REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

CIVIL APPEAL NO.37 OF 2019

IN THE MATTER OF THE ESTATE OF ROSE KAARI BENARD (DECEASED)

MARKSON KARANI MUCHUNKU.....APPLICANT

VERSUS

JOSEPH NGARI GITUKU.....RESPONDENT

(Being an appeal from the judgment of the Hon.M. Sudi (SRM) delivered in Chuka Succession Cause No. 52 of 2016 on the 19th November,2019).

R U L I N G

INTRODUCTION

The Appellant's Memorandum of Appeal dated 11th December,2019 and filed on 16th December,2019 was brought pursuant to an appeal against the judgement of Hon. Sudi in regard to Succession cause no.52 of 2016. It sought the following orders: -

i. THAT learned trial magistrate had erred in law directing the matter before her to proceed by way of written submissions whereas there were deeply contested issues of fact.

ii. THAT the learned trial magistrate erred in law in failing to acknowledge that the appellant had sought to have the directions issued on the 01/10/2019 to have the matter be determined by way of written submissions set aside.

iii. THAT the learned trial magistrate erred in law in misconstruing the provisions of sections 29 and 36 of the Law of Succession Act.

iv. THAT the learned trial court erred in law in finding that the respondent was a spouse to the deceased without the presence of any admissible evidence to that effect.

v. THAT the costs of the appeal be provided for.

It was the appellant's prayer that the judgment of the trial magistrate be set aside and the matter be referred back to the lower court for the hearing of the protest**.**

On the 10th/2/2020 the court did peruse the appeal and the file herein and thereafter certified the appeal was not appropriate for summary rejection under **Section 79B of the Civil Procedure Act** and admitted the appeal to hearing.

On the 10th /03/2020 the matter came before court and the court gave directions that the appellant files a record of appeal. Further to that, by the time the matter was coming up before court again on the 4th/6/2020, the appellant had not filed a record of appeal thus prompting the court to order a last chance. Finally, the court on its own motion dismissed the matter for want of prosecution on the 16th /6/2020 when it turned out before court that the appellant had not filed the record of appeal.

The appellant moved the court vide a Notice of Motion dated 3/9/2020 filed under a certificate of urgency. The applicant was seeking orders that the proceedings before the lower court be suspended pending the hearing and determination of the application. She also seeks orders that inhibition orders be issued on title No L.R Karingani/Ndagani/4130 pending the hearing and determination of the application. The applicant was also seeking an order that the order issued on 26/8/2020 dismissing her appeal for want of prosecution be set aside, the appeal be reinstated and be heard on merits.

THE APPELLANT'S CASE

The Appellant's present application was supported by his Supporting Affidavit which was filed on the 3rd September,2020.

The deponent stated that his former advocates never informed him of the progress of the case, he claimed that he should not be made to suffer on account of the mistakes of his counsel; and that he stood in danger of being evicted from what he calls his home.

The Appellant cited the Covid - 19 pandemic as a contributing factor towards him not being in a position to litigate the matter to the fullest.

The Appellant asked this court to give him an opportunity to prosecute his appeal. He invoked the provisions of **Section 3 and 3A and 63 (e) of the Civil Procedure Act** which provides that not only does the court have unfettered discretion to ensure just and expeditious disposal of matters but that it has inherent power to make such orders as may be necessary for the ends of justice by giving parties a right to be heard.

It was his case that he had an arguable appeal that ought to be heard. He pointed out that if the order of dismissal is not set aside, then he would have been denied an opportunity to have his Appeal determined on merits.

He therefore urged this court to allow the present application.

THE RESPONDENT'S CASE

The Respondent filed a replying affidavit that was sworn on the 26th August, 2020 filed on the 28th September, 2020.

He stated that judgment was entered in his favour against the Appellant in Chuka Succession Cause No. 52 of 2016.

It was his averment that since 21st June, 2020, the Appellant had not taken any steps to file his record of appeal and thereafter set the matter down for hearing.

He pointed out that he had suffered great inconvenience due the applicant's disinterest in prosecuting his appeal to its conclusion.

He termed the Appeal an abuse of the court process that was intended to deny him fruits of his judgment.

He therefore urged this court to dismiss the application.

