



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 84 OF 2012

BERNADETTE WANGUI WAKINI...APPELLANT/APPLICANT

VERSUS

LAWRENCE KINYUA MUCHIRI.....RESPONDENT

RULING

On 22nd May, 2015, the applicant moved this court by a motion of the even date primarily seeking three prayers; these are that first, this Court be pleased to review and/or set aside my order made on 14th May, 2015 allegedly dismissing the appeal herein and reinstate it for hearing; second, the honourable court be pleased to review, vary or extend the orders of the court issued on 16th February, 2015 granting the appellant leave to file a supplementary record of appeal within 14 days in default of which the appeal stood dismissed and third, the honourable court be pleased to order a stay of the proceedings in **Nyeri Chief Magistrates Court Civil Case No. 169 of 2010** pending the hearing and determination of this application.

The motion was made under **section 3A** of the **Civil Procedure Act, Orders 51 Rule 1** and **45 Rule 1** of the **Civil Procedure Rules** and was supported by the applicant's counsel's affidavit sworn on 22nd May, 2015. In the affidavit, Mr Karomo Paul Ngigi, counsel for the applicant swore that the record of appeal was filed without the decree against which his client was appealing. This omission was pointed out by the court on 16th February, 2015 and that the applicant was granted leave to file a supplementary record to include the decree on condition that the appeal would stand dismissed if the decree was not filed within fourteen days.

According to the applicant's counsel, the applicant applied to be supplied with the decree but that the court file went missing from the registry and that it could not be traced despite their diligent efforts to trace it. To demonstrate the efforts made in this regard, counsel annexed to his affidavit a copy of a letter dated 18th March, 2015 addressed to deputy registrar reminding him of the application for the decree and asking him to intervene and trace the file. The file, so he swore, was finally traced on 27th March, 2015 when the applicant's counsel collected the decree and served it upon the respondent's advocates.

Counsel also swore that it was apparent on the face of the decree that it had been applied for and issued within the period which the applicant had been granted to file the supplementary affidavit but since the file was missing the appellant couldn't file the supplementary record as directed.

It was counsel's deposition that the applicant was still intent on prosecuting her appeal and therefore the order dismissing it ought to be varied and the time for filing the supplementary record extended. He swore that his own mistakes should not be visited upon his client.

The respondent opposed the application and filed a replying affidavit which he swore on 26th day of June, 2015. According to the respondent, the appeal was filed way back on 16th July, 2012 and apart from filing the memorandum of appeal the appellant never took any other step towards prosecuting it until the respondent filed an application dated 28th March, 2014 seeking to dismiss the appeal for want of prosecution; that it is only after that application was made that the applicant was on 14th May, 2014 ordered to file a record of appeal within thirty days of that date.

But even then, the record filed was incomplete as it did not include some documents; the respondents counsel took it upon themselves to remind the applicant that the record filed did not include certain documents vide their letter dated 24th June, 2014. Six months after this letter, the appellant filed a supplementary record but again this record did not include the decree.

The respondent's counsel subsequently took the initiative and took a date for directions on the hearing of the appeal on 16th February, 2015; on that date, the appellant was ordered to file a supplementary record to include the decree within a specific period but that he did not comply with the court order and the appeal was ultimately struck out.

Going by the appellant's conduct, the respondent swore that she was hell-bent on denying him the fruits of his judgment. He also swore that the appellant's claim that his letter had not been stamped by the deputy registrar because of the missing file was an afterthought and a lame excuse because stamping of correspondence was not the only means through which one could demonstrate delivery or receipt of a letter by the court registry. According to the respondent, the applicant has not been diligent in the prosecution of her appeal and that this court should not come to the assistance of an indolent litigant.

The record shows that the memorandum of appeal was filed on 18th July, 2012 but the record itself was filed on 13th June, 2014. It is also apparent that the judgment was delivered on 22nd June, 2012 but it is only on 18th July, 2012 that the applicant's counsel applied for certified copies of the proceedings; they did not apply for a certified copy of the decree. By a letter dated 23rd April, 2014, the chief magistrate informed the applicant's counsel that the proceedings were ready for collection upon payment of the balance of the charges for the certified copies of the proceedings. There is an endorsement on that letter showing that indeed the proceedings were collected on 19th May, 2014 by one Mary from the applicant's advocates' firm.

It is apparent that the record of appeal was filed more than three weeks after the proceedings had been collected. In the meantime, and more particularly on 28th March, 2014, the respondent filed an application seeking to have the appeal dismissed for want of prosecution; when this application came up for hearing on 14th May, 2014, parties recorded a consent to the effect that the applicant does file and serve the record of appeal within thirty days from that particular date.

