



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CIVIL APPEAL NO.8 OF 2019

IBRAHIM MOHAMED LEO.....1ST APPELLANT

MARIAN MOHAMED GENO.....2ND APPELLANT

VERSUS

HUSSEIN MOHAMED LEO.....1ST RESPONDENT

SALAT MOHAMED.....2ND RESPONDENT

ISAAK HASSAN.....3RD RESPONDENT

WATO DARCHAE.....4TH RESPONDENT

MOHAMED ISAACK.....5TH RESPONDENT

RULING

The application dated 22nd July, 2020 seeks the following two main orders namely:-

2. That this Honourable Court be pleased to set aside, vary and or review its orders of 30th June, 2020 dismissing this suit and reinstate the same for hearing.

3. That upon grant of prayer 2 above this Honourable Court be pleased to extend time within which the applicant/appellants can file and serve their submissions on the appeal therein and further grant any other orders as the court may deem fit/necessary towards hearing and determination on merit of the appeal herein.

The application is supported by the affidavit of the first appellant. The respondents filed a replying affidavit sworn by Mohamed Issack in opposition to the application. Mr. Gikonyo, Counsel for the applicant, entirely relied on the supporting affidavit. It is submitted that the appeal was dismissed for want of prosecution. The 1st appellant is a Doctor with the Marsabit County Government and had travelled to India. Upon returning he was engaged in the Covid-19 issue as he is the one coordinating it in the County. The application was made without unreasonable delay. No prejudice will be suffered by the respondents. The appellants are ready to prosecute their appeal.

Mr. Leisagor appeared for the respondents and relied on the replying affidavit. Counsel contend that the Appeal was filed in March, 2019. All what was pending was the filing of submissions. The submissions were due way before Covid-19 issues emerged. The applicant was not required in Court. All what was required was the filing of submissions and the appellant failed to do so in five occasions. Counsel for the respondents wrote a letter to the appellants and Counsel complaining about the non-filing of appeal. The appellants had more than ten months to prosecute their appeal. They have been in contempt of the Court directions. Exercise of discretion should be extended to a deserving party. Justice should be discharged expediently. Parties and their Counsel should assist the Court in meeting the overriding objective. Discretion must be exercised fairly and Judiciously. There are no good reasons established by the applicants and award of costs cannot be the solution. Justice should be administered without delay.

Mr. Leisagor referred to the case of Simon **Wachira Nyaga –V- Patrick Wamwirwa, Kerugoya Civil Appeal No.211 of 2013(2018) eKLR** where Justice L.W. Gitari referred to the Court of Appeal decision in **Cecilia Wanja Waweru –V- Jackson Wainaina Muiruri & another (2014), eKLR** where the Court of Appeal held:-

“There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case. We are of the considered view that the learned judge in considering the application, should have looked at the appellant’s conduct from the time the appeal was filed up to the date the application for reinstatement was filed.....

We have to ask ourselves whether the failure by the appellant to prosecute the appeal in the High Court and/or the delay in filling the application for reinstatement constitute an excusable mistake or was it meant to deliberately delay the cause of justice..... Why didn’t she set the appeal down for hearing for almost 14 years”. The reasonable explanation would be that the appellant had been indolent and had slept on her rights. She was only awakened from her slumber by the dismissal of the appeal.

Counsel for the respondent also referred to the case of **George Peter Mutiso –V- Jimack Engineering Workshop Nairobi ELRC cause No.726 of 2011 (2017) eKLR** where Justice Nduma Nderi declined to reinstate a suit that had been dismissed for want of prosecution due to inordinate delay.

The issue for determination is whether the appeal should be reinstated. The court is being called upon to exercise its discretion and reinstate the appeal. According to the appellants, the application for reinstatement was filed without undue delay. The Appeal was dismissed on 30.6.2020 and the current application was filed on 22.7.2020, a period of less than one month.

The records show that the appeal was filed on 13.3.2019. It was admitted for hearing on 21.5.2019 and came up for mention on 26.9.2019. The record of appeal was filed on 24.10.2019 and it appears that the admission of the appeal was done before the record of Appeal was filed. Directions on the determination of the appeal were given on 26.11.2019 whereby parties agreed to determine the appeal by way of written submissions.

