



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 118 OF 2016

PHILOMENA WAITHERA NJOROGE.....APPELLANT/APPLICANT

VERSUS

PETER MUNYAMBU GITAU.....RESPONDENT

RULING

1. The appeal herein was filed on 2nd April 2015 by **Philomena Waithira Njoroje** (hereafter the Appellant) in respect of the judgment delivered on 4th March, 2015 in **Thika CMCC No. 456 of 2012**. Nothing further happened and on 16th August, 2017, the court set down the matter for mention on 27th September, 2017 for directions. No party attended but subsequently in December 2017, the Appellant's advocate fixed the matter for mention on 5/03/2018 when the court was informed that the proceedings in the lower court had not been received and the Appellant sought a mention after 2 months. The court set the mention for 25/6/2018.

2. The court was not sitting on that date, and parties set the 17th October 2018 for the next mention. On that date the court directed that the record of appeal be filed within 60 days, failing which the appeal would stand dismissed for want of prosecution. The Appellant did not comply, and her appeal stood dismissed for want of prosecution on the 16th December 2018, and hence an application filed on 17/12/2018 to enlarge time was withdrawn on 16/09/2019, when it came up for hearing.

3. About a month later, on 11th October 2019, the Appellant filed the motion, which is the subject of this ruling, seeking that the appeal be reinstated. The motion is supported by the affidavit of the Appellant's advocate stating that despite applying for proceedings in April 2015 the same had not been supplied by the lower court and that the Appellant's advocate has been unable to obtain the lower court file.

4. In his replying affidavit the Respondent, **Peter Munyambu Gitau** opposed the motion. Restating the history of the matter, the Respondent asserted that the Appellant had not taken steps to prosecute her appeal and that the letter requesting proceedings is dated a year since the directions given to her to file the record of appeal; and therefore, no sufficient reason has been given to warrant the exercise of the court's discretion to set aside the dismissal order. Although directions were given on 17/02/2020 and reiterated on 16/06/2020 for canvassing the motion through written submissions, only the Respondent complied. The submissions reiterate the material in the replying affidavit. The Respondent argued the motion as one brought under Order 45 Rule 1 of the Civil Procedure Rules, which is incorrect.

5. The motion was premised inter alia Order 17 Rule 2(2) and Order 51 Rule 1 of the Civil Procedure Rules. Also invoked is section 3A of the Civil Procedure Act. Under the latter provision, the court has inherent power to reinstate an appeal dismissed for want of prosecution. In so doing, the court exercises judicial discretion and the onus is upon the Appellant to persuade the court that there are sound reasons to warrant the exercise of the court's discretion in her favour. In **Richard Ncharpi Leyagu v. IEBC & 2 Others Ca. No. 18 Of 2013; (2013) eKLR** the Court of Appeal stated that the discretion to set aside an *ex parte* order or judgment "is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice".

6. In this case of **Simon Thuo Mwangi V. Unga Feeds Ltd [2015] eKLR**, the same Court citing the case of **Esther Wamaitha Njihia & Others v. Safaricom Ltd [2014] eKLR** reiterated the general principle that:

"The exercise of judicial discretion is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but it is not designed to assist a person who deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice".

7. The Appellant after filing her appeal in 2015 took no step to progress it until 2017 when the court roused her from slumber. There is no evidence to support claims in the supporting affidavit that in April 2015 the Appellant sought proceedings from the lower Court. Or even prior to the letter requesting proceedings dated 6th September 2019 (exhibited as annexure "SWA" in her advocate's affidavit). In addition, no letter from the lower court has been exhibited to confirm alleged unsuccessful efforts by the advocate's clerk in pursuit of the lower court file. There is no material to demonstrate any action in this regard until September 2019. The delay of four years in this case is clearly

inordinate, and the Appellant has not demonstrated any plausible reason why she has failed to file the record of appeal or prosecute her appeal on time.

