



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO. 19 OF 2019

JOHN MUCHORI MUCHANGA.....APPELLANT

JULIUS IRUNGU MWANGI.....RESPONDENT

RULING

1. On 10th May 2021, this appeal was listed for *dismissal* under Order 42 Rule 35(2) pursuant to a written request by the respondent to the Deputy Registrar dated 26th January 2021.
2. On that date the appellant was granted leave to file an affidavit within seven days to show cause why the appeal should not be dismissed. When the matter came up next on 12th July 2021, the parties recorded a *consent*. One of the terms required the Record of Appeal to be filed and served within 30 days and in default, the appeal be dismissed.
3. The appellant did not manage to lodge the record of appeal until 13th August 2021. It thus lodged a notice of motion dated 19th August 2021 to firstly, set aside the consent order; secondly, to extend the time for filing the pleading and, thirdly, “to order the Deputy Registrar in conjunction with the Executive Officer of the lower court to facilitate and fast track the issuance of the decree” from the lower court.
4. The application is opposed vide a replying affidavit sworn on 16th September 2021 by the respondent’s counsel.
5. On 22nd September 2021, I heard submissions from learned counsel for the appellant and respondent.
6. I take the following view of the matter. No sufficient grounds have been laid for setting aside the consent order. That prayer is *dismissed*.
7. The prayer sought against the Deputy Registrar or the Executive Officer of the lower court to facilitate and fast track the issuance of the decree has no procedural or legal foundation. It is in the nature of an administrative request to those officers which requires no formal order. Furthermore, it remains the duty of the appellant to pursue the proceedings, decree or other records necessary for preparation of the Record of Appeal. That prayer is also *dismissed*.
8. This appeal was lodged way back on 18th June 2019 challenging the assessment of damages by the lower court. On 24th June 2019, the appellant filed a Notice of Motion praying for stay of execution of the decree. Although the motion was granted dates by the registry for 21st July 2020 and 30th November 2020, it was not listed. The appellant averred that it was due to the partial shut-down of the court due to the Covid-19 regulations.
9. The appellant then went into slumber until the appeal was fixed for dismissal. Like I stated, even on that date, the appellant had not filed an affidavit to show cause. A reply was eventually filed on 18th May 2021. It is also not disputed that the appellant did not file the record of appeal within the 30 days specified in the consent recorded 12th July 2021. Furthermore, the record is incomplete and hence the prayer for assistance by the Deputy Registrar or Executive Officer to procure proceedings and the impugned decree.
10. In our adversarial system of justice, it was the primary obligation of the appellants to follow up on their appeal. The lower court file is attached to the appeal file. The lower court was sitting here at Murang’a. The supporting affidavit by *Christine Wanjiru* on 19th August 2021 blames the registry for not typing the proceedings timeously. She also avers that the record was filed out of time by one day due to “downtime occasioned to the Court Tracking System” and that her firm could not serve the respondents on that day as its offices were closed for the day.
11. The test in a matter of this nature is whether *justice* can still be done. See *Ivita v Kyumbu* [1984] KLR 441. The overriding objective is to do justice to the parties. See *Harit Sheth Advocate v Shamas Charania* Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR. In addition, power reposes in the court to enlarge time for filing pleadings. However, that power must be exercised judiciously.
12. There is a clear pattern of delays by the appellant. The prejudice to the respondent is self-explanatory as he cannot reap the fruits of the

decree. It is not lost on me either that the decree was for general and special damages arising out of a fatal road accident.

13. To avoid the ends of justice from being defeated, I will make the following orders-

- a) That I enlarge the time for filing and serving the Record of Appeal by one day to the 13th August 2021 to the intent that the record filed and served on the latter date shall be deemed to have been filed and served within time.
- b) That the other prayers in the appellant's notice of motion dated 19th August 2021 have no merit and are dismissed.
- c) That I grant the respondent thrown away costs assessed at Kshs 20,000 to be paid in 14 days. In default, execution shall issue.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 21ST DAY OF OCTOBER 2021.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

No appearance by counsel for the appellant.

No appearance by counsel for the respondent.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.