



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**CIVIL APPEAL NO. 211 OF 2013**

**SIMON WACHIRA NYAGA.....APPELLANT**

**-VERSUS-**

**PATRICIA WAMWIRWA.....RESPONDENT**

**RULING**

1. The matter pending before Court is the application dated 15<sup>th</sup> April, 2016 filed by **Simon Wachira Nyaga** seeking for orders that the Court be pleased to set aside its ruling dated 20<sup>th</sup> April, 2015 and to reinstate the appeal for hearing. The application is based on the fact that the application for dismissal of the appellant's appeal was heard ex-parte and the appellant was a lay person who did not know the effect of failing to attend court. That on the hearing of the application for dismissal of appeal for want of prosecution, the file had been placed aside until 11.00 a.m. since his advocate was in Baricho. But when the Court resumed at 12.30 p.m, his advocate had not arrived and the application was allowed. That his appeal has an overwhelming chance of success if allowed to prosecute the same and he has all along been interested in prosecuting his appeal.

2. In response the respondent filed replying affidavit dated 15<sup>th</sup> December, 2016 stating that the time to appeal had already lapsed and the land has been sub-divided and each party has their own title deed. The issue which arises is;

**Reinstating an appeal dismissed for want of prosecution**

The applicant seeks to set aside the ruling of the Court which was given when the Court was moved by the respondent, to strike out the appeal which was challenging the finding of the Court in Kerugoya Succession Cause No. 80 of 1998.

3. For a court to reinstate or refuse to reinstate is an exercise of discretion. The discretion must be exercised fairly and judicially. It must be based on a good reason and not on mere allegations.

4. I have looked at the ruling of my brother Justice Limo dated 20<sup>th</sup> April, 2015. The Judge considered the merits of the appeal and found that, "I do find as a matter of fact and law the appeal filed herein really was unlikely to see the light of day. The appellant's main ground of appeal is that because he is the only male child to the deceased he should get more share than the two sisters who according to him should get less merely because they are female and married. This view not only flies in the face of the Law of Succession, Section 38 but the Constitution Article 27 which outlaws discrimination of whatever nature. Further the overriding objective of the Civil Procedure Act as provided under Section 1A and 1B thereof mandates this Court to ensure that the interpretation of the rules made under the Civil Procedure Rules are construed to achieve the objectives of the Act which includes inter alia:-

(1) Expeditious resolution of disputes.

(2) Timely disposal of proceedings before Court."

5. To ask the Court to reinstate the appeal for hearing in view of the strong worded reasons given by the Judge is to ask this Court to sit on its own appeal and is an abuse of the Court. The applicant did not file an appeal against the ruling of the Judge. There is no good reason for this Court to exercise discretion in favour of the Applicant. By bringing this appeal he is trying to find ways to achieve his scheme to discriminate the respondents.

6. In the case of Cecilia Wanja Waweru V Jackson Wainaina Muiruri & another [2014] eKLR the Court of Appeal in holding the view that reinstating the appeal in the High Court would amount to an abuse of the court process and injustice, stated:-

***"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 filing 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.***

This is a very old matter, the suit was filed in 1998 and the appeal herein was filed in 2006 but the same was yet to be prosecuted almost 10 years later. On 20<sup>th</sup> June, 2014, the deputy registrar issued notice to show cause why the appeal should not be dismissed for want of prosecution whereupon the appellant fixed the appeal for directions on 25<sup>th</sup> September, 2014 and 4<sup>th</sup> November, 2014. There was inordinate delay which the appellant has not explained satisfactorily. Even the threat of having his appeal being dismissed did not jolt him into speedy action.

Equity helps the vigilant but not the indolent. The law encourages a speedy resolution for every dispute. A court of equity has always refused its aid to stale demands, where a party has slept on his right and acquiesced for a great length of time. The appellant slept on his rights even after being offered a warning by the Court.

7. In view of the finding by Justice Limo in the ruling which I have quoted above, the appeal has no chances of success. It would be an exercise in futility to reinstate the appeal. The ruling was not made in vain. It warned the appellant that even the appeal he has filed is not going anywhere. It is a waste of precious judicial time to ask the same Court to reinstate. I find that the Court should not in the circumstances exercise its discretion to reinstate the appeal. The application is without merits and is dismissed with costs.

***Dated and delivered at Kerugoya this 25<sup>th</sup> day of January, 2018.***

**L. W. GITARI**

**JUDGE**

Ruling read out in open Court, Mr. Maina Kagio adv. holding brief for Nduku adv. for Appellant. Respondent – absent. Court assistant Naomi Murage this 25<sup>th</sup> day of January, 2018.

**L. W. GITARI**

**JUDGE**

**25.01.2018**