REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 133 OF 2014

CHARLES GITHINJI MUIGWA.....APPELLANT

VERSUS

CHARLES KIIRU KARANJA.....RESPONDENT

R U L I N G

1. The Respondent, as a judgment-creditor in the judgment dated and delivered on 19/8/2014 has applied that the appeal be dismissed for want of prosecution. The reasons for that application are that having been granted leave to file an appeal out of time on the 19/2/2016, he was directed to file a Record of Appeal and written submissions within 30 days from 19/2/2016 but had not done so by the 12/4/2018 thus showing a delay of some two years the Respondent considers inordinate, inexcusable and prejudicial to the Respondent who has been kept away from the property in the decree because the property held as security continues to get eroded in value by application of interests.

2. The application was opposed by the Appellant who filed the Affidavit sworn by counsel Mr. William D. Wameyo. The totality of that affidavit is that even though the Record of Appeal was filed outside the time set by the court, the delay in having the proceedings typed and certified by the court as evidenced by record of requests and complaints to court. The counsel blamed the delay to have been partly caused by the fact that the Respondent appealed against the decision of the court in extending time and deeming the appeal duly filed as the lower court file and this file were forwarded to the court of appeal for purposes of that appeal being heard. Due to delay, a record of appeal was ultimately filed on the 7/5/2018 but evidently with incomplete proceedings, with gaps, not certified and some in handwritten form. The appellant then contends that it is prepared to urge the appeal even with the incomplete proceedings provided the Respondent and the court are equally prepared but is equally ready to file a supplementary Record of Appeal is granted leave.

Submissions by the parties

3. In his oral submissions Mr. Kongere relied on the list of authorities filed and pointed out that the date the appeal was deemed admitted is a critical date for purposes of Rule 35 Order 42 which provides:-

> **"The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross-appeal".**

4. Based on that provision counsel submitted that the obligation upon an applicant is merely to demonstrate that there had been inordinate delay in prosecuting the appeal. He point out that despite the order and directions by the court that the record be filed by March 2016, none was filed till May 2018 some 24 months later which to him was inordinate and inexecusable. He cited to court the decision in **Joseph Nguka vs Wilson Mwangi Ngana [2015] eKLR** for the proposition that where a party elects not to go by the directives of the court, it ought to seek a variation of the directions.

5. The decision in **Stephen Gatthua Kimani vs Nancy Waiyira Waruingi [2016] eKLR** was cited for the submissions that even a delay of one year is inordinate. The counsel did appreciate that to dismiss an appeal for want of prosecution invites the courts judicial discretion to be exercised judiciously and therefore cited to court ***Njoki Gachungu vs Francis Githii [1977] eKLR*** for the proposition that disobedience to court orders is one reason to exercise the discretion against the person in disobedience.

6. On the opposition by Appellant that the delay was caused by lack of proceedings, counsel submitted that could only be valid had the appellant approached the court for extension of time.

7. On Rule 13 Order 42, counsel pointed out that there are a number of things that must not be present in a record before an appeal can proceed to trial including proceedings. He however did not take a position whether the record filed satisfies the dictates of Rule 13 Order 42.

8. On the explanation for delay and efforts by the appellant to get proceedings prepared by the court, the counsel said that only 3 of the annextures in the Replying Affidavit were relevant to the issue at hand but hastened to point out that the three letters were written in December 2017. To counsel by that time the delay had become inordinate and inexcusable and further that the laxity and lethargy was done in the comfort of keeping away the Respondents from the fruits of its litigation.

9. On prejudice counsel submitted that as at 1/2/2018 the judgment sum, when interest is applied, stood at Kshs.5,308,000/= which went beyond the value of the security the court considered in granting stay. Reliance was put in the decision in ***Samuel Ondieki vs Samuel Ogeto[2006] eKLR*** for the position of the law that the right to access the fruits of litigation is as hallowed as the right to access justice itself.

10. For the Appellant, as a respondent in the application, Mr. Wameyo offered submissions in opposition to the application and kicked off that task by pointing out what he considered undisputed facts. To him the undisputed and undisputable facts are that the handwritten proceedings are illegible; there was an order to file Record of Appeal within 30 days; Order 42 Rule 11 & 12 were dispensed with, an appeal was filed against the decision extending time and that court of appeal has determined it. Based on those facts counsel urged the court to consider the explanation for delay and now compliance with the direction of 19/2/2016 became unachievable.

11. He made reference to Rule 13 Order 42 which mandates that a record of appeal contains the proceedings of the trial in order that the appellate court carries out its mandate as a first appellate court expected to proceed by way of a retrial. He underscored the fact that the proceedings they could lay hands upon were typed but not certified todate hence there was nothing the appellant could do to comply with the court orders. To him the record filed is of very little use to the court and the parties for purposes of the appeal being heard and determined.

