REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL NO. NO. 10 OF 2012

JOHN GITHINJI GICHIRA……..…….……..APPLICANT

-VERSUS-

BENARD MUNGE GICHIRA…….....RESPONDENT

RULING

1. This is the ruling of an application by **John Githinji Gichira** brought by way of Notice of Motion under **Order 45 rule 1 Civil Procedure Rules Cap 21 Laws of Kenya** seeking orders that the status quo over Land Parcel Number **MUTIRA/KIAGA/127** the subject matter herein be maintained pending the hearing and determination of this application. He further prays that the order of this Court made on 14th July, 2014 be reviewed or set aside and he be given leave to file a reply to the Notice of Motion dated 15th April, 2015. The application is founded on the grounds that:

(a) The orders were made *exparte*.

(b) The applicant was not served with the application coming up for hearing on 14th July, 2015.

(c) That the appellant's wife was neither served with the said application nor did she see any court process server or an Advocate of the High Court of Kenya as purported in the affidavit of Service dated 15th May, 2015. The application is supported by the affidavit of John Githinji Gichira sworn on 22nd July, 2015. He deposes that he came to learn that the appeal he had filed was dismissed without his knowledge for want of prosecution. It is then he learnt that there was an affidavit of service purporting that he was served through his wife who accepted that she was served and signed, annexture JGG-1 – affidavit of service. He depones that it was not his wife who was served but Munge's wife. He depones inter alia that he has a triable and arguable appeal which should be decided on merits.

2. The Respondent opposed the application and filed a replying affidavit sworn by Alex Ngugi Chomba on 26th January, 2016. He depones that the applicant was duly served with the application for dismissal of the suit and that the Applicant had taken over three years without prosecuting the appeal.

3. The parties filed written submissions. I have considered the application, the averments and the submissions. The application is premised on orders issued by Justice Limo on 14th July, 2015 dismissing the appeal filed before this Court on 1st November, 2012 for want of prosecution. This followed an application dated 15th April, 2015 by the Respondent which was served on the applicant but he failed to attend court. The Respondent states that he was not served with the application and so it proceeded exparte.

4. Review is provided under **Order 45 rule 1 Civil Procedure Rules**. It provides:

"Any person considering himself aggrieved –

(a) By a decree or order from which an appeal is allowed but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter of evidence, which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of the judgment to the Court which passed the decree or made the order without unreasonable delay."

A party seeking review must show that there are circumstances to warrant the Court to order a review. The Court of Appeal in binding decisions have dealt with the issue of review which are worth considering in this application. In the case of **Francis Origo & Another -V-**

James Kumali Mungala (2005) eKLR the Court of Appeal considered the grounds for review and held as follows:

> ***"From the foregoing, it is clear that an applicant has to show that there has been discovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason. And most importantly, the applicant must make the application for review without unreasonable delay."***

Further in the Court of Appeal the Court considered what would fall in the grounds of review and what would amount to a ground of review. In the case of **Pancra T. Swai -V- Kenya Breweries Limited** the Court of Appeal in dismissing the application for review held:

> ***"It seems clear to us that the appellant, in basing his review application on the failure by the Court to apply the law correctly faulted the decision on a point of law. That was a good ground for appeal but not a ground for an application for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are*** *factus officio* ***and have no appellate jurisdiction.***

In addition it held that:

> ***"The discovery of new and important matter or evidence or mistake or error apparent on the face of the record or for any other sufficient reason in rule 1 of Order 44 (now Order 45 in 2010 Civil Procedure Rules) relates to issues of facts which may emerge from evidence. The discovery does not relate or refer to issues of law. The exercise of due diligence referred to in rule 1 refers to discovery of facts but does not relate to ascertainment of existing law which the court is deemed to be alive to."***