On 19.2.2020 Counsel for both parties appeared and fixed the matter for mention on 10.3.2020 and thereafter agreed to have the appeal heard on 23.3.2020. On 23.3.2020 all parties were absent. The appeal was fixed for mention on 10.6.2020 and once again parties and their counsels failed to appear. By this time Covid-19 issues had emerged. The Court on its own motion fixed the appeal for hearing on 30.6.2020 and directed the appellant’s advocate to file written submissions within ten (10) days and serve. The Court further directed that notices for the hearing on 30.6.2020 be issued to both Counsels.

On 30.6.2020 the appeal came up for hearing. By that time the Covid -19 pandemic had limited hearing of cases through on –line communication. Mr. Kiogora for the appellant did not appear while Mr. Leisagor for the respondent appeared through zoom. Mr. Lesaigor urged the Court to dismiss the appeal.

I have checked the record and noted that no hearing notices were issued by the Court after the Court session of 10.6.2020. It is evident that order 42 rule 17 of the Civil Procedure Rules requiring service of hearing notice upon parties or their counsels was not complied with. I am alive to the fact that the court had resorted to electronic communication including mobile calls from the Court assistant to Counsels. Although this issue of service has not been raised, this is my analysis of the record.

The record also show that on 10.3.2020 Counsel for the respondent failed to appear while Mr. Kiogora for the appellant appeared. The case was fixed for hearing on 23.3.2020 when both Counsels failed to appear. By this time cessation of movement from some parts of the County including Nairobi County had been declared. Once again on 10.6.2020 both counsels failed to appear.

The two authorities relied upon by Mr. Lesaigor can be distinguished from the current Appeal. In the case of **Simon Wachira Nyaga (Supra)** the suit was filed in 1998 and had not been prosecuted for a long time. The appeal was filed in 2006 and was not prosecuted for ten (10) years leading to its dismissal. In the case of Cecilia Wanja Waweru (Supra), the appeal had not been set down for hearing for a period of 14 years. In the case of **George Peter Mutiso (Supra)** the case had not been set down for hearing for a period of four (4) years. The period the cases were not listed for hearing can be distinguished. The appeal herein is less than two years old and the record of appeal was officially filed on 24th October, 2019.

From the Court record, I am satisfied that there has been no deliberate attempt by the appellants to delay the hearing of the appeal. Although all what was remaining was the filing of submissions, at least a counsel has to liaise with his/her client before the submissions are filed. The first appellant avers that he travelled to India and annexed his passport and visa to that effect. Thereafter, he got engaged in the Covid-19 pandemic in Marsabit County.

Considering that the hearing date of 30.6.2020 was given by the Court and taking into account that no hearing notices were issued by the Court, I do find that the court’s discretion can be exercised in favour of the appellants. The appeal was filed in 2019 and the record of appeal was filed on 24.10.2020. The record shows that the proceedings from the Moyale Kadhi’s Court had not been typed. The first time the case came up for hearing was on 19.2.2019. I do find that the delay in prosecuting the appeal can be explained. Some of the adjournments can be attributed to the prevailing Covid -19 pandemic and cannot be visited on any of the parties.

The upshot is the I do find and hold that the application dated 22.7.2020 is merited and is hereby allowed. Costs shall follow the outcome of the main suit. In order to avoid further delays on the appeal I do make the following directions.

- 1. Counsel for the appellant to file and serve his submission within ten (10) days hereof.**
- 2. Counsel for the respondents to file and serve his submission within ten (10) days after service.**
- 3. The trial Court in its judgement directed parties to file valuation reports in two months time. No such reports have been**

filed. I do order that each party files its own valuation report of the estate including all those properties that were sold. The Moyale Court bailiff is hereby instructed to make an inventory of the properties alledged to be located in Ethiopia and have an estimation of their value as well as ascertain their current status, that is whether they are sold or form part of the estate. The matter to be mentioned before the Deputy Registrar, Marsabit within thirty (30) days hereof and thereafter the file to be transmitted to me for judgment writing.

Dated, Signed and delivered at Marsabit this 23rd day of September, 2020

S. CHITEMBWE

JUDGE