When the record was filed and served counsel for the respondent alerted the appellant's counsel that the record was incomplete because it did not contain the respondent's submissions and certain exhibits admitted in evidence; counsel advised their counterparts vide a letter dated 24th June, 2014 to have a proper record filed for the appeal to be admitted and directions issued on its hearing. Perhaps taking cue from the respondent's counsel's advice, the applicant's counsel sought leave of the court on 21st November, 2014 to file a supplementary record of appeal; I granted the leave and directed the appellant to file and serve it within fourteen days. The supplementary record was subsequently filed on 9th January, 2015, obviously outside the period ordered by the court and after counsel for the respondent had taken the initiative to fix the appeal for directions on 16th February, 2015.

On 16th February, 2015, Ms Kaiga who held brief for Mr Ngigi for the appellant when the appeal came up for directions informed the court that she had noticed that the record of appeal did not have a certified copy of the decree and so she sought leave to file yet another supplementary record to include the decree appealed from. Again this court granted leave to file the supplementary record but on condition that the

appeal will stand struck out if the record would not have been filed within thirty days of 16th February, 2015.

The appellant did not comply with this order and so she has yet again filed this application which, as noted, seeks to review or set aside the order issued by this court on 14th May, 2015 and also extend the orders made on 16th February, 2015.

Having perused the entire record, the affidavits in support of and in opposition to the application together with written submissions filed by both counsel for the applicant and the respondent, it is not in dispute that the applicant did not apply for the decree when she initially sought for a certified copy of the proceedings. It is also apparent that even after she was given a lifeline to file a supplementary record of appeal and include the decree, the applicant did not apply for the decree soon after that order was issued or at any other time. I have reached this conclusion because the only letter which is exhibited to her affidavit asking for the proceedings is a letter dated 18th March, 2015 purporting to remind the deputy registrar of an application made “on or about the 19th of February, 2015” for the decree. One would think that if the application was through a letter to the deputy registrar it must have been written on a specific date and more importantly the applicant must have retained a copy thereof. Without exhibiting to her affidavit a copy of this letter or “the application” that is alleged to have been made on or about the 19th February, 2015 it is logical to assume that no letter or application was made on that date and therefore the applicant did not apply for the decree as alleged; the first time she applied for the decree, if this can be taken to be the application for this particular document, was when her counsel purportedly wrote a reminder of a non-existent letter more than a month after the order granting leave was made.

It is important to note that although the applicant has alleged that the court file could not be located and therefore could not file the letter asking for the decree, her “reminder” must have been written in similar circumstances but strangely, she has the evidence of the reminder and not the initial letter. I am not persuaded by the applicant’s argument that the delivery and reception of any correspondence to the court is tied to the availability or non-availability of the court file in respect of a case which is the subject of the correspondence. In the same breath, I am not convinced that the court file could not be traced at any time the applicant may have wanted because there is no evidence that any efforts were made to obtain that file either to apply for the decree or for any other reason.

The other aspect of the applicant’s application that deserves consideration is the basis upon which the application was made; the applicant has proceeded on the premises that she was granted leave to file the supplementary record within fourteen days of 16th February, 2015. This is factually incorrect because the record is clear that the applicant was given thirty days from the 16th February, 2015 to file and serve the supplementary record; it therefore follows that the record of appeal ought to have been filed on or about the 16th March, 2015.

The first prayer in the application is also made on the premise that the appeal was dismissed on the 14th May, 2015; this is the wrong premise because the order given on 16th February, 2016 was complete or final on when the appeal was dismissed. The order was clear that if the appeal was not filed within thirty days of that date the appeal would automatically stand struck out; it was not therefore necessary to make any other order and indeed no other dismissing the appeal was made. The order of 14th May, 2015 merely reiterated the implication or the effect of the earlier order.

I have also noted from the original decree in the record that contrary to the applicant’s deposition on oath that the decree was collected on 27th March, 2015, it was in fact signed for by one Mary of the applicant’s advocates firm on 25th March, 2015; one may argue that the difference is only two days but I reckon that where time is of essence in doing any particular act, each day counts. In this particular case the applicant’s candour is also brought into focus when she makes statements on oath which are evidently contrary to the available evidence.

Be that as it may, despite the fact that the applicant collected the decree on 25th March, 2015, it was not

until the 22nd of May, 2015 that she came back to court to file the current application; the applicant has not proffered any reason whatsoever why she had to wait for over two months before she moved the court for the orders she is now seeking.

I must agree with the counsel for the respondent that the appellant has been consistently lethargic in this appeal; every aspect of her conduct in this matter points to an indolent litigant who has had to be elbowed all the way to take any step towards the conclusion of her appeal. For the reasons I have given, there is also a tinge of malafides in her application. I have not found any reason why she deserves another opportunity to revive and prosecute her appeal; on the other hand, there is no reason why the respondent should now not to be allowed to enjoy the fruits of his judgment. Accordingly, I dismiss the appellant's application with costs.

Signed, dated and delivered in open court this 26th day of February, 2016

Ngaah Jairus

JUDGE