure Rules**, to the rival arguments that had been presented before him, the learned trial Judge was obligated to act judiciously and in the best interest of justice to both parties contesting before him as well as those who were likely to be affected by the outcome of the dismissed appeal. Likewise we, as a first appellate court, with powers to revisit and re-evaluate the facts as they were before the learned trial Judge, we are also obligated to construe and apply that construction to the rival arguments before us judiciously ensuring that such an interpretation, or construction and application is **O²** (Oxygen rule) principle compliant.

The **O²** (Oxygen rule) principle is enshrined in the overriding objective principle set out in **Section 3A** of the Appellate Jurisdiction Act, chapter 9, Laws of Kenya which provides in part:-

3A. (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act.

See the case of **Dee Pak Chamanlal Kamani and another versus Kenya Anti-Corruption and 3 others Civil application No. 152 of 2009 (UR)**.

We are also obligated to ensure that such an exercise of our judicial discretion results in attaining a quick, cheap but fair and just decision for either party. See the case of *Mradula Suresh Kantaria and Suresh Naniccac Kantaria Civil Appeal No.277 of 2005 (UR)*. We also have to bear in mind the caveat that the application of the O₂ (oxygen rule) principle as a safety valve should not be employed to cover and or condone mistakes or lapses of counsel or negligent acts or dilatory tactics or acts constituting abuse of the court process. See the case of *Kenya Commercial Bank versus Kenya Planters Co-operative Union Nai Civil Application No.85 of 2010 (UR) 62 of 2010*.

When the above principle is applied to the reasoning of the learned trial Judge, bearing in mind the appellants' right to exercise his undoubted right of appeal, it is our considered view that the said interpretation and application of the provisions of **Order XLI rule 31(2)** of the **Civil Procedure Rules** to the rival arguments that were before the learned trial Judge did not comply with the O₂ (Oxygen rule) principle. Our reason for saying so is that the resulting action taken by the learned trial Judge in dismissing the appellants appeal for want of prosecution cannot be said to have resulted in a just, fair, proportionate and expeditious disposal of the appeal dismissed. This is because the learned trial Judge failed to note that a dismissal order under **Order XLI rule 31(2)** of the **Civil Procedure Rules** was not a final order. Any party aggrieved by it had the right of appeal to this court and that is exactly what the appellant did.

Such a step does not expeditiously dispose off the matter but instead prolongs the litigation. Secondly, such a technical disposal of the appeal did not resolve the issues really in controversy as between the parties directly and indirectly affected by the dismissed appeal, considering that the proceedings giving rise to the appeal dismissed for want of prosecution had in fact arisen from what has been termed as a test suit. By terminating this test suit in the manner done, it meant that all the other litigations and parties concerned would be affected and or were going to be affected by the same.

It is our considered view that it is in the best interest of justice to all the parties involved and affected by the meritorious disposal of the dismissed appeal that the appellant should have been given a second chance by being given a time frame within which to make the appeal for disposal, failing which then a dismissal order would have been inevitable.

Whereas the court placed blame squarely on the appellant, the appellant has shifted blame on to the court registry in failing to avail court proceedings to him expeditiously. There is nothing in the reasoning of the learned trial Judge in the ruling dated 21st May, 2007, to demonstrate that indeed the Court registry had no role to play in the delay in failing to make the appellants' appeal ready for disposal.

We also have found that although it is correct that the appellant had been given an unconditional order of stay in the High Court, there was nothing from facts on the record to show that the appellant had employed the said unconditional order of stay of execution both as a weapon as well as a shield against the respondents. Apart from decrying the delay in the disposal of the dismissed appeal, no other prejudice was shown to have been suffered by the respondents which could not have been compensated for by way of an award of costs and an order requiring the appellant to move within a particular time frame In order to ready the appeal for hearing and disposal.

We also have found that although it is correct that the appellant had been given an unconditional order of stay in the High Court, there was nothing from facts on the record to show that the appellant had employed the said unconditional order of stay of execution both as a weapon as well as shield against the respondents. Apart from decrying the delay in the disposal of the dismissed appeal, no other prejudice was shown to have been suffered by the respondents which could not have been compensated for by way of costs and an order requiring the appellant to move within a particular time frame in order to make the appeal ready for hearing and disposal.

In the result we are inclined to allow this appeal which we hereby do. We accordingly set aside the order of the High Court dismissing H.C.C.A No. 100 of 2001, restore the appellant's appeal and direct that the appeal be made ready and set down for hearing and disposal by the appellant within 21 day of the reading of this Judgment and thereafter it be set down for hearing on priority basis.

Each party will bear their own costs of this appeal because the error giving rise to this appeal lay with the court.

Dated at Nyeri this 4th day of July, 2013.

R.N.NAMBUYE

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

J. OTIENO ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR