Kathuu v Mboroki (Environment and Land Appeal E089 of 2021)
[2023] KEELC 16301 (KLR) (15 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16301 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL E089 OF 2021

CK NZILI, J

MARCH 15, 2023

BETWEEN

HENRY KARERE KATHUU ..... APPELLANT

AND

STANLEY KIBORI MBOROKI ..... RESPONDENT

RULING

1. Before the court is an application dated October 3, 2022 in which the appellant seeks the court to set aside its orders made on September 26, 2022 striking out the appeal for non-compliance and to have it reinstated for hearing on merits.

2. The reasons given are contained in the supporting affidavit of Lilian Kimotho advocate sworn on November 30, 2022. It is averred that the record of appeal was filed late since the decree had not been signed by the lower court. That the file had to go back to the lower court for the decree to be signed and issued. The error is not attributable to the appellant otherwise if the appeal is not resuscitated, the appellant shall suffer grave prejudice. Despite service, no replying affidavit was filed by the respondent.

3. The court record indicates that this appeal was filed on July 30, 2021. The lower file court was forwarded on December 10, 2021, after which the appeal was admitted for hearing on December 20, 2021. The record of appeal was ordered to be filed within 60 days upon admission of the appeal. This would have been by March 12, 2022.

4. At the request of the appellant, the court on July 18, 2022 granted 30 more days to comply and default, the appeal to stand dismissed. Come September 26, 2022, no record of appeal had been filed hence the appeal was struck out for non-compliance. However, soon thereafter the appellant purported to file a record of appeal court stamped on September 23, 2022. How the same was filed and not placed in the court file and or brought to the attention of the court on the material day remains unexplained by the applicant. The said record of appeal lacks a duly signed decree. The affidavit in support of the

application herein has not explained the circumstances under which the record of appeal found itself on the court file afterward and not on the day the appeal was struck out for non-compliance. Is it that the applicant is trying to blame the court for striking out the appeal while there was already a record of appeal in the court file? And why would a party have his documents court stamped and fail to notify the court before the order for striking out or so soon thereafter? These are efforts of a party out to use any means to obstruct and or derail the cause of justice.

5. Be that as it may, the court under Order 42 Rule 22 of the *Civil Procedure Rules* has the power to dismiss an appeal for both non-prosecution and non-compliance. Similarly, under Order 42 Rule 21 Civil Procedure Rules the court has powers to readmit a dismissed appeal on such terms as to a court or it otherwise thinks fit.

6. In this appeal, directions were given under Order 42 Rule 11 of the Civil Procedure Rules as read together with Section 79 G of the *Civil Procedure Act* on December 20, 2021. The same were never complied with by September 26, 2022 when the court struck out the appeal. The delay is blamed on an unsigned decree. No single letter has been attached showing the efforts by the appellant to pursue the decree directly with the trial court or through this court. The appeal is against a judgment delivered on May 4, 2020. The only letter in the lower court file is dated January 12, 2021 and sought the proceedings of a ruling delivered on January 11, 2021 and an order dated February 4, 2021. The order dated February 26, 2021 is also signed. So, can there be any blame on the part of the lower court if there are orders after the decree which were requested for and signed? Can the blame be on the court if the lower court file before it being forwarded had no specific request for a decree? Can a delay of 3 years without extracting and filing the decree be said to be reasonable or show an appellant who has been keen to prosecute the appeal?

7. In the case, *Habo Agencies Ltd vs Wilfred Odhiambo Musingo (2020) eKLR*, the court cited with approval *Raila Odinga & 5 others vs IEBC (2012) eKLR* and *Nicholas Kiptoo Arap Salat vs IEBC & others (2014) eKLR* on the proposition that Article 159 of the *Constitution* is not a panacea in each instance of breach of procedure, but only avails itself to deserving cases. In that appeal, the case had been in court for 20 years and was full of a litany of errors by the appellant's legal advisors. The sufficient cause presented in court was a mistake of counsel. The court saw no basis to restore the appeal since the lawyers had endorsed the hearing notice with the word 'without prejudice'.

8. In the case of *Ngugi vs Thogo (Civil Applicant 372 of 2018) (2021) KECA 88 (KLR)* 22 October (2021) Ruling, the court was faced with an uncontested application for reinstatement based on non-attendance by counsel out of an alleged confusion by the court registry's communication.

9. The court distilled the principles to apply as;

    a. It is more just if litigation is brought to an end after all parties have been heard on merits.

    b. The rules of the court provide timelines for the performance of an act and which should also be applied to non-performance.

    c. Article 159 of the *Constitution* enjoins the court to do substantive justice.

    d. Sections 3A & B of the *Appellate Jurisdiction Act* on the overriding objectives mandates the court to act justly and fairly.

    e. The overriding objective is not aimed at giving justice to one party at the expense of another but for the ends of justice to be met for all parties involved or who stand to be affected by the matter.

f. In seeking the court's intervention upon default or non-compliance with a procedural step, a demonstration of the existence of a reasonable explanation for the delay is a sufficient basis for the exercise of the court's discretion.

g. Consideration of the nature of the substratum of the litigation is also a paramount consideration in an application for an extension of time.

h. Article 50 of the *Constitution* on the right to be heard should also be considered.

i. There is a need to balance the requirement as to whether reasonable grounds have been preferred. The prejudice to be suffered by the opposite party if such an order for reinstatement were to issue bearing in mind at the same time that dismissal of a suit is a draconian order that drives a party from the seat of justice and should therefore be employed sparingly.

10. In the said case, the court considered the totality of the record and found that the applicant had demonstrated sufficient and plausible cause namely, service of hearing notices with conflicting dates by the court registry which had not been controverted by the Deputy Registrar of the court.

11. Applying the foregoing principles to the instant application can the appellant fit within the principles aforestated? I think not for the simple reasons that counsel for the applicant is out to mislead the court, paint the trial court and this court a bad picture. The applicant and his lawyers have failed to honor the mistakes, the inordinate delay, noncompliance, and lack of diligence in complying with court directives. Be that as it may, I will give the applicant a benefit of the doubt since he was present before the court on the material day but was let down by the lawyers on record for him.

12. The upshot is that the appeal is hereby reinstated. Throw away costs of Kshs 20,000/= to the respondent in any event to be paid within 14 days from the date hereof.

Orders accordingly.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 15TH DAY OF MARCH, 2023

In presence of:

C/A: John Paul

Wamache for respondent

Applicant

HON. C.K. NZILI

ELC JUDGE