REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 156 OF 2006

BENARD K. MAHETHERE ..... APPELLANT

VERSUS

HEZEKIAH K. KINUTHIA ..... RESPONDENT

RULING

1. In his amended Notice of Motion dated 15th July 2019, the appellant, *Bernard K. Mahethere* implores this court to set aside orders made on 16th June 2015 dismissing his appeal for want of prosecution and to reinstate his appeal. The application is premised on grounds set out on its face and averments made in the supporting affidavit sworn by his learned counsel *Mr. Kennedy Mwangi Kinyanjui*.

2. The application is opposed. The respondent filed a replying affidavit sworn on 25th July 2019 and though he averred that he swore the affidavit in response to an application dated 15th July 2019, a holistic reading of the affidavit leaves no doubt that it was sworn in opposition to the application under consideration by this court.

3. When the application came up for hearing, with the consent of the parties, I directed that the same be disposed of by way of written submissions which both parties duly filed and which I have carefully considered.

4. In support of his application, the applicant contended that the delay in prosecuting his appeal was not deliberate and was caused by factors beyond his control. He explained that he instructed the firm of *J.G. Gacheru* to file the appeal but he later withdrew his instructions and appointed the firm of *S.N. Karago* to prosecute the appeal. Unfortunately, *Mr. Karago* died before filing or serving a notice of change of advocates on the firm of *J.G. Gacheru* and after his demise, the firm was closed; that his efforts to find out what became of his appeal bore no fruit until he was informed by a former clerk in the firm of *S.N. Karago* that all files in the firm were transferred to another law firm; that he instructed that other law firm, M/s *Majau Maiteithia & Associates* in which the deponent to the supporting affidavit practices to take up the matter.

5. According to the deponent, on receiving the applicant's instructions, the firm made several inquiries in the court registry and this is when it was discovered that the appeal had been dismissed although the appellant was never served with notice of the intended dismissal; that the delay in filing the application was caused by the disappearance of the court file from the court registry. Counsel further deponed that the applicant is ready and willing to prosecute his appeal and that it was in the interest of justice that he be given an opportunity to do so considering the nature of the dispute that gave rise to the appeal.

6. Relying on the persuasive authority of ***Simon Wachira Nyaga V Patricia Wamwira, Kerugoya CA No. 211 of 2013***, the appellant asserted that his appeal ought to be reinstated because in his view, it had high chances of success considering that he was now the registered owner of Land Parcel No. 454 and not No. 455 which was being claimed by the respondent in the suit filed in the lower court. He also submitted that the dismissal orders were prejudicial and against the rules of natural justice since he was never served with a notice of the intended dismissal of his appeal nor were his advocates on record at the time since their office had been closed down.

7. On his part, the respondent submitted that the appellant was not deserving of the orders sought considering that apart from serving the memorandum of appeal, he did not take any further action to facilitate hearing of the appeal; that the reasons given for the delay in prosecuting the appeal are not satisfactory since he has not disclosed when he learnt of his advocate's demise and what steps he took thereafter to secure his interests; that the delay of nine years is inordinate, unreasonable and greatly prejudicial to the respondent since he has been denied enjoyment of fruits of his judgment.

8. Having considered the application, the affidavits sworn in support and in opposition to the application as well as the parties' rival written submissions, I find that the only issue which crystalizes for my determination is whether the appellant has established sufficient cause to justify the exercise of this court's discretion in his favour by allowing the application as prayed.

9. Upon perusal of the court record, I note that according to the proceedings of 16th June 2015, the appellant's appeal was dismissed under *Order 42 Rule 35 (2)* of the *Civil Procedure Rules* on the premise that he had been served with a notice to show cause why the appeal should

not be dismissed and he had failed to provide a satisfactory response thereto.

10. *Order 42 Rule 35* governs dismissal of appeals for want of prosecution. It states as follows:

> ***"(1) Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.***
>
> ***(2) If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal."***

11. It is clear from the above provisions that the law envisages two scenarios in which appeals can be dismissed for want of prosecution. The first one is where the appellant fails to set down the appeal for hearing within three months after directions for its disposal had been given. In such a case, the respondent can either fix the appeal for hearing or apply for its dismissal.

