REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 78 OF 2012

DAUDI LUGHO.....APPELLANT

VERSUS

NELSON SHAMUNGE.....RESPONDENT

RULING

[1] Before the Court for determination is the Notice of Motion dated **15th January 2020.** It was filed by **Maghanga Mwangima,** on behalf of the appellant, for orders that:

[a] Spent

[b] the Court be pleased to vary the orders issued herein on **29th June 2017** by reinstating this appeal;

[c] that upon varying the order dated **29th June 2017**, the Court be pleased to transfer this appeal to **Voi High Court** for hearing;

[d] That the Court be pleased to stay all the criminal cases in Taveta Law Courts;

[e] That the Court be pleased to give any other order as the justice of the case may require.

[2] The application was premised on the grounds that the entire family of the appellant will suffer a great deal if this appeal is not reinstated as it concerns land; that the appellant suffered stroke and is now paralyzed and therefore was unable to attend court to prosecuted the appeal or defend the application for dismissal; and that he was all along relying on his advocate who abandoned the case midway. Consequently, the applicant prayed that the application be allowed and the orders prayed for granted.

[3] The application is supported by the affidavit of the applicant, sworn on **14th January 2020,** to which he annexed copies of the Order dated **29th June 2017**, Caution dated **27th November 2018** and Official Search done on **7th December 2018.**

[4] The applicant filed a second application dated **10th June 2021** for orders that the Court be pleased to substitute him as the appellant in place of **Daudi Lugho** who is now ailing and bedridden with paralysis; and therefore in no condition to proceed with this matter. He averred that the proposed substitution will not prejudice the respondent; but will facilitate the speedy conclusion of this appeal. In his Supporting Affidavit sworn on **10th June 2021**, the applicant averred that the appellant got physically ill and has been suffering from paralysis from **2017**. He added that, as one of the sons of the appellant, he is conversant with the issues in this suit and therefore competent to be substituted as the appellant. He reiterated his assertion that no party will suffer any prejudice with the substitution.

[5] The application was opposed by **Mr. Oddiaga**, learned counsel for the respondent. He filed a Preliminary Objection on **12th February 2020** on the following grounds:

[a] That the application is an abuse of the process of the Court and ought to be dismissed with costs;

[b] That the applicant is not a party to these proceedings and cannot file any competent application in the appeal;

[c] The orders sought cannot be granted to the applicant since he is a stranger to these proceedings;

[d] That by virtue of the applicant being a busybody the orders sought cannot be granted to him;

[e] This matter is now finalized and a title deed has already been issued to the respondent; as such there is nothing to litigate over;

[f] The orders sought are untenable, mischievous and aimed at reviving a suit which was lawfully concluded for the purposes of further delaying the conclusion of this matter and prolonging the suffering of the respondent.

[6] Accordingly, **Mr. Oddiaga** urged the Court to dismiss the application dated **15th January 2020**.

[7] The parties presented their submissions orally on **29th November 2021** and it is noteworthy that none of them made any reference to the 2nd application dated **10th June 2021**; yet it has a bearing on the 1st application dated **15th January 2020**. Thus, both the applicant and **Mr. Oddiaga** reiterated their respective positions in connection with the appeal and left the matter for the Court's determination. In particular, **Mr. Oddiaga** underscored the fact that the appeal and the underlying dispute has been determined with finality and that the title has since vested in the respondent. He therefore argued that it is mischievous for the applicant to seek the re-opening of the appeal; particularly because he has no *locus standi* to do so from the standpoint of **Order 9 Rule 2** of the **Civil Procedure Rules**.

[8] A perusal of the court record shows that this appeal was dismissed on **29th June 2017** pursuant to **Order 42 Rule 20(1)** of the **Civil Procedure Rules;** the Court **(Hon. P.J. Otieno, J.)** having satisfied himself that the appellant, who was absent and unrepresented, had been duly served with hearing notice for that day. **Order 42 Rule 20(1), Civil Procedure Rules,** provides that:

> **"Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, and has not filed a declaration under rule 16, the court may make an order that the appeal be dismissed."**

[9] **Order 42 Rule 21** of the **Civil Procedure Rules**, on the other hand recognizes that:

> **"Where an appeal is dismissed under rule 20, the appellant may apply to the court to which such appeal is preferred for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing, the court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit."**

[10] In the premises, the two issues arising for determination in this matter are:

[a] Whether the applicant has *locus standi* to prosecute the instant application; and if so,

[b] Whether sufficient cause has been shown as to why neither the appellant nor his counsel was unable to attend court for the hearing of the appeal on **29th June 2017.**

[11] As matters stand, the applicant proceeded to prosecute the instant application before obtaining the leave of the Court to come on record in place of the appellant, **Daudi Lugho**. Thus, **Mr. Oddiaga** argued, and rightly so in my view, that he does not quality as a recognized agent for purposes of **Order 9 Rule 2** of the **Civil Procedure Rules**. Whereas he did explain that the appellant is his father; and that he has been ailing and bed-ridden since **2017,** there is nothing by way of documentation, either in the 1st application or the 2nd application, to back up these assertions of sickness; or to show that the applicant was consequently appointed as the appellant's agent.

[12] In the same vein, the allegations that the appellant was, by reason of prolonged illness and paralysis unable to attend court for the hearing of the appeal have not been backed up by cogent evidence; medical or otherwise. The Court was therefore asked to rely on the bare depositions by the applicant in this respect; which in my view, fall short of proof of sufficient cause for purposes of **Order 42 Rule 21** of the **Civil Procedure Rules**.

[13] In **Attorney General v Law Society of Kenya & Another** [2013] eKLR, the Court of Appeal defined "sufficient cause" as follows at paragraph 28:

> **"Sufficient cause" or "good cause" in law means:**
>
> > **"…the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused". See BLACK'S LAW DICTIONARY, 9th Edition, page 251.**
>
> **Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events.**

[14] The applicant having failed to present convincing evidence that the appellant has been sick and bed-ridden since **2017**, and particularly on **29th June 2017** when the impugned order was given, I am unable to find that sufficient cause has been shown for the Court to set aside the orders issued herein on **29th June 2017** and reinstate this appeal; in which event the prayers for the transfer this appeal to **Voi High Court** for hearing and for **"...stay of all the criminal cases in Taveta Law Courts..."** require no consideration.

[15] In the result, I find no merit in the application dated **15th January 2020**. The same is hereby dismissed with an order that each party shall bear own costs of that application.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 24TH DAY OF MARCH 2022.

OLGA SEWE

JUDGE