



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL APPEAL NO. 14 OF 2014**

**LATIFA M. RAMADHAN.....APPLICANT**

**VERSUS**

**1. OMAR M. RAMADHAN**

**2. RAMADHAN M. RAMADHAN.....RESPONDENTS**

**RULING**

1. Vide a ruling delivered in Succession Case No.37 of 2011 before the Kadhi's Court at Mombasa, the only asset comprising the estate of Mohamed Ramadhan Omar was distributed to various beneficiaries. At the Centre of the controversy was the said asset being a Swahili house Mombasa/Blockxvii/142 whose distribution the applicant/appellant was not satisfied with. Consequently, she filed the appeal herein vide a memorandum of appeal filed in court on 30<sup>th</sup> October 2014. The matter having stayed dormant from the date of filing, this court issued a notice to show cause why the appeal could not be dismissed for want of prosecution. The notice issued on 15<sup>th</sup> August 2018 having not been responded to, the court dismissed the appeal on 7<sup>th</sup> September 2018

2. Aggrieved by the said dismissal, the appellant/ applicant filed a Notice of Motion Application dated 10<sup>th</sup> May 2019 under Order 42 Rule 21 and 2 and Order 12 Rule 7 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya, Article 48, 50 and 159 (2) (d) of the Constitution of Kenya, 2010 and all enabling provisions of law seeking orders that: -

**1. This Honourable court do set aside its orders of 7<sup>th</sup> September 2018 and all subsequent orders made thereafter**

**2. Upon granting of prayer 2 hereinabove, this honourable court do reinstate the appeal herein.**

**3. Cost of this Application be in the cause**

3. The Application is premised on the grounds stated on the face of it and averments contained in an Affidavit sworn on 10<sup>th</sup> May 2019 by Yusuf M. Aboubakar, Counsel appearing for the Appellant stating that; the appellant has at all times exhibited eagerness to prosecute her appeal filed on 30<sup>th</sup> October 2014; that the delay in prosecuting the appeal was due to the appellant's counsel's engagement in a plethora of Election Petitions arising out of the 2017 general elections; that the appellant's counsel was not aware of the notice to show cause scheduled for 7<sup>th</sup> September 2018 when the suit was dismissed for want of prosecution; that there is no prejudice in reinstating the suit and that, the appellant has a right to be heard pursuant to Article 50 of the Constitution.

4. In response to the Application, the Respondents filed Grounds of Opposition dated the 22<sup>nd</sup> May 2019 claiming that; the application is misconceived, frivolous, vexatious, bad in-law and abuse of the court process; Appellant is guilty of filing the current application; no reasonable explanation has been given to explain why counsel did not attend court the date the appeal was dismissed; appellant is guilty of laches by failing to prosecute the appeal and, that the respondent will be prejudiced if this case is further delayed.

5. When parties appeared for hearing, they agreed to file submissions to dispose of the matter. However, the Appellant/Applicant did not file any submissions. The Respondent filed submissions on the 4<sup>th</sup> December 2020. According to Mr. Nyongesa counsel for the respondent, the applicant failed to show sufficient cause why she did not turn up in court when the appeal was dismissed on 7<sup>th</sup> September 2018. Further, learned counsel contended that, the applicant is guilty of laches as no action was taken since 7<sup>th</sup> September 2018 up to 10<sup>th</sup> May 2019 when she filed this application

6. It was learned counsel's submission that a successful litigant should not be prejudiced by an indolent litigant or denied the fruits of his judgment. In support of this proposition, counsel relied on the decision in **Malindi Salt Works Limited vs Rongai Workshop & Transport Limited (2019) eKLR** and **Kenya shell Limited vs Kiburu and another (1986) KLR410**

## Analysis and determination

7. Having considered the Application herein, the Affidavit in support and written submissions by the Respondent, the only issue for determination is whether this court can set aside the orders of 7<sup>th</sup> September 2018 and consequently reinstate the Appeal filed on 30/10/2014.

8. The Appellant's Appeal was on 7<sup>th</sup> September 2018 dismissed for want of prosecution pursuant to Order 17 rule 2 of the CPRS which empowers the court to dismiss a suit that remains dormant for over one year. For purposes of this proceedings, an appeal is a civil proceeding as per the definition under section two of the Civil Procedure Act.

9. The Appellant's Advocate on record has stated that he was not aware that the Appeal had been dismissed until he sought to have it listed for hearing. He stated that eagerness to proceed with the appeal was demonstrated when the Appeal was severally listed for hearing on 8<sup>th</sup> February 2017 and 10<sup>th</sup> May 2017. However, from the record, there appears to be no evidence of any alleged effort having been made. The applicant simply forgot about the appeal and went to sleep. There is no sufficient reason given why the appeal was left dormant for about four years without being prosecuted. A court cannot be recruited to aid an indolent litigant. It was the duty of the litigant to move her lawyer to prosecute her case. The appellant contributed in delaying prosecution of her case as well. See Mathews Sankok Shompa vs Kenya Commercial Bank Limited and others Civil Appeal No. 529/2004 where the court held;

**“I have considered the reason that the plaintiff gave for failure to prosecute is his case. It is clear that the plaintiff was indolent. It is trite that a case does not belong to the advocate but to the litigant. It is the duty of the litigant to pursue his advocate so that his case may be prosecuted. A litigant cannot blame his advocate when his suit is dismissed if he cannot give an explanation of the effort that he made to move his advocate to prosecute his case. In the present application, the plaintiff is asking the court to excuse his delay in prosecuting the case and set aside the orders of dismissal.”**

10. In his affidavit in support of the application, counsel averred that he delayed in prosecuting the appeal because he had several Election petitions. He went further to list them at paragraph 8 of the affidavit in support of the application. However, between 2014 and 2017 Sept. when election petitions commenced, no action was taken. In any event, he had a duty to engage an assistant so that court business could continue. The respondent cannot be subjected to prejudice by further delaying this case 7years down the line thus contravening the right to expeditious disposal of his case under Article 50 (2)(e) of the Constitution.

11. It is trite that for the court to reinstate a suit that has been dismissed for want of prosecution, the applicant must prove that there was reasonable and excusable cause for the prolonged delay. See IVITA V KYUMBU 1984 KLR 441 CHESON J (as he then was) held as follows;

**“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant so both parties to the suit must be considered and the position of the judge too because it is no easy task for the documents and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged, if the court is satisfied will(sic) the plaintiff's excuse for the delay, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time”.**

12. In the instant case, I do not see any reasonable excuse for the delay. Notice to show cause dated 15<sup>th</sup> August 2018 was served upon the appellant's counsel. In any event, the appellant has been accorded an opportunity to justify reinstatement of the appeal but she has failed. The applicant who was supposed to argue the application by way of written submissions could not even file any submissions. Technically the application was not prosecuted.

13. I am however alive to the fact that it is not only the Appellant who is entitled to access to justice and right to a fair hearing as provided for under Article 48 and Article 50 of the Constitution of Kenya respectively. This Court also has to protect the rights of the Respondents as envisaged under Article 48 and Article 50 of the Constitution of Kenya. Taking the totality of the circumstances leading to the dismissal of this suit, I am convinced that litigation must come to an end and considering that the succession case giving rise to this appeal was filed the year 2011 one would pose a question, how long are litigants supposed to wait before they enjoy their inheritance or the fruit of their judgment.

14. Accordingly, I am satisfied that the application is not merited and the same is dismissed with no order as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 26<sup>TH</sup> MARCH 2021.**

**J.N. ONYIEGO**

**JUDGE**