5. The applicant in his affidavit has deponed that he was not served with the application for dismissal of appeal for want of prosecution. He has not given any reason as to why he did not prosecute the appeal for a period of three years. The appeal arose out of succession proceedings which were before the subordinate courts. The grant was confirmed in a judgment dated 11th October, 2012. The parties who were before Court were given the right of appeal within 30 days. The Applicant filed his appeal on 12th November, 2012. The appeal was admitted on 12th November, 2012. The Appeallant failed to take action to prosecute the appeal. The Respondent moved the Court with an application dated 1st March, 2013. The Court gave the Appellant a chance to prosecute the appeal within the next 21 days. Thereafter on 2nd May, 2013 the Applicant filed an application dated 2nd May, 2013 stating that the Respondent has never summoned family members since the death of their father and therefore cannot be entrusted to represent the family in any transaction. He further asked the Court to withdraw the letter of confirmation of grant and the same be issued to their mothers to enable the smooth distribution of the estate. He did not comply with the order to file the appeal within 21 days.

6. Close to two years after that the applicant took no action prompting the Respondent to file another application for dismissal of the appeal for want of prosecution which orders were granted *exparte* on 14th May, 2015. After sleeping on his rights he brought this application for review. 'Justice delayed is justice denied.' Judgment was delivered in 2012 and close to seven years thereafter the rest of the family members are yet to enjoy the fruits of judgment due to failure by the applicant to prosecute the appeal. The contention that he was not served is hearsay as the wife has not sworn an affidavit and the averment that she was not the one who was served is not controverted. It raises a point of law which as stated in the case of **Pancras T. Swai -V- Kenya Breweries** does not entitle the applicant to a review but to an appeal. He needs to prove that there is discovery of new matter of evidence which after due diligence was not within his knowledge, mistake or error apparent on the face of the record or for any other sufficient reason. He also needs to show that the application was brought without undue delay. The judgment in this matter was entered in 2012. Since 2013 the applicant did not take any steps to prosecute the appeal. There was clearly inordinate delay. Review is not available to the Applicant as there was unreasonable delay.

7. Let me consider that the Applicant was seeking review of the order dismissing the appeal for want of prosecution and ask whether review was available. The application under which the order was issued was brought under **Order 42 rule 35 (1) Civil Procedure Rules**, which provides:

> ***"Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution."***

Under **Order 43 rule (1) Civil Procedure Rules**, a party may appeal under **Order 42 rule 35** as of right. **Section 75 (1) (h) Civil Procedure Act** provides that:-

> ***"an appeal shall lie as of right from orders and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted- any order made under rules from which an appeal is expressly allowed by rules."***

The applicant could file an appeal as of right.

8. The Appellant after being given the opportunity to appeal within 21 days on 28th March, 2013 in the interest of justice filed an application dated 2nd May, 2013 stating that the Respondent has never summoned the family members since the death of their father and therefore cannot be entrusted to represent the family in any transaction. In addition he prayed that the Court withdraws the letter of confirmation of grant and the same be issued to their mother to enable smooth distribution.

9. He failed to comply with the directions given by the Court. This was fatal since the Court had exercised discretion and gave him a time frame within which to file the appeal. Non-compliance entitled the Respondents to seek dismissal of the appeal. In the case of **Richard Richard Ndapi Leiyagu V Independent Electoral and Boundaries Commission (I.E.B.C.) & 2 Others (2013) eKLR** the Court of Appeal stated:-

> ***"We agree with those noble principles which go further to establish that the court's discretion to set aside an exparte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice."***

10. As can be seen above, the applicant failed to file record of appeal even after the court had granted him 21 days within which to file after the respondent had filed a similar application for dismissal of appeal on 1st March, 2013. The appellant failed to do so for a period of more than two years prompting the respondent file another application for dismissal of the appeal. It therefore seems that the applicant's only intention is to delay the course of justice and the Court cannot come to his aid. Equity aids those who are vigilant, not those who slumber on their rights. This application is without merits. I dismiss it with costs.

Dated and delivered at Kerugoya this 8th day of December, 2017.

L. W. GITARI

JUDGE

Ruling read out in open Court.

L. W. GITARI

JUDGE

8.12.2017