



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 8 OF 2019

WILSON KIMTAI.....1ST APPELLANT

JULIUS MBURUNGA M'RIMBERIA MWIRI.....2ND APPELLANT

MWINIRA.....3RD RESPONDENT

LEKAUS GGALLORO.....4TH APPELLANT

VERSUS

JANE NKATHA KITHINJI (Suing as legal representative of the estate of

JAPHET KITHINJI MWIREBUA-DECEASED).....1ST RESPONDENT

ISAAC KINOTI MARETE.....2ND RESPONDENT

CHARITY MBEGEGU SAMSON.....3RD RESPONDENT

ISABELLA KIBURIO SAMSON.....4TH RESPONDENT

DAVID MEME A. M'IMANYARA.....5TH RESPONDENT

RODA KAGWIRIA KITHINJI.....6TH RESPONDENT

RULING

1. Before court is the application dated 19.10.2021 seeking under **Sections 3, 3A and 63 E** of the **Civil Procedure Act** and **Order 50 rule 1** for the setting aside and vacation of the orders made on 3.3.2021, 3.3.2021 and the reinstatement of the appeal for hearing on merits.
2. The application is supported by an affidavit sworn on 19.10.2021 by Mercy Kaume advocate.
3. The grounds are that the court had made an order that the appeal be prosecuted within five months; the court was bereaved on 28.7.2021 and subsequently went on transfer hence the mistake cannot be attributed to the applicant or his counsels on record and lastly that the matter involves land hence it is in the interest of justice the appeal be heard on merits otherwise the appellant shall suffer grave injustice.
4. The respondents oppose the application through a replying affidavit filed on 15.11.2021 by Christine Murithi advocate.
5. It is averred the court gave clear orders for the appeal be prosecuted within 5 months from 3.3.2021 and the appellant has not demonstrated what measures he took to comply with the court orders, given the appeal had previously been dismissed twice and two applications previously on 10.12.2019 and 26.6.2020 filed and allowed on terms; this being the third application all out of mistakes by counsel for the applicants.
6. Third it is averred the applicant has not been diligent, vigilant and hence his indolence should not be condoned any further.
7. Fourth, the respondents maintain the reasons for non-prosecution of the appeal are not only misplaced, unconvincing but also

unsubstantiated hence pray the court finds the application lacking merits.

