



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 58 OF 2015**

**PETER NYARAMBA NYABATE.....1<sup>ST</sup> APPELLANT/APPLICANT**

**RIFTVALLEY BAKERY LIMITED.....2<sup>ND</sup> APPELLANT/APPLICANT**

**-VERSUS-**

**NANCY WAKONYO GATHERU.....1<sup>ST</sup> RESPONDENT**

**DANIEL SAITOTI.....2<sup>ND</sup> RESPONDENT**

**PETER GACHOIRU GICHANGA.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The background to the application by the Appellant filed on 20<sup>th</sup> July, 2017 is as follows. The Applicants filed their appeal in Nakuru in 2006. On 26<sup>th</sup> May, 2016 the matter was transferred to this court and registered as HCCA 58 of 2016. The record of appeal had been filed some seven (7) years earlier and directions given on 18<sup>th</sup> February, 2010.
2. The appeal was not heard on several occasions for reasons *inter alia*, that some of the Respondents had not been served with the hearing notice. No steps were taken by the Appellants to set the matter down for hearing pursuant to the transfer. The Respondents' advocate Mr. Waigwa Ngunjiri eventually took a mention date for directions which were given on 21<sup>st</sup> February, 2017. This court set down the appeal for hearing by oral submissions on 22<sup>nd</sup> March, 2017. The Appellants were absent, and this court, reviewing the history dismissed the appeal with costs.
3. The Respondents had the bill of costs set down for taxation by the Deputy Registrar on 20<sup>th</sup> July, 2017. It would appear that the Appellants swung into action upon being served with the hearing notice in respect of taxation, on 12<sup>th</sup> June, 2017. On the day set for taxation, the Appellants filed the Notice of Motion that is the subject of this ruling, seeking *inter alia* to stay the taxation proceedings.
4. By the time the file was placed before the court, the Deputy Registrar had already taxed the bill of costs, again in the absence of the Appellants despite notice. Thus prayer 2 of the Notice of Motion has been overtaken by events.
5. The live prayers are number 3 and 4 seeking:-

**“3. THAT the honourable court be pleased to set aside the ex-parte proceedings of 22<sup>nd</sup> March, 2017 and all the consequential orders and stay all proceedings arising therefrom.**

**4. THAT this honourable court be pleased to set aside its orders of 22<sup>nd</sup> March, 2017 dismissing the appeal herein and reinstate the appeal herein and allow the Appellants to ventilate the appeal in such manner as is expedient in the interests of justice.”**

6. The gist of the affidavit supporting the application, and sworn by **Chek T. Geno**, the advocate for the Appellants, is that his firm, Messrs Murimi, Ndumia, Mbogo & Muchela Advocates were not on record by the date of the proceedings leading to the dismissal of the appeal on 22<sup>nd</sup> March, 2017. That the said advocates only took over the matter and filed the requisite notice of change of advocate on 26<sup>th</sup> April, 2017.

7. Thus the notice served earlier upon the said firm had been received under protest. That the Appellants will suffer prejudice yet they have always been desirous of prosecuting the appeal, and are therefore willing to pay throw away costs, and to prosecute the appeal expeditiously. They therefore urged the court through oral submissions on 22<sup>nd</sup> November, 2017 to reinstate the appeal, attributing admitted previous delay to the predecessor firm of advocates, and not the clients who stand to suffer prejudice if the application fails.

8. The Respondents through **Waigwa Ngunjiri** filed a Replying affidavit in opposition to the application, citing the unexplained failure by the Applicants’ advocate to attend court despite notice. Further that **Mr. Geno** who swore the supporting affidavit was always seized of the matter. According to counsel, for 10 years the Appellants failed to take steps in prosecuting the appeal, and that besides, the appeal being in respect of a consent judgment has no merit.

9. In oral submissions, Mr. Waigwa Ngunjiri reiterated that the Applicants have not explained their failure to attend the hearing of the appeal. And that the appeal had delayed for an inordinate period of time. The Respondents’ view is that the Appellants have sprang into action upon the commencement of execution proceedings for recovery of costs.

