REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Appeal 100 of 1986

(From the Original Civil Suit No. 58 of 1986 of the District Magistrate at Mwingi: G.M. Nzilu Esq. of 19th November 1986)

NGURO MWANIKI……………………………………………………APPELLANT

-VERSUS-

MANZI MOLU………………………………...................…………RESPONDENT

Coram: J.W. Mwera J.

Mr. Kisebu Advocate for Applicant Mr. Mule Advocate for Respondent Court Clerk Muli

RULING

The appeal herein was filed on 16th December 1986. On 6th July 1987 it was admitted to hearing.

The appeal was fixed for directions on 18th July 1989 and on 8th August 1989. Nothing took place on either of the 2 occasions.

Later the appeal was fixed for hearing on 7th September 1989, 18th May 1990 and even by consent on 28th March 1991. It was further fixed for hearing on 24th January 1992 which was moved to 9th April 1992. Then all went silent.

On an undisclosed date notices were sent out to the parties under 0.16 rr.2 and 6 (a typing error showed O.XVI R 326 which was clarified) for mention/directions/hearing on 8th July 1996.

On 8th July 1996 the Appellant did not appear but the Respondent's counsel was present. He asked for dismissal of appeal for non-prosecution or for taking no steps since 24th January 1992. The court was of the view that the Appellant had not shown up to show good cause why he had been relaxed in prosecuting his appeal and it was dismissed with costs to the Respondent. This bit was attacked in the present application on the ground that since it was the court which moved parties to appear before it on 8th July 1996, costs should not have been given to any party who appeared, here, the Respondent.

Then on 5th April 1996 the Appellant filed the application now under review, dated 4th September 1996 for orders inter alia, thatthe ex parte orders made on 8th July 1996 be set aside and the appeal be reinstated for trial on merits. Mr. Kisebu argued so while Mr. Mule opposed it on behalf of Mr. Musyoka.

Mr. Kisebu submitted that since no directions had been issued under 0.41 r.31 Civil Procedure Rules, the appeal was not ready for hearing and so the Appellant could not be expected to make any move. But the court did point out that on several occasions and in absence of those directions, the parties had endeavoured to set down the appeal for hearing. To this Mr. Kisebu conceded that it was by error on both sides. He added however that to dismiss the appeal the Deputy Registrar should have issued a notice under 0.41 r.31(2) Civil Procedure Code and not under 0.16 r.2, 6. Mr. Kisebu cited 3 *cases* that shall presently be referred to, and also pointed out that infact the notice issued by the Deputy Registrar under 0.16 rr.2, 6 for 8th July 1996 reached the Appellant on 10th July 1996 - 2 days after and when the orders under attack had been given. He appreciated the point that the law as it is did not permit reinstatement of an appeal once dismissed as the case was here save by the authority of the court's own inherent jurisdiction.

Mr. Mule countered those arguments and concluded by asking this court not to grant orders as prayed. It should be pertinent to set out the legal provisions involved before proceeding to thedetermination.

The undated notices of the registrar summoning parties to court on 8th July 1996 were under 0.16 rr.2 6 which read:

"Rule 2(1): In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

(2) .... (not relevant now)

rule 6: In any case not otherwise provided for for whichno application is made or step taken for a periodof three years by either party with a view toproceeding with the suit, the court may order thesuit to be dismissed; and in such case the Plaintiff may subject to the law of limitation bring a fresh suit."

A "suit" is defined under the Civil Procedure Rules as to mean all civil proceedings commenced in any manner prescribed

0.41 is devoted wholly to appeals. Rule 31 has the marginal notes: Dismissal for want of prosecution of an appeal, and it reads:

"rule 31(1): Unless within three months after giving of directions under rule 8B the appeal shall have been set down for hearing by the Appellant, the Respondent shall be at liberty either to set down the appeal for hearing or apply by summons for its dismissal for want of prosecution.

(2) If within one year after service of the memorandum of appeal, the appeal is not set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal."

