



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 93 OF 2013**

**PETER KINGECHA NYOTA .....1<sup>ST</sup> APPELLANT/APPLICANT**

**WILSON MAINA.....2<sup>ND</sup> APPELLANT/APPLICANT**

**VERSUS**

**LUCY WANGUI (Suing as the legal representative of the Estate of**

**EPHRAIM WANJOHI WAIRIMU.....RESPONDENT**

**RULING**

1. The application is by way of Notice of Motion and is dated the 17<sup>th</sup> November, 2017 and is brought under the provisions of Sections 1A, 1B, 3A and 95 of the Civil Procedure Act and Order 45 Rule 1 Order 42 Rule 6 Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules. The applicant seeks the following orders;

(i) Spent;

(ii) That this appeal being Nyeri HCCA No.93 of 2013 Peter Kingecha & Another vs Lucy Wangui be and is hereby reinstated for hearing and determination in the normal way;

(iii) That this Honorable Court be pleased to review and set aside the terms and conditions of the ruling/order of Hon.Lady Justice A. Mshila to the extent that time of fixing this Appeal for hearing is extended by a further 21 days;

(iv) That this Honorable Court do make any such further Order(s) and issue any other relief it may deem just to grant in the interest of justice;

(v) Costs of this application be in the cause.

2. The applicants place reliance on the grounds on the face of the application and on the Supporting Affidavit dated the 17<sup>th</sup> November, 2017 and made by learned counsel for the applicants **DANIEL MUTHEE** who deponed that he was an advocate of the High Court of Kenya and is conversant with the facts and is duly authorized to make the affidavit.

3. A summary of the applicants submissions; that the respondent applied for the dismissal of the appellant's appeal and a ruling was delivered on the 28/09/2017 in which the appellants were directed to list the Appeal for hearing within 30 days from the date of the ruling; the ruling was delivered in the absence of the appellants; counsel averred that the advocate seized with the matter failed to attend court on the material day and also failed to convey the correct information on the outcome; therefore the appellants advocates were not aware of the orders made and the directions and timelines given; thereafter the appellants were unable to trace the court file within which time for fixing a date as directed had lapsed;

4. The appellants counsel submitted that unless the Appeal is reinstated and the period within which to fix the appeal for hearing is extended the appellants stand to suffer irreparable loss and damage as their appeal is on quantum against an award in the sum of Kshs.4,500,000/-; and the appeal would be rendered nugatory;

5. That the application was made without inordinate delay; that it would not occasion prejudice to the respondent; and that it ought to be allowed in the interest of justice otherwise the appellants would lose their constitutional right to be heard;

6. An order for the review is now being sought of the order made by this Honorable Court on the 28/09/2017 enlarging the time for fixing of the date for hearing of the appeal; and the appellants were willing to shoulder the costs;

7. In response counsel for respondent opposed the application and relied on the grounds of opposition; counsel submitted that the application was vexatious and brought in bad faith and was also an abuse of due process; that it was calculated to delaying and denying the respondent the fruits of her judgment; the applicants failed to comply with the timelines and the law does not aid the indolent;
8. The excuses given by the applicants for failure to attend on the 28/09/2017 when the timelines were set and for failure to prosecute the appeal are exactly the same; and it is apparent that the appellants are not interested in prosecuting this appeal;
9. When the ruling was delivered the counsel for the applicant was not in court; counsel for the respondent herein arrived late and upon perusal of the court file appraised herself of the orders made; that this Honorable Court was lenient and did not dismiss the appeal for want of prosecution but gave timelines; after the expiry of 30 days upon visiting the Registry and perusing the file it was noted that the appellants had taken no action; and therefore the appeal stood as having been dismissed;
10. The respondent applied to have the file taken back to Karatina so as to institute execution proceedings; the appellants awoke from their slumber when served with the execution proceedings; counsel reiterated that the court should not aid the indolent;
11. That fairness be applied and the respondent be allowed to enjoy the fruits of her judgment; the proposal to release some of the decretal sum held in a Fixed Deposit Account was never honored;
12. There was malice and bad faith in the application and the same should be dismissed with costs to the respondent;