10. In a brief reply, Mr. Geno stated that events prior to the dismissal were outside the firm’s control and that the transfer order in Nakuru also came prior to their taking up the matter.

11. The court has considered the affidavits on record and the arguments made in respect of the Appellants’ application, expressed to be brought under Order 51 Rule 1 and Order 10 Rule 11 of the Civil Procedure Rules. For the avoidance of doubt, the appeal was dismissed for non-attendance by the Appellants under Order 42 Rule 20(1) of the Civil Procedure Rules.

12. Thus the present application ought to have been brought under Order 42 Rule 21 of the Civil Procedure Rules which states:-

**“Where an appeal is dismissed under Rule 20, the Appellant may apply to the court to which such appeal is preferred for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing, the court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.”** (Emphasis added)

13. As I understand it, the key plank upon which the Appellants’ advocates stake the present application is that they were not on record, or seized of this matter at the material date, not having come on record. Further, that the notice of change of advocate was filed by them on 26<sup>th</sup> April, 2017. There is also reference made to the fact that the transfer of the matter to this court from the High Court at Nakuru was made prior to their coming on record.

14. Indeed, while perusing the record I have noted a notice of change of advocate which is dated 18<sup>th</sup> April, 2017 and filed on 26<sup>th</sup> April, 2017. The Respondent disputes the Appellants advocates’ version asserting that they have always been on record hence service of process upon them. This statement is borne out by the record. On 13<sup>th</sup> March, 2015 the current firm of advocates, Murimi, Ndumia, Mbago &

Muchela filed a notice of change of advocates, dated 4<sup>th</sup> March, 2015. By this notice, the said firm was taking over the appeal from the firm of Mukite Musangi & Co. Advocates.

15. Thus, the firm of Murimi, Ndumia, Mbago & Muchela Advocates was served with the mention and hearing notices in respect of the matter before the High Court at Naivasha. On the face of the latter hearing notice filed into court on 22<sup>nd</sup> March, 2017, is a note purporting that the notice was received under protest because the transfer of the suit was undertaken without the participation of the Appellants' advocates, that the notice was too short and that the said firm was not on record. The Appellants' advocates have in the present application emphasized what is obviously incorrect – that they only came on record in April, 2017. The record confirms that they have been on record since 13<sup>th</sup> March, 2015, the date of the initial notice of change of advocates. The second notice merely introduces confusion.

16. Appellants who have allowed their appeal to lie dormant for 10 years cannot be described as desirous of prosecuting the same. Much less, their advocates non-attendance on 22<sup>nd</sup> March, 2017 deemed inadvertent, when the same advocates failed to attend the mention notice earlier or even the taxation before the Deputy Registrar, despite notice.

17. The court cannot exercise its discretion in favour of a party who peddles obvious untruths. It is significant that the Appellants did not file any affidavits in the matter to explain the alleged delayed instructions to their advocates. The appeal, after all, belongs to the Appellants and not their advocates, present or past.

18. For an application brought under Order 42 Rule 20 of the Civil Procedure Rules to succeed, the Applicant must prove he was prevented by sufficient cause from appearing on the hearing date. I agree with the Respondents' counsel that in the present case, no sufficient cause to prevent attendance has been demonstrated. The Appellants' advocates and their clients left the appeal lying unprosecuted for ten years, and when invited to the hearing failed to attend. The reasons given are not factual as the record has demonstrated.

19. Besides, the Appellants themselves have not shown by affidavit any interest in pursuing their appeal. The application by the Appellants has no merit, runs counter to the overriding objective principle in Section 1A and 1B of the Civil Procedure Act, and must fail. The application is dismissed with costs.

**Delivered and signed at Naivasha on this 16<sup>th</sup> day of March, 2018.**

In the presence of:-

N/A or the Appellants

Mr. Waigwa Ngunjiri for the Respondents

Court Clerk - Quinter Ogutu

**C. MEOLI**

**JUDGE**