



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CIVIL APPEAL CASE NO. 114 OF 2009**

**NGUNGI NGARI.....APPELLANT/APPLICANT**

**VERSUS**

**ELIJAH NJOROGE MWANGI.....RESPONDENT**

***(An Appeal from the Ruling of the Senior Resident Magistrate Siakago in PMCC No. 40 of 2007 dated 31st July, 2009)***

**R U L I N G**

The applicant/appellant in his application dated 4th February 2014 seeks for review or setting aside the orders of this court made on 18th October 2011 dismissing the applicant's appeal. Upon setting aside or reviewing the said orders the applicant's appeal be re-instated. In the face of his application and in his supporting affidavit the applicant relied on the following grounds:-

1. *That he did not have funds to facilitate the filing of the appeal record.*
2. *That he left this jurisdiction for Mombasa to work there and later lost his phone which made it difficult to communicate with his advocate.*
3. *That for these reasons the applicant was not able to sign the replying affidavit to the application dated 3/8/2011.*
4. *That it is fair and just to have his appeal reinstated.*

The application was vehemently opposed by the respondent in his replying affidavit. He depones that the applicant has not given any reason why his advocate failed to attend court on the day that the application was coming for hearing on 15th October 2011. It is not true as claimed that the application for dismissal had not been responded to because grounds of opposition had been filed. The applicant argues that the appeal has no chances of success and its reinstatement is a waste of time. The applicant had admitted the respondent's claim in the lower court and is therefore by law estopped from pursuing this appeal.

On perusal of the record, it is a matter of fact that the appellant had engaged a counsel in this appeal who filed the grounds of opposition. In response to an application, a party has an option to file grounds of opposition or a replying affidavit or even both if he wishes. A party who opts to file grounds of opposition and a replying affidavit would be within the law. Once grounds of opposition have been filed, the application has been adequately responded to. The applicant did not need to come to Embu from Mombasa to sign a replying affidavit. The grounds of opposition were sufficient and the counsel ought to have appeared in court to argue the application based on the grounds. If the applicant still desired to file a replying affidavit, he would have asked his advocate to send it to him by courier or securicor to sign and return through a similar medium. I do not find the argument that he was not able to come and sign the replying affidavit tenable. The issue of financial costs does not make sense given the current means of communication technology. After all the applicant afforded to hire a counsel who was working for him

and who filed this appeal and grounds of opposition in respect of the application in issue herein. If he was a poor person, he would have applied to sue as a pauper. The ground of financial hardship cannot stand for it is not a sufficient reason in the circumstances.

It has also not been explained why the counsel did not attend court to argue the grounds of opposition which he had filed on behalf of his client. The personal presence of the applicant during the hearing of the application was not necessary. The advocate ought to have attended court and argued the application on his behalf.

The other issue to consider is whether the applicant's appeal has high chances of success to justify its reinstatement. I have looked at the appeal record and noted that the applicant admitted the claim of the respondent. However, he argues that the respondent is only entitled to refund of the money he paid but not to the land. The transaction in question was between the respondent and the deceased father of the applicant. His father also admitted the claim during the trial and said he is ready to give the respondent his land. The trial magistrate considered all these issues and entered judgment in favour of the respondent. Without appearing like I am deciding the appeal, I am not convinced that it has any chances of success.

On perusal of the record I find that the orders complained of were made on the 18th October 2011. This application was filed on 4th February 2014 which was over two years later. The applicant was indeed an indolent litigant who took a long time to pursue his rights. I rely on the case of **CECILIA WANJA WAWERU VS JACKSON WAINAINA MUIRURI & ANOTHER [2014 eKLR]** where the court declined to allow an application for reinstatement of the appeal on ground of delay of over 3 years in filing the application and that allowing it would amount to an abuse of the due process of the court.

In the case of **ALBERT MUNYI J. KABARATHI VS JOSEPH NTHIGA KAGAU & ANOTHER [2004] eKLR** the Court held that the respondents could not wait eternally for their fate to be decided in a case where the appellant had gone to slumber. In this case the delay was not sufficiently explained.

This application was filed over two years after the appeal was dismissed. The applicant says he came to know of the dismissal on 2nd August 2013 which was about two years later. If this is true, then the applicant is guilty of failing to use due diligence to follow-up his appeal which was filed in the year 2009. This indolence explains why his appeal had to be dismissed for want of prosecution. In his application, he did not explain the delay in prosecuting his appeal which resulted in the dismissal. I am convinced that the applicant has not made a case for this court to set aside the orders of the honourable Judge issued on 18/11/2011.

For the foregoing reasons I find the application not merited and dismiss it with costs.

**DELIVERED, SIGNED AND DATED AT EMBU THIS 24TH DAY OF FEBRUARY, 2015.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Ms. Gitari for appellant**

**Both parties**

**F. MUCHEMI**

**JUDGE**