



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO.170 OF 2018**

**DAVID WARUI MWANGI (Suing as legal representative of the  
estate of RODGERS MWANGI WARUI.....APPELLANT**

**-VERSUS-**

**FRANCISCO NGUGI NGANGA.....1<sup>ST</sup> RESPONDENT**

**STEPHEN WAITHAKA MWANGI.....2<sup>ND</sup> RESPONDENT**

(Being an Appeal from the Judgment delivered by the Honourable R. Amwayi, Resident Magistrate on the 29<sup>th</sup> October, 2014 at Nakuru in CMCC. No.320 of 2010)

**RULING**

1. This is a ruling on the application dated 28<sup>th</sup> March 2019. It seeks to set aside orders of 11<sup>th</sup> February 2019 dismissing the appellants appeal and reinstate it for hearing. It also seeks to stay judgment delivered in Nakuru CMCC No.320 of 2010.
2. Grounds on the face of the application are that the appellant stand to suffer irreparable harm if dismissal order is not set aside and that the respondent will not suffer prejudice beyond the scope of costs if this matter is reinstated.
3. The application is supported by affidavit sworn by **Kevin Ngure** Director of Direct Line Insurance Company Limited who are the insurers of motor vehicle registration number KAY 896Q.
4. He deponed that after entry of judgment the insurance instructed the firm of **Kairu and McCourt** to institute appeal as they were aggrieved with the judgment delivered in Nakuru CMCC No.320 of 2010.
5. He further averred that from information from the lawyer on record the proceedings for the lower court trial took long to be typed despite various follow up occasioning delay in prosecuting the appeal.
6. He attributed further delay in prosecuting appeal to mix up in handing over of the file by Ms. Wanjiru Njuguna Advocate who left the firm resulting to the file remaining unallocated for a while thus file was not reflected in the Advocates internal diary.
7. He averred that mistakes of counsel should not be visited on innocent litigants and that they have always been willing to expedite this appeal. He averred that the application has been brought without inordinate delay and that the appeal has high chances of success.
8. In response, the respondent filed replying affidavit sworn on 23<sup>rd</sup> April 2019. He averred that the applicant is not keen in prosecuting this appeal and that the applicant was granted stay of execution pending appeal on condition that Kshs.633,947.50 in a joint interest earning account in the names of Advocates on record. He further averred that since the year 2014, the appellant has not filed record of appeal and set the matter for hearing.
9. Further that on 26<sup>th</sup> October 2016 the notice to show cause why appeal should not be dismissed was served on the applicant but the appeal was not dismissed due failure to cite the correct provisions of law; that thereafter application dated 1<sup>st</sup> December 2017 for dismissal was filed and notice to show cause dated 10<sup>th</sup> May 2018 which came up on 26<sup>th</sup> June 2018.
10. That upon being given extension of 30 days within which to file appeal, the applicant filed record of appeal on 7<sup>th</sup> August 2018. On 11<sup>th</sup>

December 2018 direction for filing submissions were given by court appellant to file within 30 days and respondent 21 days but despite being served with mention notice has not filed written submissions to date.

11. Respondent refuted averments that Ms. Wanjiru Njuguna has been in conduct of this matter and averred that it is Fredrick Ragui Kariuki who has been on record for the appellant. He added that that the firm of Kairu and McCourt is a big law firm with a branch in Nakuru and there is no justification for failure to attend court.

12. Respondent further averred that, litigation must come to an end and mistake of Advocate should not be allowed to occasion miscarriage of justice.

**ANALYSIS AND DETERMINATION**

13. I have considered arguments herein. I have also perused the court file. I note from record that this matter was listed for dismissal on 26<sup>th</sup> October 2016. Court ordered fresh notice to be issued. No action was taken up to 26<sup>th</sup> June 2018 when the appellant indicated to the court that they were interested in prosecuting the appeal. Appellant was given 30 days to file record of appeal. In application dated 24<sup>th</sup> July 2018 the appellant's Advocate indicated that they had difficulties in tracing the court file to be able to comply with the order requiring them to file record of appeal within 30 days. The Chief Magistrate's registry was blamed for delay in availing the court file. The appellant was granted extension 14 days to file record of appeal.

14. Directions on hearing of the appeal were given on 11<sup>th</sup> December 2018. Appellant was given 30 days and respondent 21 days to file submissions. On 28<sup>th</sup> January 2019, the appellant's Advocate failed to attend court for hearing of the appeal. On 11<sup>th</sup> February 2019 the appeal was dismissed for want of prosecution.

15. From record it is evident that before 11<sup>th</sup> December 2018, the appellant was unable to prosecute the appeal due to factors beyond their control. As observed by Justice Ngugi the court file was not forwarded to High Court Registry until 23<sup>rd</sup> March 2017 despite court orders and several letters from the appellant. Delay during that period is explained. However between now and December reasons for failing to file submissions as directed have not been given.

16. After the long delay in following up court file, the appellant should have moved fast thereafter to ensure that the appeal is heard and determined.

17. Upon considering all issues raised here and perusing court record, I am however inclined to giving to the appellant a last opportunity to file submissions. The appeal herein is reinstated on condition upon compliance with the following conditions:-

1. The appellant to pay respondent thrown away costs of kshs 20,000 within 14 days from the date of this ruling
2. The defendant to file written submissions within 14 days from the date of this ruling
3. Failure to comply with any one of the above conditions, the appeal to stand dismissed.

**Ruling Dated, signed and delivered at Nakuru this 30<sup>th</sup> day of May, 2019.**

.....

**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF:-**

Schola/Jared Court Assistant

M/s Ayuma Counsel for Appellant

Ms. Wangari Counsel for Respondent