



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 671 OF 2009

CHRISTINE WAMBUI KABECHA.....APPELLANT

VERSUS

SIMON KIRIKA NJOROGE.....1ST RESPONDENT

KIAMBU DISTRICT LAND SURVEYOR.....2ND RESPONDENT

RULING

1. In her Notice of Motion application dated 23rd May 2019 and filed on 29th May 2019, the Appellant sought that the order made on 18th June 2015 be set aside and the Appeal herein be reinstated for hearing and determination. Her said application was supported by the Affidavit of her advocate, Chrispin Wainaina that was sworn on 23rd May 2019.
2. She contended that she was not able to obtain certified copies of the proceedings for the reason that the lower court file was forwarded to this court for hearing of the Appeal herein. She stated that her advocates became aware of the dismissal of the Appeal herein when the Respondents' advocates informed the lower court that the Appeal was dismissed on 18th June 2015 which her advocates confirmed to have been the position.
3. It was her averment that she did not receive the Notice to Show Cause (NTSC) why the Appeal should not be dismissed and hence did not attend court. It was her further averment that the Appeal had neither been fixed for hearing nor had directions on its hearing had been given.
4. She stated that she was willing to abide by any condition and direction of the court and urged this court to allow her application as prayed.
5. In opposition to the said application, on 3rd July 2019, the 1st Respondent swore a Replying Affidavit. The same was filed on even date. He contended that the lower court file could not be availed to the High Court for hearing unless the Appeal herein had been certified ready for hearing. He averred that since obtaining an order for stay of execution pending appeal, the Appellant had not taken any step to prosecute the Appeal herein.
6. He pointed out that the Appeal was against an interlocutory ruling and urged this court to dismiss the present application which lacked merit and parties be directed to proceed for the hearing of the main suit whereafter any aggrieved party could approach this court to address a final judgment rather than an interlocutory ruling.
7. It was his contention that it would defeat the interests of justice to reinstate a matter that was filed more than ten (10) years ago and was dismissed more than five (5) years ago but that in the event this court was inclined to reinstate any interim orders, the Appellant ought to be condemned to pay costs in the sum of Kshs 50,000/=.
8. The court noted that Appellant's submissions that he could not obtain certified copies of the proceedings as the lower court file was brought to this court and that if he had received the NTSC, he would have attended court and explained what had caused him not to prosecute the Appeal herein.
9. It was his contention that he had a right to be heard and that he would be prejudiced if the orders he had sought were not granted. In this regard, he placed reliance on the cases of **Pan Africa Paper Mills Limited vs Sylvester Nyarango Obwocha [2018] eKLR** and **Ivita vs Kyumbu [1984] KLR 441** where the common thread was that in exercising their discretion to dismiss a matter, courts must consider the prejudice will be suffered by parties.

10. On its part, the 1st Respondent was categorical that there had been inordinate delay in prosecuting the Appeal herein, which disintitiled the Appellant from being granted the orders he had sought. He placed reliance on the cases of Utalii Transport Company Limited & 3 Others vs NIC Bank & Another [2014] eKLR and Cecilia Wanja Waweru vs Jackson Wainaina Muiruri & Another [2014] eKLR where the courts dismissed matters that had not been prosecuted for an inordinately long time.

11. Notably, the Appeal herein was filed in 2009. On 1st March 2011, Mbogholi Msagha J granted the Appellant an order of stay of execution pending the hearing and determination of the Appeal herein. On 7th November 2017, the lower court file was returned to the Kikuyu Law Courts.

12. While this court agreed with the 1st Respondent that there had been a lot of delay in this matter, it noted that there was no indication in the court file that the Appeal herein had been admitted for hearing, directions given under Order 42 Rule 13 of the Civil Procedure Rules, 2010 and that the Appeal had been certified as ready for hearing so that the same could be dismissed for want of prosecution under Order 42 Rule 35(2) of the Civil Procedure Rules. There was also no NTSC in the file making it difficult for this court to know how the same was served upon the Appellant and the Respondent herein for hearing on 18th June 2015.

13. It was therefore the considered opinion of this court that in the absence of proof of service of the NTSC upon the Appellant herein, notwithstanding the delay herein, it was prejudicial for him to be denied an opportunity to have his Appeal heard on merit.

14. Indeed, weighing his right to have his dispute determined fairly in a court of law or competent tribunal as provided in Article 50(1) of the Constitution of Kenya and the equally important 1st Respondent's fundamental right that justice delayed is justice denied as stipulated in Article 159(2) (b) of the Constitution of Kenya, this court determined that he would suffer more injustice and prejudice if he was denied an opportunity to ventilate his Appeal on merit.

15. The 1st Respondent's proposal that they proceed for hearing in the lower court for the hearing and determination of the main suit did not find of this court in view of the fact that the aforesaid decision of Mbogholi Msagha J, who was of equal and competent jurisdiction, to have the Appeal herein heard and determined on merit had not been set aside and/or vacated.

DISPOSITION

16. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application dated 23rd May 2019 and filed on 29th May 2019 was merited and the same is hereby allowed. Costs of the said application will be in the cause.

17. This court noted that this matter related to a dispute of land boundary. This was within the jurisdiction of the Environment and Land Court that deals with the environment and the use and occupation of, and title to, land as provided in Article 162(2) (b) of the Constitution of Kenya, 2010. Further, the appeal emanates from a dispute that was filed in the Kikuyu Law Courts where appeals are heard and determined by the High Court of Kenya, Kiambu.

18. In view of the fact that Mbogholi Msagha J directed that the Appeal herein be heard and determined vide his Ruling of 1st March 2011, it is hereby directed that the file herein be placed before him on 13th October 2020 for his further orders and directions regarding the jurisdiction of this court to hear and determine the appeal in respect of the issues raised hereinabove.

19. It is so ordered.

DATED and DELIVERED at NAIROBI this 30th day of September 2020

J. KAMAU

JUDGE