8. The appeal arises out of a decree passed on 13.12.2018. the bone of contention is that the appellants were not given an opportunity to give their evidence on 14.11.2018 because their advocates on record were not present or even aware of the hearing date.
9. The court admitted the appeal for hearing on 9.7.2019, issued interim orders of inhibition were issued on 8.4.2019 for a period of one year. Further it directed the record of appeal to be filed within 60 days. The matter was listed for pretrial conference on 20.6.2019.
10. The case was mentioned on the aforesaid date but the appellants had not complied with the filing of the record of appeal and a further mention for 6.8.2019 was given. An order was made for the record of appeal to be filed within 30 days since proceedings and the lower court file had already been forwarded to the court.
11. Once again the appellants did not comply and were given a further 14 days. The appellants did not file and serve the record of appeal by 30.9.2019. The appellants did not attend the next mention of 30.10.2019 but nevertheless the court gave them a last and final chance to file and serve the record of appeal within 30 days failure of which the appeal shall stand dismissed as at 1.11.2019.
12. On 3.12.2019 counsel for appellants appeared in court and once again requested for more time to comply with the filing of the record of appeal. The court declined and maintained the appeal stood dismissed with costs for non-compliance as ordered earlier on.
13. The appellants filed an application for reinstatement dated 10.12.2019 which was to be heard on 18.2.2020. The applicants failed to attend leading to its dismissal. The appellants filed another application dated 26.6.2020 for the setting aside of the orders made on 18.2.2020. The court gave the applicants a benefit of doubt and reinstated the application dated 10.12.2019 for hearing on priority basis. However, the application did not take off but was listed for hearing on 20.1.2021. The court allowed the application on conditions that the record of appeal be filed and served within 7 days in default of which the appeal to stand dismissed, earlier orders of 8.4.2019 stood vacated. The appeal was to be prosecuted within 5 months in default of which it shall stand dismissed.
14. The appellants did not attend the mention date for 18.3.2021. The appellants did not file the record of appeal as ordered on 8.3.2021.
15. Another mention for 6.5.2021 was taken by the respondents. On 6.5.2021 the appellants attended the court and urged the for a near date. Already two months were over. The appellants took a hearing date for 28.7.2021 knowing very well it was outside the set timelines.
16. Parties thereafter attended the court on 28.7.2021 and fixed a mention date for 13.10.2021. During the mention, the appellants orally sought for the enlargement of time. The court made an order a formal application to be filed within 7 days.
17. Given the above history, it is obvious the appellants have for one reason or the other failed to meet court deadlines and or comply with clear court orders.
18. It is also clear the application dated 10.12.2019 was brought on the same reasons and or grounds as the instant application. The only difference or additional reasons this time round are the appellants did everything possible to have the matter heard but in vain since the court was bereaved and or on transfer.
19. The orders given on 3.3.2021 were the appeal to be heard by 3.8.2021. The five months expired on 3.8.2021. As at 28.7.2021 there were only five days remaining. The appellants knew the deadline was soon approaching but took no remedial action for the enlargement of time.
20. The instant application does not seek for the enlargement of time at all. There are also no good reasons given why the applicants did not come under certificate of urgency for the enlargement of time before it elapsed. Instead and while aware of the self-executing orders, the appellants took a far of date for 13.10.2021 when they knew it was an act in futility.
21. Counsel for the appellants did not also see it fit to appear before the Deputy Registrar on 28.7.2021 to seek for more directions since the five months was about to expire. The attitude actions of the appellants shows they were not vigilant or concerned about the fate of their appeal. This casual manner is evident from the time the appeal was filed.
22. It has been held sheer inaction by counsel does not constitute an excusable mistake. **See *Rajesh Rughani –vs- Fifty Investments Ltd & Another [2005] eKLR.***
23. The appellants have not accounted for how they prudently used the available five months. There is no explanation why between 3.3.2021 and 6.5.2021 the appellants did not fasttrack the hearing of the appeal.
24. The court record shows there has been a litany of omissions on the part of the appellants and their counsels on record. The appellants have not given sufficient cause and explanation why they did not heed to the orders of the court. **Sections 3, 3A of the Civil Procedure Act and Article 159 of the Constitution** is not a panacea in each and every instance of breach of procedure and court directives. **See *Raila Odinga & 5 Others –vs- IEBC & 3 Others [2013] eKLR and Nicholas Kiptoo Arap Korir Salat –vs- IEBC & 7 Others [2014] eKLR.***
25. There must be basis for restoring the appeal as held in ***Habo Agencies Ltd –vs- Wilfred Odhiambo Musingo [2020] eKLR.***
26. **Order 42 rule 21** allows the court to dismiss the appeal where a party has not complied with court directions. The court has powers to re-admit a dismissed appeal where it is proved a party was prevented by any sufficient cause to prosecute his appeal.

27. In *Ivita –vs- Kyumba [1975] C.A 441* the court held the test is whether the delay is prolonged and inexcusable and if justice can be done despite such a delay and if there could be no prejudice to the respondents. In this matter there has been endless delay occasioned by the appellants for mistakes some which to say the least are reckless and in excusable.

28. Whereas **Order 50 rule 1** has been invoked on the enlargement of time even where the application is made after the expiration of the time, under **Section 95** of the **Civil Procedure Act** the court has powers to enlarge the time. The court has to be convinced the application is not filed with inordinate delay, which is not explained.

29. The explanation given in this application is that the court was bereaved and or on transfer. The deadline to prosecute the appeal was 3.8.2021. The evidence on either the bereavement or the transfer was as at 3.8.2021 is not attached and cannot be true. In any event there is never vacuum in courts. The appellants did not lodge the application before 3.8.2021 but only later in 19.10.2021 after being directed to do so by the court. There was always a duty Judge during the High Court vacation but the appellants did not exploit that opportunity.

30. In my view a two and half months delay coupled with other circumstances herein which has not been explained at all does not amount to sufficient cause for this court to restore the appeal for hearing.

31. The upshot is the application dated 19.10.2021 lacks merits. The same is dismissed with costs.

32. Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 26TH DAY OF

JANUARY, 2022

In presence of:

Kiruai for respondents

Kaume for appellants – absent

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE