



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 20 OF 2005

(An appeal from the Ruling of the Principal Magistrate, Embu

in Children Case No. 39 of 2013 dated 28/05/2016)

NANCY WAMAITHA MICHAEL.....APPLICANT

TERESIA WANJIKU NYAGA.....APPELLANT/2ND APPLICANT

V E R S U S

MATHEW KAMANU MWAURA.....RESPONDENT

R U L I N G

1. This is a ruling on an application 31/03/2016 seeking for orders that the court substitute the applicant in lieu of one Michael Njoroge who is now deceased and upon such substitution reinstate and revive the appeal for hearing and disposal.

2. The application is supported by the following grounds:-

(a) That the appellant is deceased.

(b) That the applicant was granted letter of administration limited.

(c) That she instructed an advocate to file the application for substitution.

(d) That no notices were sent to both advocates to show cause why the appeal should not be dismissed.

(e) That the file has been missing.

(f) That the appeal survives the deceased.

3. The application is supported by the applicant's affidavit in which he states that the deceased was her husband and that he passed on 10/05/2010. After his death she instructed her advocate to file an application for substitution which he failed to do because the court file was missing. However, the file resurfaced and was listed for dismissal.

4. The applicant states that none of the parties was served with the notices to show cause why the appeal

should not be dismissed for want of prosecution. On checking the court file, the applicant noted that it was not admitted although the court proceeded to dismiss it.

5. The application was opposed by the respondent who said that the application was an abuse of the due process of the court. The appeal was filed on 31/05/2005 and was dismissed on 9/03/2015. There was an inordinate delay of 9 years which has not been explained by the applicant. It has not been explained why the applicant took three more years after the dismissal of the appeal to seek for its reinstatement.

6. There were two appellants in the appeal and there is no explanation as to why the 2nd applicant did not proceed to prosecute the appeal. By the time the first appellant died there was a delay of five years without prosecuting the appeal with no explanation given.

7. The applicant has not explained why she took 2 years to obtain letters of administration intestate and why she further waited for 3 years before filing this application. Neither has the applicant explained why she did not apply for reconstruction of the file at the time she discovered the original file was missing.

8. The respondent further states that there has been no explanation why the record of appeal was never filed. It is argued that the appeal was rightly dismissed for there was no requirement to serve the parties with notices for dismissal.

9. The application was argued by way of written submissions filed by the counsel for the applicants Ms. Ann Thungu and Munene Muriuki for the respondents.

10. The issue arising from this appeal is whether the appeal was rightly dismissed.

11. The appeal was dismissed on the 9/03/2015 under Order 16 Rule 6 of the Civil Procedure Rules, Revised Edition 2007 (1998) which provided:-

In any case not otherwise provided for in which no application is made or step taken for a period of three years by either party with a view to proceeding with the suit, the court may order the suit to be dismissed; and in such case the plaintiff may, subject to the law of limitation, bring a fresh suit.

12. This was the provision for dismissal that was applicable before the Civil Procedure Rules, 2010 came into force. The law did not require service of notice to show cause on a party/parties who had not taken action in their suit or appeal for a period of three years. The argument by the applicant that she ought to have been served with notice to show cause was not supported by the law applicable at the material time.

13. The applicant argues that the delay to file this application was caused by the disappearance of the court file. No single correspondence has been annexed to demonstrate that the matter was brought to the attention of the Deputy Registrar. The letters annexed to the application are addressed to the Principal Secretary, Ministry of Interior, the chairman, Commission on Administrative Justice and the Judiciary ombudsman among others. The applicant chose to seek remedy from other institutions other than this court.

14. It is an established practice of court that when a file goes missing for some time and that all efforts to trace it have been exhausted, a skeleton file is opened. The applicant ought to have applied for reconstruction of the court file so as to facilitate the filing of this application. The delay of five years after the death of her husband has not been explained.

15. Before the applicant's husband died, the appeal had delayed for nine years. This application was filed five years after the death of the 1st appellant. The delay of 13 years is inordinate. The Civil Procedure Rules, 2010 as well as the repealed rules provide for time line within which certain actions must be taken in regard to appeals. Those time lines are designed to ensure that appeals are heard and determined expeditiously.

16. The applicant argues that the court had not admitted the appeal. Although no time lines are given for admission of appeals, the appellant has a duty to follow up his appeal for admission. An appellant cannot wholly blame the court for failure to take the necessary action or even for the dismissal of an appeal that has been lying in court for a decade.

17. The enactment of Section 1A and 1B of the Civil Procedure Act was purposed to facilitate expeditious, proportionate and affordable resolution of civil disputes. The provisions impose a duty on a party or his advocate to assist the court to further the overriding objective. The court is required to handle all matters presented before it for the purposes of attaining timely disposal of the proceedings at a cost affordable by the respective parties.

18. The 2nd appellant/applicant deliberately avoided to swear an affidavit to explain the delay given that she is still alive and well. She is an indolent litigant and so was the deceased before he passed on.

19. Litigation must come to an end and parties have a duty to comply with time lines given by the law. I agree with the respondent that this application is an abuse of the due process of the court. It is not in the interest of justice for the court to reinstate this appeal or to allow substitution considering the circumstances of the case.

20. I reach a conclusion that the appeal was rightly dismissed under the then existing rules.

21. It is my finding that this application has no merit and it is hereby dismissed with costs.

DELIVERED, DATED AND SIGNED AT EMBU THIS 30TH DAY OF NOVEMBER, 2017.

F. MUCHEMI

JUDGE

In the presence of:-

1. Mr. Alakonya for Mr. Muriuki for Applicants

2. 1st Respondent present