The court gave directions that the appeal be disposed off by way of written submissions. The appellant filed his submissions on 14/10/2020 while those of the respondent were filed on 28/10/20.

For the applicant, it is submitted that the appeal was dismissed on account of negligence and/or mistakes by the applicant's former advocates who failed to file a record of appeal as directed by the court on various occasions. He submits that he only came to learn about the dismissal when he was served with an application which was filed in the lower court. He contends that the application is not time barred and that the applicant should not be made to suffer on account of mistakes and/or negligence of his former advocates. He further contends that the appeal was filed on 11/12/2019 and it was therefore premature to dismiss it under **Order 17 rule 2 of the Civil Procedure Rules**. He urges the court to consider the effects of covid -19 pandemic crisis which had led to scaling down of all courts operations at the time the applicant's appeal was dismissed. He urges the court to find that he was condemned unheard. It is further submitted that the appeal is arguable as she is in occupation of LR Karingani/Ndagani/4138 and is holding the original Title deed in respect of the deceased's estate which is prima facie evidence that the appeal is arguable and has overwhelming chances of success. The applicant relies on the case of ***Joseph Wekesa Tulula-v-Hilda Wanjiru Tulula Kitale ELC Case No.52 of 2013*** where the court state as follows:-

> ***" Mistakes of counsel are common and in certain deserving cases this court is inclined to overlook those mistakes if only to do substantive justice to an applicant. In the case of Shiekh T/A Hasa Hauliers -v- Highway Carriers Ltd [1988] eKLR the Court of Appeal (Gachuhi, JA) observed as follows:-***
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> ***" it must be clear that the court is to administer justice that the suit in court is between two litigants and the counsel is merely putting the case for his client forward. The litigant, may not be aware of the failure of his advocates in complying with rules. He is at the mercy of his advocates. It is the law of agency that the principal is bound by the acts of his agent. Yet in administering justice, why should the litigant suffer due to the mistakes and errors of his advocate.***
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> ***If the court should be inclined to punish the advocate, it should state so and choose the appropriate punishment without injuring the litigant's rights. Mr. Maosa relied on Pithon Waweru Maina -v- Thuki Mugiria (ibid) as an authority that a litigant should not be punished through the mistake of his counsel. This is what was referred to by Harris J in Sha v Mbogo, (ibid) so as to avoid miscarriage of justice. The judge misdirected himself in importing matters which cause miscarriage of justice."***

He urges the court to find merits in the application and allow it. For the respondent, it submitted that the applicant was indolent and cannot blame his advocate for any wrong doing. He submits that the respondent should not suffer for the mistakes of the applicant's former advocate. He relies on the case of ***Omwoyo- v- African Highlands & Produce Co-Ltd (2002) eKLR*** where **Justice Ringera** held that, "the plaintiff should not be made to shoulder the consequences of the negligence of the defendant's advocates."

He also relies on savings and loans ***Limited -v- Susan Wanjiru Muritu Milimani HCCC No.397/2002*** where it was stated that ***"it is trite***

that the case belongs to a litigant and not her advocate. A litigant has a duty to persue his or her case……." The respondent submits that it will be a travesty of justice to allow the applicant to reinstate the suit where he refused to take the chance to prosecute it.

I have considered the application. There are two issues which arise-

- Setting aside the order dismissing the appeal.
- Mistake by Counsel.

Setting aside:

The applicant seeks the exercise of discretion by this court to reinstate the appeal. It is trite that the court's discretion must be exercised fairly and judiciously. It is a principle of natural justice that a party should be given an opportunity to be heard. **Article 50** of the Constitution provides that, ***"every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court, or if appropriate, another independent and impartial tribunal or body"***

It follows that every person ought not to be shut out from accessing the court or normally what is referred to as having his day in court. The right of a party to enjoy the fruits of judgment must be weighed against the right of a party to access court and to have his dispute heard and determined by a court or tribunal with competent jurisdiction. The emerging jurisprudence is that courts should lean on doing substantive justice by determining disputes on merits other than on procedural technicalities **Article 159(2) (d)** of the Constitution provides that ***"Justice shall be administered without undue regard to procedural technicalities."***

This is buttressed by **Section 1A &1B of the Civil Procedure Act** which provides for the overriding objectives of the Act which is to facilitate the just, expeditions proportionate and affordable resolution of civil disputes governed by the Act.