### **ISSUES FOR DETERMINATION**

13. After taking into consideration the presentations of both parties this court finds only one issue for determination;

(i) Whether to review the order of 28/09/2017;

### **ANALYSIS**

14. The provisions for review of an order or decree of the court are set out in Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Code; the rules provide that there must be discovery of new and important material or evidence, which, after the exercise of due diligence, was not within the knowledge or could not be obtained and produced at the time the order was made; or that there must be a mistake or error apparent on the face of the record; or for any other sufficient reason.
15. Having perused the court record this court notes and sets out the chronology of events; the directions were given on the 28/09/2017; the appellant's then filed an application for enlargement of time under a Certificate of Urgency and on the 27/11/2017 the matter was certified as urgent and it was fixed for inter-partes hearing on the 5/12/2017; on the 5/12/2017 only the respondent was present when the matter was called out; the respondent urged the court to dismiss the application as the applicants were absent and thus there was no one to prosecute the application; the application was duly dismissed for non-attendance;
16. On the 10/01/2018 the applicants approached the court with another urgent application which was certified as urgent and an inter-partes mention date given on the 5/02/2018; on that date the parties entered into a consent that the application of 5/12/2017 be allowed provided the applicants paid the respondent thrown away costs of Kshs.15,000/-; and that the application dated 17/11/2017 be fixed for hearing within 30 days from 5/02/2018; and on the 12/02/2018 the applicants fixed the date for the hearing of the application dated 17/11/2017; which is found to be within the time limit given;
17. The applicants were granted timelines within which to have their appeal listed for hearing but failed to adhere to the timelines given; counsel for the appellants' states in his submissions that there are sufficient reasons that entitle the appellants for an order of review; one being the mistake by counsel should not be visited upon a litigant; and counsel readily admits that the advocate sent to attend court failed to do so and further misinformed the firm that the ruling had been deferred;
18. It has been submitted that the firm later discovered that the ruling had in fact been delivered and directions and timelines set; and this was not within their knowledge; despite exercising due diligence they were unable to trace the court file;
19. The key principle that this court will take into consideration herein when making the order for review is the justice principle; the applicants by themselves cannot be found guilty or held to blame for their advocates non-attendance and misconduct;
20. On the principle of timeliness, this court notes that this application was fixed for hearing within the timelines as directed by the court; the applicant is not guilty of laches and the application is therefore found to be properly before the court; this court is satisfied that the application was listed for hearing within the timelines as directed by the court;
21. Though this court is not blind to the fact that the respondent has been greatly inconvenienced by the numerous applications made by the appellants the fact still remains that the applicants have filed their Record of Appeal and denying them an opportunity to prosecute it to its logical conclusion due to the mistakes of counsel being visited on them would indeed occasion real injustice and would be a great miscarriage of the law;
22. For the above reasons this court is satisfied that the applicants have tendered sufficient reasons for the review of the order of this court made on the 28/09/2017 to have the timelines set out by this court, enlarged; and finds that the application qualifies for the orders sought of review.

23. The above notwithstanding the appellants are also reminded that the appeal was filed in 2013 and to date the main appeal has never been set down for hearing; that public interest requires that in pursuit of justice there is need to have conclusiveness to litigation; so this is the final time that this court will allow the enlargement of timelines herein; and in allowing the application for enlargement and stay of the execution proceedings, stringent terms will be set and failure to adhere to the same will lead to the automatic dismissal of the appeal;

#### **FINDINGS AND DETERMINATION**

24. This court finds that the applicant has satisfied the salient requirements for an order for review to enable this court grant the order sought; the application is hereby allowed;

25. The appeal is hereby admitted for hearing; and the time for fixing a date for the hearing and determination of the appeal is hereby enlarged for fourteen (14) days from the date hereof; the extension of the order for stay of execution proceedings is pegged on the partial release of the decretal sum of Kshs.750,000/- to the respondent within fourteen (14) days from the date hereof; in default the appeal shall stand as having been dismissed and all the orders granted for stay of execution and proceedings thereto shall stand vacated;

26. The appellants' advocates shall personally bear the costs of this application.

It is so Ordered.

**Dated, Signed and Delivered at Nyeri this 25<sup>th</sup> day of October, 2018.**

**HON.A. MSHILA**

**JUDGE**