



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 88 OF 2019

BERNARD MUTHEE.....1ST APPELLANT

JAPHET KIMAIYA.....2ND APPELLANT

VERSUS

ANITA KAMBA MWITI.....RESPONDENT

RULING

1. On 5th December 2019, the Appellants were granted 30 days to lodge their record of appeal from the date of service of the order. They failed to do so and on 27th July 2020, they sought for 14 days to file the same. The Court on the said date declined to grant the time sought and held that the appeal stood dismissed for failure to comply with the Court's orders of 5th December 2019. By their application dated 9th June 2021, the Appellants seek the reinstatement of their appeal for hearing and determination on its merits.

The Application

2. The Appellants claim that they were unable to meet the deadline since the proceedings had not been typed and the confirmed grant was not issued within 30 days. They further urge that there was a mix up when the matter was mentioned on 5th February 2020 instead of 26th March 2020 which was the date which had been given and that they had no knowledge of the mention date of 5th February 2020. They urge that the appeal was dismissed because of non-attendance on the said 5th February 2020 as well as because of non-compliance with the directions of 5th December 2019. They urge that they are men of straw and it took a while to raise the requisite legal fees for the appeal.

3. The Respondent has not responded to the application. There is an affidavit of service on record to confirm service.

Determination

4. On 24th July 2019, the Appellants filed a memorandum of appeal of even date. Following filing of a memorandum of appeal, the Civil Procedure Rules require an Appellant to file his record of appeal within 60 days. The Appellant thus ought to have filed his record of appeal by 24th September 2019. As at 5th December 2019, no record of appeal had been filed as yet. Before 5th December 2019, there was a previous order that had been made on 30th October 2019 requiring the filing of the record of appeal. On 5th December 2019, the Court ordered for the record of appeal to be filed within 30 days but this was again not done. On 27th July 2020, the Court found that the appeal stood dismissed for failure to file the record of appeal within the required time frame.

5. The instant application seeking reinstatement of the appeal was filed on 10th June 2021, slightly less than two years from the date of filing the memorandum of appeal. The Appellants have brought their application under the provisions of Order 42 Rule 21 of the Civil Procedure Rules which provides as follows: -

[Order 42, rule 21.] Re-admission of appeal dismissed for default

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.

6. Bearing the circumstances of the case, where the dismissal resulted from an omission by the Appellants to file their record of appeal within the timeframe that had been ordered by the Court, the provisions of Order 42 Rule 21 which make reference to Rule 20 on dismissal for non-

attendance on the date of hearing appear inapplicable. Dismissal for non-attendance during hearing is one thing, and dismissal for failure to file a record of appeal is another.

7. Further, the Appellants appear to be misguided on the dates involved in the matter and partly on the reasons for dismissal as has been seen above. They claim that on 5th February 2020, the dismissal order was made in their absence and that they were not aware of this date. This however does not reflect the record as the matter was never mentioned on 5th February 2020. From the record, the order confirming that the appeal stood dismissed was made on 27th July 2020. During that date, the Appellant's Counsel Mr. Muthomi prayed for 14 days to file the record of appeal but his request was declined by the Court. The Court noted that the Appellants had failed to file their record of appeal within 30 days as had been earlier ordered by the Court. The appeal would appear to have been dismissed for want of prosecution and not for non-attendance.

8. The considerations to be made in determining whether or not to dismiss matters for want of prosecution and therefore whether to order reinstatement were considered in the case of *Ivita vs Kyumbu, Civil Suit No. 340 of 1971 (1975) EA 441, 449*, where Chesoni J. held as follows: -

“...So the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay....

...The defendant must however satisfy the Court that he will be prejudiced by the delay or even that the Plaintiff will be prejudiced...”

9. Borrowing from the above, this Court has to determine whether the delay was prolonged, whether it is inexcusable and finally what prejudice the Respondent stands to suffer. The delay herein which was for a period of almost two years from the date of filing the memorandum of appeal is undoubtedly a prolonged delay. To this extent, this Court finds that the order for dismissal was indeed sound and justifiable.

10. Concerning the reasons advanced of difficulties in obtaining the record of typed proceedings from the court registry, this Court recognizes that there is an avenue to file an initial record of appeal and thereafter file a supplementary record once the proceedings are obtained. This would have been the best course to take and would be more convincing bearing in mind that it was over a period of 8 months between the date when the Appellants were ordered to file their record of appeal on 5th December 2019 and when the order confirming the dismissal was made on 27th July 2020. The Appellants have also failed to annex evidence in form of correspondence or otherwise to confirm what efforts, if any, they made to secure the said typed proceedings. It is not enough to make mere averments devoid of supporting evidence.

11. The Appellants further claim that they also had some financial challenges and were unable to raise the funds required for the appeal in good time. No evidence has however been produced to confirm this averment. This Court finds that the Appellants have not adequately explained the delay.

12. The Court is however alive to the fact that re-instatement of an appeal is a matter of discretion and is to be handled on a case to case basis. Order 51 Rule 6 of the Civil Procedure Rules provides for the mechanics of extension of time even where the application to extend is brought after the lapse of the time allowed for the doing the action relevant to the application as follows:

“Power to enlarge time [Order 50, rule 6.]

6. Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

13. Section 95 of the Civil Procedure Act, Cap 21 Laws of Kenya has a mirror provision as follows: -

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

14. Although the Appellants have not expressly sought for extension of time, an order reinstating the appeal would be of the same effect as an order extending the time within which they were required to file the record of appeal.

15. This Court has perused the record and observes that there is a memorandum of appeal raising 6 grounds of appeal. The Court observes that the appeal concerns a family and/or succession matter. The main grounds appear to touch on the mode of distribution of the properties forming part of the deceased estate. It is alleged that the Court failed to consider the fact that the beneficiaries had already agreed on the mode of distribution. This is indeed an arguable appeal, which is not one which must necessarily succeed and neither is it for this Court to go into the merits of this intended appeal.

16. This Court also observes that despite service, the Respondent failed to respond to the application. There is an affidavit of service on record sworn by Zakayo Mutua Mutea, confirming service of the application upon the Respondent. Had she responded and explained the nature of prejudice likely to be suffered in the event of reinstatement of the appeal, this Court would not have hesitated to decline the request for reinstatement, in view of the prolonged delays. This was however not done. This Court will thus exercise its discretion and reinstate the

appeal with appropriate conditions.

Conclusion

17. In the end, this Court finds that although there has been a prolonged and unjustifiable delay in prosecution of the appeal, substantive justice enjoins the Court to reinstate the appeal for hearing and determination on its merits. This finding is also arrived at noting that the Respondent did not oppose the application despite proper service. The apparent laxity on the part of the Appellants will however call for the imposition of strict timelines as well as consequences for non-compliance, if any. The Court will also order for payment of costs to the Respondent, despite her non-participation in these proceedings as a way of communicating the discontentment with the Appellant's delays.

ORDERS

18. Accordingly, for the reasons set out above, this Court makes the following orders: -

i. The Appellant's application dated 9th June 2021 is hereby allowed in terms of prayer number 2 and the appeal is hereby reinstated.

ii. The Appellants are hereby directed to file their Record of Appeal within fourteen (14) days from the date of this order, failure to which the appeal will stand dismissed.

iii. Costs of this application will abide the result of the appeal.

Order accordingly.

DATED AND DELIVERED ON THIS 24TH DAY OF AUGUST, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances

M/S Gichunge Muthuri & Co. Advocates for the Appellants

Ms. Anita Kamba Mwiti, the Respondent in person.