



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 365 OF 2012

STEPHEN MBURU KIMANI 1ST APPELLANT

MATHEKA FAULINER 2ND APPELLANT

VERSUS

EVERLINE NJOKI MUCHOKI RESPONDENT

RULING

1. The appellants have moved this court by a notice of motion dated 31st January, 2017 seeking the following orders:

a. That the terms and conditions of the ruling and/or order of this court made on 15th September, 2016 be varied and or reviewed.

b. That in the result, the appellant's appeal be reinstated for hearing and determination in the normal way.

c. That there be a stay of execution of the judgment and or decree issued on 28th July, 2011 in Milimani CMCC No. 4843 of 2010 Everline Muchoki v Stephen Mburu & Another pending the hearing and determination of the appeal.

d. That the period of ninety (90) days granted to the appellants on 15th September, 2016 to prosecute the appeal herein be enlarged or extended to enable the appellants prosecute and finalize the appeal.

2. The motion is based on the grounds on the body of the application and the supporting affidavit of Allan Odongo who is the advocate in conduct of the matter on behalf of the appellants. The reason advanced for the motion is that the appellants filed the record of appeal within the 90 days ordered by court but that the court was away on leave on the day the matter was scheduled for directions thereby the matter automatically stood dismissed.

3. The respondent filed grounds of opposition dated 17th February, 2017 and a replying affidavit sworn by *Daniel Mwangi Kibicho* who is the advocate in conduct of the matter on behalf of the respondent. It was contended that the respondent filed an application for dismissal of this appeal for want of prosecution following the appellants' inaction on the matter since the filing of the appeal. That this court granted the appellants 90 days from 15th September, 2016 within which to prosecute this appeal. That it has been almost 5 years since the filing of this appeal and the delay is inordinate and inexcusable. That the

appellants have not disclosed any compelling reason for failure to prosecute the appeal within the time granted and does not meet the legal threshold to warrant revival. He alleged that this motion is an attempt to frustrate the respondent and deny her the fruits of her judgment and the same undermines the letter and spirit of the overriding objectives envisaged in **sections 1A and 1B of the Civil Procedure Act** which provides for a just, expeditious and efficient determination of cases.

4. I have considered the application and the dispositions by the parties herein. The application was dispensed with by oral submissions which were essentially a reiteration of averments in the affidavits and I will not belabor on them. This is a matter where the record of appeal has been filed and served within the time given by this court. The period of 90 days given by this court however, lapsed before the appellant could set the matter for hearing. I have indeed perused the court file and it emerges that the matter was not listed on 15th December, 2016, rather this court did not sit on the said date and the appellant could not have directions taken. In my view, there was no deliberate effort by the appellant to further delay this appeal. In the case of **GIRADO V ALAM & SONS (U) LTD, [1971] EA 448** it was held that the court has inherent power to restore a suit dismissed for default even if no sufficient cause has been shown. While I do appreciate that the respondent has gone through a long period of waiting, it would not on the other hand be in the interest of justice to drive the appellant from the seat of justice. It is only fair that the appeal be heard and determined on merits. The respondent can be compensated by way of costs.

5. In the result, the application dated 31st January, 2017 is allowed in the following terms:

- a. The orders of the court issued on 15th September, 2016 are set aside.***
- b. The appeal herein is reinstated for hearing.***
- c. Costs of KShs.15,000/- be paid to the respondents within 14 days from the date of this ruling.***
- d. The appeal to be prosecuted within 45 days failing which it shall stand dismissed.***

It is so ordered.

Dated, signed and delivered at Nairobi this 27th day of April, 2017.

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L. NJUGUNA

JUDGE