



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CIVIL APPEAL NO. 93 OF 2017

ELIKANAH MBUGUA KARIUKI.....APPELLANT/APPLICANT

VERSUS

MARY MUTHONI NJOROGE.....RESPONDENT

RULING

Before me is a Notice of Motion filed by Kairu & McCourt Advocates, dated 23/09/2019, on behalf of Elikanah Mbugua Kariuki, the Appellant/ Applicant, against Mary Muthoni Njoroge, the Respondent. The respondent is represented by Mr. Kamanga Advocate.

The Applicant seeks the following prayers;

1) Spent;

2) That pending the determination of the application, inter-parties, there be an order of stay of execution of the judgment and/or decree of Hon. Gesora SPM, delivered in Nyahururu CMC 185/2011 on 01/08/2016 and all consequential orders and proceedings therein;

3) That the appeal being Nyahururu HCCA 93 of 2017 Elikanah Mbugua vrs Mary Muthoni be and is hereby reinstated, re-admitted for hearing and determination;

4) That the court do make any other orders that may deem fit to grant;

5) Costs of the application be in the cause.

The grounds upon which the application is brought are that failure to attend court on 21/05/2019 by the applicant's Counsel is excusable because the applicant was never served with a Notice to show cause and hence the applicant was not aware of the said date; that the applicant's advocates were not aware that the appeal had been fixed for Notice to show cause; that Counsel only got to learn that the appeal had been dismissed when they sent their clerk to fix the appeal for directions; that the respondent's advocates are demanding payment and it is only fair that the appeal be reinstated in order to be heard in the normal way; that unless the appeal is reinstated, the applicant stands to suffer irreparable loss and damage and the appeal on liability will be rendered nugatory; that therefore it is in the interests of justice that the appeal be reinstated and heard on the merits; that the respondent will not suffer any prejudice or damage because she can be compensated in terms of costs. The applicant also contends that the application was made without unreasonable delay. The application was also supported by the affidavit of **Fredrick Ragui Kariuki** an advocate from the firm of Kairu McCourt Advocates who reiterated the above grounds.

The application was opposed through a replying affidavit sworn by Njuguna Kamanga Advocate and dated 26/05/2020. He deponed that by a Notice to show cause dated 29/10/2017, the parties were required to appear before the court and show cause why the appeal could not be dismissed for want of prosecution; that the parties did appear on 06/03/2019 wherein Bosibori Advocate appeared for the applicant and the applicant was allowed two months to prepare and file a Record of Appeal. The matter was fixed for mention on 21/05/2019 when the respondent appeared but the applicant did not appear nor had he complied with the order requiring him to file and serve the Record of Appeal. As a result, the court dismissed the appeal for want of prosecution; that it is untrue to allege that the applicant was not served with the Notice to show cause; that it is not true that the applicant learnt of the dismissal when their clerk came to fix the appeal for directions but because the respondent had by a letter dated 24/07/2019 demanded payment – MKI (a) & (b); that since 2016 the applicant has not filed a Record of Appeal, evidence that he is not keen to prosecute the appeal.

As regards the instant application, dated 23/09/2019, on 05/03/2020 the court in the presence of Mr. Makori appearing for the applicant and Mr. Kamanga for the Respondent, directed that parties do file and exchange their respective written submissions and the matter was to be heard on 14/05/2020.

On 14/05/2020, the matter was mentioned before the court and fixed for mention on 27/05/2020 when there was no appearance. The court

again gave a reminder to both Counsel that submissions be filed for mention on 20/07/2020. M/s Kairu & McCourt were served with the said notice via email but never filed any submissions. The respondents however did file theirs on 29/07/2020 and the court decided to go ahead to write the ruling.

I have considered the respondent's submissions which are more or less the facts contained in their affidavit.

I have considered both the applicant's and respondent's affidavits and respondent's submissions.

This appeal was filed in Nakuru High Court as HCA 89/2016 and transferred to this court in 2017. When the number was changed to HCA 93/2017.

On 06/03/2019, in the presence of Ms. Bosibori who held brief for Mr. Kariuki, Counsel for the applicant and Mr. Mathea who held brief for Mr. Kamanga, Counsel for the respondent, the court noted that the Record of Appeal had not been filed. The applicant was allowed two months within which to prepare and file the Record of Appeal. A mention was reserved for 21/05/2019.

On 21/05/2019, the applicant's counsel did not appear, while Ms. Ng'ethe held brief for Mr. Kamanga. The applicant is not being forthright to claim that they were not aware of the date of 21/05/2019 – because they had Counsel, Ms. Bosibori was present in court when the date was given on 06/03/2019. Further to that, by that date the applicant had not filed a Record of Appeal and the applicant's Counsel is also not forthright to claim that they learnt of the matter when coming to take directions in the appeal. Directions can not be taken when there is no appeal filed. I believe that the applicant's Counsel moved this court with the instant application when they received the respondent's letter dated 27/07/2019 served on them on 29/07/2019 demanding payment.

Even after the demand letter was received on 29/07/019, the applicant still demonstrated lethargy by not moving to have the court's order set aside. The applicant sat back till about two months later when he filed this application on 01/10/2019. In my view, there was unreasonable delay in filing this application considering the circumstances.

I find that the applicant has not been diligent in prosecuting this appeal. Even after the court gave the applicant a second chance to file a Record of Appeal on 06/03/2019, the applicant did nothing.

To demonstrate further that the applicant was not keen on prosecuting this appeal, even after this court directed that the applicant files submissions, and a reminder was done with evidence that Kairu & McCourt were served through email on 18/07/2020 as per the current practice during this Covid-19, none were filed and there was no response from the applicant's Counsel.

The only conclusion I can make is that the applicant is not keen on prosecuting this appeal yet on the other hand, the respondent has a judgment she should be allowed to enjoy the fruits of the said judgment without any further unnecessary delay.

For all the above reasons, I find that the application dated 23/09/2019 lacks merit and is hereby dismissed with costs to the respondent.

Dated, Signed and Delivered at NYAHURURU this 29th day of September, 2020.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Kamanga for Respondent (Virtual)

Kairu & McCourt - Absent

Henry – Court Assistant