Thus either the Respondent issues a summons to dismiss for want of prosecution of an appeal 3 months after the directions, if the Appellant has not set it down for hearing or if it stays for one year the registrar should on notice to the parties set down that appeal for dismissal. In this regard the court heard that this is the only route that the registrar should have followed to have this appeal validly dismissed otherwise it was not validly dismissed via 0.16 either r.2 or 6. Mr. Kisebu however seemed to say that the cases he cited fell under 0.16 r.5 which is not relevant or applicable in the present matter because no action was taken under 0.16 r.5.

0.31 r.8B referred to in rule 31(1) reads:

"rule 8B(1) On notice to the parties delivered not less than twenty one days after the date of service of the memorandum of appeal the registrar shall list the appeal for giving of directions by a judge in chambers.

(2) Any objection to the jurisdiction of the appellate court shall be raised before the judge before he gives directions under this rule.

(3) The judge in chambers may give directions concerning the appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of any record or part thereof and any exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise."

It can be said perhaps in error or by practical course that appeals take in this court (and it is in doubt if a different approach is taken in other high court registries) that in fact it has not been found imperative to insist that the registrar do list any appeal as envisaged in R.8B(1) which is couched in mandatory terms as to what the registrar must do. Unless the judge feels that some directions as envisaged under r.8B (3) are necessary, the course under 0.8B(1) has rarely if not hardly been resorted to, and to this court's view without injustice being done to parties. Thus in most appeals in this court (and quite very likely in all other high court registries) 0.31 & 8B has not been put to much use or at all. The non-use of this rule, it is to a greater degree, safe to remark, has not resulted in injustice. But the law ought to be followed, though.

So where does this application lie in the light of all the foregoing"

The appeal may be and is hereby to be reinstated by setting aside the dismissal orders of 8th July 1996 because this court was satisfied that the undated notice to parties issued by the registrar under 0.16 rr.2 6 reached the Appellant on 10th July 1996 - two days after the orders of dismissal had been issued. This was demonstrated by annexture Exh.AFKIB. That being the case it is only fair that the appeal be reinstated. The Appellant's letter Exh.AFKIA of 3rd July 1996 was said to have been sent out to the

Respondent and the registry intimating that the Appellant was still active and he was seeking to list his appeal for hearing. However neither the court file nor the Respondent had a copy of such a letter.

The issue of costs awarded on 8th July 1996 can correctly be said not to have been warranted as the parties were appearing solely on the court's notice.

It is further considered and found that the correct mode to sent out notices for dismissal of appeals should be by 0.41 r.31 (2) by the Deputy Registrar while 0.16 remains solely for civil proceedings not commenced by way of appeal at all. Indeed for this error in the statutory procedure to dismiss an appeal, this court would be inclined to reinstate this appeal had it not done so earlier as set out above. 0.41 r.13 does not specifically allow for reinstatement of appeals as the case is here or filing a fresh one as under 0.16 r.6. But in the circumstances like this justice does forcefully demand that the appeal be reinstated by the court using its inherent powers and that is done.

From what has been said above 0.41 r.8B, this court would be disinclined, save for the strict letter of the law, to allow reinstatement of this appeal because the registrar had not listed this appeal for the judges' directions. Inspite of not having such

directions it is apparent on record that the parties on several occasions fixed hearing dates of the appeal. On two occasions they had not shown up for the vaunted directions. These are clear acts by the parties that they were ready to go on without the directions whether the judge felt some were required or not.

Then now come the cited cases:

KARATINA GARMENTS LTD. VS. NYANARUA (1976) KLR 94 NRI.HC.MISC.APP.no.257/83 CIVIL APPEAL NO.17/84 RAWAL VS. MOMBASA HARDWARE LTD (1968) EA 192

What each stood for in its own way has more or less already been incorporated in the body of the ruling above and so each case need not be discussed here.

In sum the application is allowed. Costs in the cause.

A copy of the ruling herein to be availed to the Deputy Registrar who should have regard to, inter alia, dating all literature of notices, processes, letters etc from the registry and the application of 0.16 and 0.41 to suits and appeals.

Orders accordingly.

Delivered on 19th December 1996.

J.W. MWERA

JUDGE

While the design, structure and metadata of the Case Search database are licensed by Kenya Law under a Creative Commons Attribution-ShareAlike 4.0 International, the texts of the judicial opinions contained in it are in the public domain and are free from any copyright restrictions. Read our Privacy Policy | Disclaimer