



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL APPEAL NO. 93 OF 2013

PETER KINGECHA NYOTA.....1ST APPELLANT/RESPONDENT

WILSON MAINA.....2ND APPELLANT/RESPONDENT

VERSUS

**LUCY WANGUI NYANGUTHII (Suing as legal representative of the estate of
EPHRAIM WANJOHI WAIRIMU.....RESPONDENT/ APPLICANT**

RULING

1. The applicant filed a Notice of Motion dated the 17th January, 2017; the application was brought under the provisions of sections 1A, 1B and 3A of the Civil Procedure Act and Order 42 Rule 35(2) of the Civil Procedure Rules and all other enabling provisions of law; the Applicant prayed for the following Orders;

- a) That this appeal be dismissed with costs for want of prosecution.
- b) That the costs of the application and the appeal be awarded to the respondent/applicant against the appellants.
- c) Such further orders be made as are just in the circumstances.

THE APPLICANTS CASE

2. The application is premised on the grounds on the face of the application and on the supporting affidavit made by the applicant and dated the 17th January, 2017;

3. Counsel for the applicant submitted that judgment was delivered on the 7th November, 2013 by the subordinate court; the Memorandum of Appeal was filed on the 6th December, 2013 and was served upon their firm on the 10th February, 2014; the Record of Appeal was filed on the 11th August, 2015 and was served upon their firm on the 1st September, 2015;

4. That three years had lapsed from the date of service of the Record of Appeal yet the appellants have unreasonably and without justifiable cause failed to take all necessary steps towards prosecuting or setting down the appeal for hearing;

5. The provisions of Order 42(11) of the Civil Procedure Rules stipulate that upon service the appeal must be referred to the Judge within thirty days for directions;

6. The applicant was awarded the sum of Kshs.4Million as damages arising out of a fatal accident claim for her late husband; that she has been unable to enjoy the fruits of that judgment;
7. That the failure to prosecute the appeal was working an injustice on the applicant as she is a widow with five children two of whom are abled differently;
8. In the circumstances it is only fair and just that the appeal be dismissed for want of prosecution;

THE APPELLANT/RESPONDENTS RESPONSE

9. In response respondents counsel submitted that being aggrieved by the judgment the appellants instituted the Appeal herein against the whole of the judgment and filed their Record of Appeal on the 11th August, 2015;
10. That unfortunately the advocate who had personal conduct of the matter at that time abruptly left the firm without notice or any proper handing over; therefore the matter was never set down for directions or hearing; that failure or mistake of Counsel should not be visited upon the litigants;
11. Upon realization that no action had been taken since the filing of the Record of Appeal the appellant/respondents moved with haste to secure a date for directions; a copy of the letter written to the Deputy Registrar requesting for a date for directions is annexed and marked as ‘AO1’;
12. That there are relevant steps that must be undertaken before the Appeal is admitted in accordance with the provisions of Section 79B of the Civil Procedure Act; one such step being the transfer of the lower court file to the High Court for this court to consider whether to admit the appeal for hearing or to summarily dismiss it; that without admission no steps could have been undertaken by the appellant/respondents;
13. Since the appeal is yet to be admitted and directions given as envisaged under the provisions of Order 42 Rule 35(1) of the Civil Procedure Code the orders sought by the applicant are premature and should not be entertained;
14. The appellant/respondents have a viable appeal which ought to be determined on merits; that the decretal sum appealed against is in the sum of Kshs.4,560,000/- which is substantial and in the event the appeal is dismissed the appellants stand to suffer serious prejudice with grave financial implications; that a substantial part has been paid (Kshs.1,500,000/-) and the balance deposited in a joint interest earning account; that the applicant does not stand to suffer any prejudice that cannot be compensated by an award of damages if the appellants are allowed to prosecute their appeal; hence this court should balance the right of the appellants to be heard and the applicants enjoyment of the fruits of her judgment;
15. That the overriding objective is expeditious disposal of suits and the appellant has a right to appeal and a right to a fair hearing as provided under the Constitution; that this Honorable Court has inherent powers to make such orders as may be necessary for the ends of justice and equity to be met and that the instant application be dismissed and the appellants be allowed to prosecute their appeal to its logical conclusion.
16. The appellants relied on the following authorities **Bruce Mutie Mutuku T/A Diani Tour and Travel Center vs Equity Bank Ltd [2014]eKLR; Benson Mangera & Anor vs Wambua Mbuva [2014] eKLR ; Richard Ncharpi Leiyagu vs IEBC & 2 others [2013] eKLR.**

ISSUES FOR DETERMINATION

17. Upon hearing the respective submissions, these are the framed main issues that are in contention:-
 - (i) Whether has been an inordinate delay;

(iii) Whether the appeal filed herein should be dismissed for want of prosecution;

ANALYSIS

Whether has been an inordinate delay;

18. Judgment was delivered on the 7th November, 2013 and the appellants being aggrieved by the whole judgment filed their Memorandum of Appeal on the 6th December, 2013 and subsequently filed their Record of Appeal on the 11th August, 2015; service was effected on the 1st September, 2015 and from that date no action was taken;

19. Upon perusal of the court record this court has noted that there exists a letter on record dated the 28th January, 2015 from the Deputy Registrar advising Counsel for the appellants that the appeal had been admitted; this court is mandated to consider whether the length of delay is inordinate; from the 28th January, 2015 to the date the letter dated 13th January, 2017 was written to the Deputy Registrar translates to approximately two (2) years; there are legions of authorities that have held that a delay of four months has been considered to be inordinate delay;

