

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO 243 OF 2017

JESSE GICHURU MWANGI.....1ST APPELLANT

NDUNG’U STEPHEN.....2ND APPELLANT

VERSUS

VIDELIS AUMA WANYAMA & CHRISTABELONDECHE SIRO (suing as the

Legal Representative of the late WITMAN SIRO MALOBA)...RESPONDENTS

RULING

1. On 21st June 2019, the Respondents filed a Notice of Motion application dated 20th June 2018 in which they had sought the dismissal of the Appellants’ Appeal for want of prosecution and further, for the release of the decretal sum that had been deposited in the account in the joint names of their advocate and those of the Appellants herein. They had sought the same orders as those of their Notice of Motion application dated 7th August 2018 and filed on 10th September 2019.
2. The said application was supported by the Affidavit of their advocate, Maloba Kiyaka, that was sworn on 20th June 2019. Their contention was that since the court directed the Appellants to file their Record of Appeal on 8th April 2019, they had not done so to date.
3. In opposition to the said application, on 13th September 2019, the Appellants filed Grounds of Opposition dated 11th September 2019. It was their further averment that they could not file a Record of Appeal as they had still been furnished with certified copies of the proceedings.
4. What was in contention herein was whether or not the court could dismiss the Appeal herein for failure by the Appellants to file their Record of Appeal within sixty (60) days of the court’s Ruling dated 8th April 2019 in which it declined to dismiss the Appellants’ Appeal for want of prosecution.
5. In Paragraph 38 of the said Ruling, this court had directed the Registrar of High Court of Kenya Milimani Law Courts Civil Division to place the proceedings in the file herein to enable the Appellants proceed with the Appeal herein.
6. In the absence of the lower court file herein, this court was satisfied that the Appellants could not file their Record of Appeal within the time stipulated in the said Ruling and it would be unfair to dismiss their Appeal herein.

DISPOSITION

7. For the foregoing reasons, the upshot of this court’s decision was that the Respondents’ Notice of Motion application dated 20th June 2019 and filed on 21st June 2019 was not merited and the same is hereby dismissed. Costs of the application will be in the cause.
8. The Deputy Registrar High Court of Kenya Milimani Law Courts Civil Division is hereby directed to comply with Paragraph 38 of this court’s Ruling of 8th April 2019 to enable the Appellants file their Record of Appeal. To monitor this matter, the Appellant is hereby directed to fix a mention date, at the Registry, in one hundred and sixty (160) days from the date of the Ruling herein. In the event the Appellants fail to do so, the Respondents will be at liberty to fix the matter for mention as aforesaid for further orders and/or directions.
9. It is so ordered.

DATED and DELIVERED at NAIROBI this 28th day of May 2020

J. KAMAU

JUDGE