In its decision in **NileshPremchandMulji Shah & Another t/a Ketan Emporium v M.D. Popat and others & another [2016] eKLR**, the court stated as follows:

> ***"11. Nonetheless, Article 159 of the Constitution and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay. This is what the case of Ivita vs Kyumba [1984] KLR 441 espoused ."***

The right of party to appeal is a constitutional right and the court has to weigh the cost and prejudice a party has to suffer if the appeal is struct out before it is heard and determined on merits.

It is important to point out that under **Order 42 Rule 13 (4)** of the **Civil Procedure Rules**, the judge shall not allow a matter to proceed for hearing unless the record of Appeal is duly filed.

Once directions are given under **Order 42 Rule 13** of Civil Procedure Rules and the Appellant fails to fix the appeal for hearing, the Respondent may fix the same for hearing and or seek dismissal of the same for want of prosecution under **Order 42 Rule 35 (1) of the Civil Procedure Rules** or the registrar lists the appeal before a judge for dismissal under **Order 42 Rule 35 (2)** of **Civil Procedure Rules.**

Order 17 Rule 2(1), which governs dismissal of suits for want of prosecution, provides as follows:

> ***"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."***

The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court.

Under Order 17 Rule (2) (1), the court or a party can issue a notice where a matter has been inactive for a period of over one year. In regard to the case at hand, the application is premature and does not meet the conditions to warrant dismissal for want of prosecution. This matter was filed on the 11th December,2020 and the court on it's own motion dismissed the matter on the 16th June, 2017, a duration of 7 months from the date the matter was filed. It therefore follows that the mandatory requirement under **Order 17 Rule (2) (1)** has not been met.

In this case the appeal was dismissed by the Judge on his motion. The appeal was dismissed within a period of three months. The respondent have not indicated the prejudice they are likely to suffer if the appeal is reinstated. It is my view that failure to file the record of appeal was satisfactorily explained as the counsel informed the Judge that he was facing challenges with filing the documents online. It is common knowledge that there were challenges in filing documents online in the year 2020 as it was a system which was introduced owing to covid - 19. It is not far fetched that he faced challenges in online filing as there could have been teething problems. It is notable that the counsel for the appellant dutifully attended court and the want of prosecution was in failing to file the record of appeal within seven days as ordered by the court. The appellant was not guilty of in-action which is envisaged under ***Order 17 rule 2(1) Civil Procedure rules (Supra).*** The appeal

is still within the window of one year which is provided before the suit can be dismissed for want of prosecution. The respondent has not demonstrated to this court the prejudice he is likely to suffer if the appeal is reinstated. The nature of dispute in the appeal calls on this court to determine it on merits rather than on procedural technicalities. I find that failure to file the record of appeal in time has been satisfactorily explained and the delay was in my view not inordinate. The appellant ought to be given an opportunity to be heard and the appeal be determined on merits.

- Mistake of Counsel:

I entirely agree with the authorities cited by the respondent which affirm that litigation belongs to a party and not the counsel. I hasten to add that each case must be determined on its own individual circumstances. It is a common excuse for a party to urge the court that mistake of counsel ought not to be visited on him. My view is that the court ought to approach the issue by doing what would achieve best the interest of justice in the case.

Where a litigant raises the issue of negligence of counsel, the court will consider doing justice to the parties depending on the circumstances of the case. The court had the following to comment in the case of **Belinda Muras& 6 Others –Vs- Amos Wainaina [1978] Klr** in which **Hon Madan JA** (as he then was) and defined what constitutes a mistake as follows:

> **"A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because of a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate."** [own emphasis].

From what I have stated above it is in the interest of justice that the party be given an opportunity to be heard.

In conclusion:

I find that the application has merits.

I order that:

1. The order dismissing the appeal for want of prosecution is set aside.

2. The appeal is reinstated for hearing and determination on merits.

3. The appellant will have 30 days from today to file and serve the record of appeal.

4. Costs shall be in the cause.

Dated, signed and delivered at Chuka this 11th day of February 2021.

L.W. GITARI

JUDGE

11/2/2021

Ruling has been read out in open court.

L.W. GITARI

JUDGE

11/2/2021