



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

ENVIRONMENTAL AND LAND APPEAL NO. 303 OF 2013

BENARD MWITI RINTARI.....APPELLANT

VERSUS

ISAIAH MBAABU RUCHIAKA.....RESPONDENT

RULING

1. In the application dated 24.10.2018, Appellant/Applicant is seeking orders granting leave to the firm of M/S Kiogora Mugambi & Co. Advocates to come on record in place of Ayub K. Anampiu & Co. Advocates, and for reinstatement of the suit which was dismissed on 28.6.2018.
2. The grounds in support of the application are that on 28.6.2018 the court gave directions for the parties to file and serve their respective submissions within 30 days, failure to which the appeal would stand dismissed.
3. On 18/9/2018 when this matter was slated for mention, the same was dismissed for non-compliance with directions issued on 28.6.2018. Thereafter, the appellant withdrew the services of his previous advocate Messrs'. Ayub K. Anampiu & Co Advocate as the said advocates had kept him in the dark regarding the courts directions. They also failed to file submissions.
4. The appellant avers that he has a strong and meritorious appeal against the respondent and the respondent shall suffer no prejudice if the suit is reinstated for hearing as the submissions are ready. Appellant further states that he will stand to suffer irreparable loss and damage unless the dismissal order is set aside and the suit is reinstated for hearing.
5. Applicant has also filed a supporting affidavit where he has reiterated the grounds in support of the application.
6. The application is opposed via the replying affidavit of the respondent, who avers that the appeal was in respect of a very old Tigania suit. 47/07, that the appellant has remained aloof about this matter since 2013 when the appeal was filed and that the appellant is merely delaying the matter and is trying to avoid costs in the lower court. He also avers that the advocate for appellant is not properly on record.
7. I have considered the arguments raised herein as well as the rival submissions.
8. On 28.6.2018 the court gave directions on how the suit was to be heard, which entailed the filing of submissions within given timelines, failure to which the appeal was to stand as dismissed. There was no compliance with courts directions and hence the appeal stood as dismissed as at **28.7.2018** (30 days after 28.6.2018).
9. The file was to be dispatched to Hon. Justice Mwangi Njoroge of Kitale ELC on 18.9.2018 for the writing of the judgment. This was however no longer necessary as there was no suit to be determined, the same having been dismissed as at **28.7.2018**.
10. The applicant is essentially blaming his advocate for failure to update him about the case. The orders sought by applicant are discretionary in nature. The court has to look at the circumstances surrounding the entire litigation herein. In particular, the court has had to consider the age of the dispute. The Tigania matter was filed in 2007 but the dispute existed long before the filing of that suit. Litigation has to come to an end at some point.
11. It is common ground that backlog of cases is a menace that has remained a thorn in the flesh of the justice system in Kenya for decades. One of the cardinal principles in our 2010 constitution is **“the expeditious delivery of justice”** – see **Article 159 (2) (b) of the Constitution of Kenya**, in effect codifying the 17th century maxim of **“Justice delayed is justice denied”**. This means that if justice is not provided in a timely manner to the parties, it loses its importance and it violates the human rights of the litigants and their family. That is precisely why rights to speedy trials are incorporated in law worldwide. Thus law and in equity, delayed justice is abhorred.
12. The judiciary being alive to this principle of expeditious delivery of justice **devised** ways of tackling the problem by coming up with the

renewed strategies and techniques which found their place in a blue print known as **SUSTAINING JUDICIARY TRANSFORMATION (SJT)**. Against this background, the judiciary in year 2018 set out to deal with all matters which were more than five years old by the end of that year 2018.

13. Meru ELC being one of the hardest hit stations in the country in terms of case backlog, benefited from a service week programme, where by Hon. Justice Mwangi Njoroge of Kitale ELC participated in this exercise. It is against this background that Judge Njoroge dealt with the matter on 28.6.2018 and gave strict timelines regarding the prosecution of the suit.

14. I have also taken into account the fact that the applicant has dealt with this matter in a rather cavalier manner. Although the appeal was filed in 2013, he doesn't seem to have been active in ensuring that the matter was prosecuted. Throughout, the lifespan of this suit, not even once did the appellant take any step to have the matter prosecuted. It is the court which was taking the initiative of keeping the matter active.

15. In **Alice Mumbi Nganga vs Danson Chenge Nganga & Another (2006) eKLR**, Kimaru J stated thus;

“This court has unfettered discretion to set aside any order which was entered ex parte. This discretion however, has to be exercised judicially. The applicant must satisfy this court that she has good reasons why she failed to attend court when the said application for dismissal was heard and determined in her absence. In the first place, she cannot blame her counsel who was then on record for failing to attend court when the said application was listed for hearing. This court has ruled in several cases that a civil case once filed, is owned by a litigant not his advocate. It behooves the litigant to always follow up his case and check its progress. He cannot come to court and say that he was let down by his advocate when a decision adverse to him is made by the court due to lack of diligence on the part of his advocate. It think it has been ruled by the Court of Appeal that where an advocate fails to prosecute a case to the satisfaction of his client then such a litigant has an option of suit such an advocate for professional negligence. The mistake of counsel will not, per se make this court to exercise its discretion in favour of an aggrieved litigant”.

16. Also see – **Savings and Loans Limited vs Susan Wanjiru Muirtu Nairobi (Milimani) HCCS No.397 of 2002.**

17. In the case of **Peter Kinyari Kihumba vs Gladys Wanjiru Migwi & Another C.A Civil Application No. NAI 121 of 2005 (6/05NYR)** (unreported) **Waki J.A** held that;

“With respect, I think the applicant and his counsel adopted a casual attitude to this litigation and they have no one but themselves to blame if no further indulgence is extended to them. The plea they made is that this is a land matter, but the simple answer is that even in land matters there must be an end to litigation.....”.

18. In the case of **Tana and Athi Rivers Development Authority vs Jeremia Kimigho Mwakio and 3 others (2015) eKLR**, it was stated thus;

“From past decisions of this court, it is without doubt that courts will readily excuse a mistake if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side”.

19. Taking into account, the litigation journey of this case, where a luckluster attitude is manifestly evident on the part of the applicant, I am not inclined to allow the prayer for the reinstatement of the suit. I however allow the new advocate to come on record.

20. Final orders;

- 1) The application is hereby dismissed but Messrs Kiogora Mugambi advocates are deemed as properly on record for the applicant.**
- 2) Applicant is condemned to pay the costs of this application.**
- 3) This suit is marked as closed.**
- 4) The Tigania lower court file no. 47/2007 is to be severed from this file and is to be remitted back to the magistrate's court at Tigania for execution of the judgment.**
- 5) A copy of this ruling is to be extracted and to be placed in the lower court file.**

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 28TH MARCH, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Ndubi holding brief for Kiogora Mugambi for appellant

Appellant

Respondent

HON. LUCY. N. MBUGUA

ELC JUDGE