8. It is not tenable to heap blame on the lower court for the failure to furnish proceedings when there is no proof of the earliest request for the same by the Appellant. This dispute started in 2012 in the lower court. In as much as the Appellant's right to be heard on merit cannot be gainsaid, the interests of the Respondent must be considered. He stands to be prejudiced by the delay through additional costs. The Appellant's conduct on this appeal does not demonstrate a litigant eager to prosecute her appeal. Not only did she fail, without good cause to comply with direction to file the record of appeal, but also upon filing her application for reinstatement did not comply with the order to file her submissions thereon.

9. At a time when courts are deluged by heavy caseloads, they can hardly afford to entertain litigants who prosecute matters at leisure, ignoring their duty to assist the Court in furthering the overriding objective. The imperative in Article 159 (2) (b) of the Constitution and the overriding objective in section 1A of the Civil Procedure Act is the facilitation of just, expeditious, proportionate, and affordable resolution of disputes. Parties and their advocates are obligated under Section 1A (3) of the Civil Procedure Act to cooperate with the Court in furthering the objective by complying with directions and orders of the Court.

10. In *Caltex Oil Limited v. Evanson Wanjihia Civil Application No. Nai. 190 of 2009; (2009) eKLR* the Court of Appeal stated that:

“Before we set out the terms of the conditional stay it is important to state that in our view, the powers of this Court have recently been enhanced by the incorporation of an overriding objective in sections 3A and 3B of the Appellate Jurisdiction Act Cap 9 and sections 1A and 1B of the Civil Procedure Act Cap 21 following the amendment of the Statute Law (Miscellaneous Amendment Act No.6 of 2009). The overriding objective provides that the purpose of the two Acts and the rule is to facilitate the just, expeditious, proportionate, and affordable resolution of civil disputes. Although the overriding objective has several aims the principal aim is for the Court to act justly in every situation either when interpreting the law or exercising its power. The Court has therefore been given greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective.”

26. The same Court reiterating the above decision also stated in *Hunker Trading Company Ltd v. Elf Oil Kenya Ltd [2010] eKLR* that under section 1 A (3) parties have a duty to obey all court processes and orders. The court had observed as follows:

“As the applicant has admitted having failed to comply with the order of stay by Koome, J. we find that it is in breach of section 1A (3) of the Civil Procedure Act and also section 3A (3) of the Appellate Jurisdiction Act. We do not think that the fact that the order has since lapsed has in any way eroded the relevance of the disobedience of the order to the operation of the overriding objective. The thrust of the applicant's application to this Court under section 3A is substantially to seek similar orders to those he was granted in the superior court and failed to obey. Under section 1A (3) the applicant has a duty to obey all court processes and orders. In our opinion, coming to us having abused the process in the superior court violates the overriding objective (which in another case has been baptized the (double “O” principle) and in this case, we have chosen to call it (“the O2 or the oxygen principle”) because it is intended to re-energise the processes of the courts and to encourage good management of cases and appeals. The violation arises from the fact that this Court is again being asked to cover almost the same points although using different rules and this is a waste or misapplication of this Court's resources (time) and also an abuse of its process...The applicant cannot be allowed to invoke the “O2 principle” and at the same time abuse it at will as has happened in this matter”

11. Similarly in this case, the Appellant having failed, without any demonstrated and reasonable cause, to comply with two orders given on this appeal cannot hope for another chance to continue with her lethargic conduct in the appeal, at the expense of the Respondent and in disregard of the court's limited time resource. The application to reinstate the appeal is devoid of merit. For all the foregoing reasons, the court is not persuaded that it ought to exercise its discretion in the Appellant's favour. The motion dated 8th October 2019 is hereby dismissed with costs.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 29TH DAY OF JULY 2021

C. MEOLI

JUDGE

In the presence of:

Mr.Mshindi h/b for Mr Wandaka for for the Appellant

Mr Warutere h/b for Mr Kanyi for the Respondent

Kevin: Court Assistant