In the second scenario, the Deputy Registrar can with notice to the parties, place the appeal before the court for dismissal if within one year after service of the memorandum of appeal no action had been taken by the appellant to fix it for hearing.

12. It is evident from the court record that this appeal fell in the second category contemplated in *Order 42 rule 35 (2)* of the *Rules*. A close reading of this rule reveals that for an appeal to be lawfully dismissed under this rule, the court through its Deputy Registrar must give notice to the parties regarding the intended dismissal.

13. The rationale for the above requirement in my view is to accord the parties, particularly the appellant, an opportunity to be heard before the court makes its decision whether or not to dismiss the appeal as proposed because in the event the court decides to dismiss the appeal, the appellant would no doubt be adversely affected. The need to notify the parties is borne out of the fact that unlike in Order 42 *Rule 35 (1)* where the dismissal is initiated by the respondent by way of an application which would naturally be served on the appellant, the dismissal under *Rule 35 (2)* is initiated by the court *suo moto*.

14. In this case, the appellant has denied that he was ever served either directly or through his advocates with a notice to show cause why his appeal should not be dismissed. I have perused the entire court record and I have not come across any evidence to confirm that the appellant was indeed served with the said notice.

15. Though I appreciate the respondent's submissions regarding the prolonged and inordinate delay in the prosecution of the appeal and filing of the instant application and though I am unable to ascertain from the material placed before me whether or not the appeal has any chances of success, I find that in the absence of evidence proving that the appellant was indeed served with a notice of the intended dismissal of his appeal, the orders dismissing his appeal on 16th June 2015 were made contrary to the express provisions of *Order 42 Rule 35 (2)* of the *Rules* and had the effect of throwing the appellant from the seat of justice without giving him an opportunity to be heard. I am persuaded to find that the dismissal orders were made irregularly and may have violated the rules of natural justice.

16. In making the above finding, it is not lost on me that the respondent as the successful party in the trial court has a right to enjoy the fruits of his judgment and a right to have the appeal expeditiously determined but these rights must be weighed against the appellant's right to protection and equal benefit of the law which in this case translates to the right to be heard before his appeal was summarily determined by way of dismissal.

17. Having weighed the competing interests of the parties, I find that if this application is dismissed, the appellant will suffer grave prejudice which cannot be compared to the prejudice the respondent is likely to suffer if the application is allowed. The prejudice the respondent is likely to suffer is a measure of inconvenience and further delay in the finalization of the appeal which can be ameliorated by an award of costs. On the other hand, if the application is dismissed, the door of justice will be shut on the appellant before his appeal is determined on merit or before he is given an opportunity to show cause why the appeal should not be dismissed for want of prosecution.

18. For the foregoing reasons, I find that the dictates of substantive justice requires that I exercise my discretion in favour of the appellant by setting aside the dismissal orders and reinstating his appeal as prayed. I consequently allow the application in terms of prayers 1 and 2.

19. Although the original record of the trial court has not been forwarded to this court, it is apparent from the material placed before me that the dispute giving rise to this appeal relates to ownership of two parcels of land. The appeal was filed in the year 2006 before the promulgation of the Constitution of Kenya 2010 which created two special courts with equal status to the High Court. One of those courts is the Environment and Land Court which is the court with jurisdiction to hear appeals emanating from the Magistrate's Courts on land matters.

20. Since the impugned decision was made by the Chief Magistrate's Court at Thika, I hereby direct that this appeal be transferred to the Environment and Land Court at Thika for hearing and final disposal.

21. Costs follow the event and are at the discretion of the court. Considering the circumstances in which the appeal was dismissed, the order that best commends itself to me on costs is that each party shall bear its own costs of the application.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this 17th day of December 2020.

C. W. GITHUA

JUDGE

In the presence of:

Ms Masai holding brief for Mr. Anzala for the appellant

No appearance for the respondent

Ms Mwinzi: Court Assistant