20. This court opines that the firm of advocates acting for the appellants were woken up from its slumber when the firm was served with the application for dismissal for want of prosecution; this court finds that the issue of fixing a date for directions does not obtain at this juncture as the appeal had been admitted; and further finds that there has been inordinate delay in causing the appeal to be set down for hearing;

Whether the appeal filed herein should be dismissed for want of prosecution;

21. Even though this court finds that there has been an inordinate delay it is incumbent upon it to consider the circumstances and or the reasons given by the appellants that occasioned the delay and the amount of injustice and or prejudice that may befall the respective litigants and to take into consideration the principle of proportionality;

22. On one hand the appellants attribute their inaction to an advocate who had personal conduct of the matter; that this advocate left the firm abruptly, without giving notice or any proper handing over of the matters in his docket; as a result the matter was never set down for directions and thereafter for hearing; the appellants contention was that the inaction was due to the mistake of counsel and it should not be visited upon them;

23. This court it is alive to the long line of precedents where courts have been reluctant to visit the mistake of counsel upon the litigants and have advocated for the rectification of the mistake if it is in the best interests of justice; in the case of **Belinda Murai & Others vs Amos Wainaina [1978]** Madan JA (as he then was) described what constitutes a mistake as follows;

“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel court might feel 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 lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.”

24. In the case of **Philip Chemowolo & Anor vs Augustine Kubede [1982- 88] KAR 103 at 1040** Appalloo JA (as he then was) stated that;

“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. 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 exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.”

25. This court is satisfied that the mistake/carelessness is attributable to the advocates on record and the appellants should not suffer the penalty of not having their case heard on merit.

26. On the other hand the appellants contend that the lower court file had not been availed to the High Court to enable the court to determine whether to admit the appeal and that therefore the instant application was premature;

27. This court reiterates that it has sighted a letter written by the Deputy Registrar which is dated the 28th January, 2015 and is addressed to the appellants advocates and was copied to the applicants advocates; this letter informs both counsel for the appellants and the applicant herein that the appeal had been admitted to hearing; this aforesaid letter therefore vindicates the lower court and the Deputy Registrar;

28. This court is satisfied that a record of appeal was filed, served upon the applicant and that the appeal had been admitted; this court is of the view that the letter dated the 13th January, 2017 addressed to the Deputy Registrar is the first attempt made by the appellants to pursue the appeal and that this was definitely triggered by the service of the application for dismissal for want of prosecution; and finds that the appellants counsel cannot therefore blame or apportion blame to the courts for their own indolence;

29. The application herein is premised on Order 42 Rule 35(2) which provides that if within one year after service of the Memorandum of Appeal the appeal shall not have been set down for hearing the Registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal;

30. The appellants allege that the lower court file had not been availed so no directions could be given; this court has dealt with this issue conclusively and states for the appeal to have been admitted it would mean that the lower court file had been availed;

31. This appeal was ready for trial on the 28th January, 2015 and the delay to prosecute has been found to be inordinate but nevertheless this court has to take into consideration the prejudice likely to suffered by both litigants; this court is guided by the Court of Appeal case of **Abdirahman Abdi vs Safi Petroleum Products Ltd & 6 thers [2011] eKLR** where the court held;

“the objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, and to focus on substantive justice”

32. The law provides for dismissal after admission and the applicants application is within the confines of the law; the appellants saving grace is that they have a right to appeal and a right to a fair hearing as provided under the Constitution; and that this court must do justice with undue regard to technicalities; that this Honorable Court also has inherent powers to exercise its discretion and to make such orders as may be necessary for the ends of justice and equity to be met; and that before dismissing the appeal as sought this court must weigh the hardship, costs and prejudice to the parties against the interest of justice;

33. In this case the court has to weigh the prejudice likely to be suffered by the innocent party against that of the offending party; in the case of **Bruce Mutie Mutuku T/A Diani Tour and Travel Center vs Equity Bank Ltd [2014]eKLR** the learned judge held that;

“The prejudice the appellant is likely to suffer if this appeal is dismissed is likely to be graver than the prejudice that the respondent would suffer if the appeal is ordered to proceed. I think it would be in the wider interest of justice to pardon the appellants delay and allow him a chance to take appropriate steps to ensure the appeal is set down for directions and hearing expeditiously.”

34. This court is persuaded by the above authority but is quick to add that the distinguishing factor is that in this instant appeal directions had been given and that the appeal had been admitted and that the delay

was in pursuing a hearing date as opposed to causing the appeal to be listed for directions.

FINDINGS AND DETERMINATION

35. In the light of the above these are the findings and determination;

(i) The delay is found to be inordinate but is pardonable as the reasons assigned to the delay are found to be attributable mistake or carelessness by the advocates on record seized with the instructions to act for and on behalf of the appellants;

(ii) This court is also inclined to find the explanation given for the delay to be satisfactory and also finds that the delay in failing to prosecute the suit was not occasioned by the appellants;

(iii) The application for dismissal for want of prosecution is disallowed so as to facilitate the just determination of the appeal;

(iv) The appellants are directed to fix the appeal for hearing within 30 (thirty) days from the date hereof; in default the appeal shall stand as having been dismissed.

(v) The appellants are hereby condemned to pay the costs of this application.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 28th day of September, 2017.

HON.A.MSHILA

JUDGE