12. On the decisions cited, counsel said the decision in Nguku's case is of no relevance while that of Stephen Gathua says explanation for delay affords excused for the delay. On prejudice and the value of the security held being eroded he said the comments were made from the bar and that lastly the decision in Samuel Ondiekis' case was of no assistance to court.

Analysis and determination

13. In considering an application to dismiss an appeal or a suit for want of prosecution, the court merely revisits and takes into account the time honoured principles that justice delayed is justice denied and that ultimately the purpose and only goal of the court system is to resolved dispute between the parties in a fair just and proportionate manner. Those to me are the foundation of even the later day values like the overriding objectives of the court and the rules intended to further expeditious disposal of court business.

14. That, delay defeats justice in indictable but there must be justice at the forefront before one can talk of expeditious disposal. I do take it that the values sought to be met by them the provisions dictating expeditous disposal of the business of the court do not by themselves, on their plain meaning, say that promptitude must overshadow the need to hear and determine the dispute on the merits. That to me would be to put the cart before the horse. Promptitude only fair. Promptitude cannot substitute the need for fairness and just resolution of disputes.

15. That is what I understand to be the rationale of the rules which allows matters to be dismissed before hearing on the merits. The default must be such as to visit prejudice that goes counter the notions of just determination of the dispute. ***Sachdeva J in Njoki Gachungu's case [supra]*** aptly capture the spirit of the law when he said:-

> **"The question of delays in bringing civil actions to speedy conclusion was exhaustively considered by the Court of Appeal in England in Allen vs Sir Alfred McAlpine & Sons [1968] 1 All ER 543 where it was held that when the delay is prolonged and inexcusable, and is such as to do grave injustice to the one side or the other or to both, the Court may in its discretion dismiss the action straightway. On the other hand this power should be exercised unless the Court is satisfied: (1) that the default has been intentional and contumelious eg disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party".**

16. Put in the context of the matter at hand, can it be said that the delay to file the Record was intentional and willful and calculated to defeat and prejudice the Respondent in fair and just disposal of the appeal? I do not think so.

17. The default, I am prepared to hold was wholy beyond the control of the appellant. It cannot be denied that the preparation of proceedings and the certificate thereof is the sole responsibility of the court. I have perused the record filed and to my mind it does not quality as a record that the court can rely on to achieve its mandate of re-appraising, re-evaluating and re-examining the entire record to come to our conclusions. If that be the case, and noting that the court has not met its obligation to the appellant to avail proceedings, then no justice would have been availed to the parties by terminating this appeal at this juncture.

18. In any event, this court proceeds for the standpoint that mistakes even blunders are to human beings in all sphares of human engagements and merely that a mistake has occurred should not be the only reason for the mistaken to be condemned and banished.

19. In his usual flair of the English language Madam JA in MURAI VS WAINAINA said of how the court proceeds:

> **"A mistake is a mistake. It is not a less mistake because it is an unfortunate slip. It is not less pardonable because it is committed by a senior counsel the court might fee compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought certainty to do whatever is necessary to rectify it if the interests of justice so dictate".**

20. Another Court of Appeal Judge, Apaloo JA in ***Phillip Chemunto vs Augustine Kibende*** shared the same philosophy and said:-

> **"Blunders will continue to be made from time to time and it doesn't follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merits. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court is often said to exist from the purpose of deciding the rights of the parties not for purpose of imposing discipline".**
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> ***Apaloo JA, in Philip Chemuolo & another vs Augustine Kubenbe (1982-1988) KAR 103***

21. In ***Shabbin Keah vs Patrick Omondi [2016] eKLR*** this court said:-

> **"It is a general principle of law that before a court deliveries itself on the merits of the dispute, it reserves the right to undue any act done courtesy of a default"**.

22. In this file there is a default by appellant to comply with directions of the court. The explanation given by the appellant is plausible and understandable. I am convinced that no justice would be served by dismissing the appeal just now. I decline the application but deem it desirable that orders be made as to enable the matter be heard on the merits. I therefore direct that the Deputy Registrar of this court, calls for, avails the trial court file and causes the proceedings to be typed and certified within 45 days for today.

23. This matter shall be mentioned on 17/12/2018 to confirm the status of the proceedings 17/12/2018.

24. On costs I consider that even though the Respondent/Applicant has failed in his application, the aim was to assist the court meet is mandate and overriding objectives. For that reason, I will not burden him with the costs of the dismissed application and direct that each party shall bear own costs.

Dated and delivered at Mombasa this 29th day of October 2018.

P.J.O. OTIENO

JUDGE