



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 95 OF 2016

HEZEKIA NDUNGU THUKU.....1ST APPELLANT/APPLICANT

ISAAC MACHARIA GATHU.....2ND APPELLANT/APPLICANT

MARY NDUTA PETER.....3RD APPELLANT/APPLICANT

VERSUS

DM (a Minor suing through his

Mother and Friend (RNW).....RESPONDENT

RULING

1. The Appellant/ Applicants' appeal stood automatically dismissed on 5th April, 2018 as a consequence of the Applicants' failure to comply with the of orders of Ngugi J of 5th March 2018, to file the record of appeal in 30 days. On 8th June,2018, the Applicants filed the motion which is the subject of this ruling. The live prayers therein seek that the appeal be and is hereby reinstated and that court be pleased to review and set aside the terms and conditions of the directions/order of Ngugi J, and to effectively to enlarge time so that record of appeal now filed, is deemed as duly filed.

2. **DANIEL MUTHEE** filed the affidavit in support of the application. He deposed that he is the Advocate with the conduct of this matter on behalf of the Appellant/Applicants. That the Appellants were unable to file their record of appeal within the period of 30 days as directed because the lower court file went missing, making it impossible to obtain typed and certified copies of proceedings from the lower court, hence the delay was inadvertent and excusable. He stated that if the orders sought are denied, the Appellants stand to suffer irreparably.

3. The Respondent filed his Grounds of Opposition on 19th September, 2018. He contended that the application is frivolous, bad in law and an abuse of the court process; that the Applicants had been given and wasted several opportunities to file their record of appeal; that litigation must come to an end and in any case, the Appellants have not annexed any evidence to back up their allegations that the lower court file was missing, and as such, the application should be dismissed.

4. The application was canvassed by way of written submissions. The Applicants reiterated their depositions. Counsel submitted that the present application has been made without undue delay and that the Respondent has not demonstrated any likely prejudice he might suffer. The case of **Kasturi Limited vs Nyeri Wholesalers Limited (2014) eKLR** was cited to urge the proposition that in reinstating a dismissed appeal, the court grants to all the parties a chance to be heard, and substantive justice administered. It was further contended that the Applicants have demonstrated sufficient and plausible reasons that warrant a review of the court orders. Counsel cited the case of **Elem Investment Ltd vs John Mokora Otwoma (2015) eKLR** where it was stated that in exercising discretion, the court ought to weigh the prejudice that is likely to be suffered by the innocent party as against the prejudice to be suffered by the offending party. In conclusion, the Applicants asserted that they have not been indolent in prosecuting the appeal and are entitled to the right have their appeal heard and determined on merit.

5. The Respondent's counsel placed reliance on rely on the grounds of opposition. In addition, counsel stated that the application is an abuse of the court process; that the Applicants are out to deny the Respondent the enjoyment of the fruits of his judgment and that there should be an end to litigation. Counsel relied on the cases of **Beatrice Munene vs Molly Wangui Gitahi Machakos HCCA NO. 249 OF 2013 and Musyoki Chris & another vs Charles Kaloki Maingi & another Machakos HCCA NO. 243 OF 2014** as to the consequences of disobedience of court orders.

6. The court has considered the matters canvassed. This appeal was first filed in the High Court at Murang'a in 2015. No action was taken to perfect the appeal, and the court on its own motion issued due notices to the parties. On two occasions, between July,2017 and March 2018, the court granted time to the Applicants to file the record of appeal, on the last occasion attaching a default clause. The Applicants did not comply and two months after the appeal had expired by default, the Applicants brought this application. As the Respondents rightly point

out, there is no evidence to support claims by the Applicant that the failure to comply was occasioned by the fact of the lower court filed being misplaced or lost. Not even a certificate of delay or letter from the registry concerned is proffered. Notably, all the Applicants' letters annexed to the supporting affidavit were written by themselves between February and April, 2018- three years since the filing of the appeal.

7. The orders sought by the Applicants are discretionary in nature. Essentially, the Applicants desire to have the appeal reinstated and record of appeal deemed as properly filed. Yet, they have not explained to the satisfaction of the Court their failure to comply with previous orders of the court in that regard.

8. While the discretion of the court is unfettered, an Applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court's discretion in his favor.

9. The Supreme Court in the case of **Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others [2014] e KLR** enunciated the principles applicable in an application for leave to appeal out of time. The Court state inter alia that:

“(T)he underlying principles a court should consider in exercise of such discretion include;

- 1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;**
- 2. A party who seeks for extension of time has the burn of laying a basis to the satisfaction of the court;**
- 3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case to case basis;**
- 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;**
- 5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;**
- 6. Whether the application has been brought without undue delay.**
- 7.”**

See also **County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] e KLR**.

10. In this case the Applicants have not explained their tardiness and delay sufficiently or laid a basis to the court's satisfaction. This appeal has been outstanding for close to four years. The lower court suit giving rise to the appeal was filed in 2008. Delay certainly prejudices the Respondent who continues to incur costs in defending the appeal. At a time when courts are choking with increasing and complex litigation, they cannot afford to condone the conduct of parties such as the present Applicants, who appear to prosecute their cases at leisure, thereby further clogging the system of administration of justice. The Applicants' asserted right to a hearing is not absolute or unlimited; all parties deserve to have their cases heard without undue delay. This court is not satisfied that the Appellant/Applicants are deserving of the orders sought. The application is dismissed with costs to the Respondent.

DELIVERED AND SIGNED AT KIAMBU THIS 20TH DAY OF DECEMBER 2019

C.MEOLI

JUDGE

In the presence of:

Mr. Muthee for Applicant.

Respondent non-appearance.