



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CIVIL APPEAL NO. 183 OF 2002

JOSEPH MWANIKI KINGORI.....APPELLANT

Versus

JOSPHINE MWIYERIA.....RESPONDENT

(Appeal arising from the judgment of Hon. J.B. Olukoye

Resident Magistrate in Nyeri Civil Case No. 126 of 1999)

RULING

1. By a notice of motion dated 23rd September 2002 brought under order 22 rule 22(1) 2 and 3 order 42 rule 6 Order 45 rule 1 of the Civil Procedure Rules and section 24 Civil Procedure Act the appellant moved the court for orders

(i) That this honourable court set review or set aside the order dismissing the appeal for want of prosecution and the appeal reinstated for hearing.

(ii) That there be a stay of execution of the decree in Nyeri CMCC No. 126 of 1999 pending the hearing and determination of the appeal.

(iii) That cost of the application be provided for.

2. The application was filed under certificate of urgency on 26th September 2013 when the court granted leave to the firm of Muthui Kimani and co Advocates to come on record for the appellant in place of M/s Wambugu Mureithi & Co. Advocates and a temporary stay of execution of the decree in Nyeri CMCC 126 of 1999 being the hearing of this application

3. The application was made on the ground that the applicant was prevented by unavoidable constraints of his ill health and lack of proper briefing and information about dismissal of his appeal by his previous Advocates and that if the stay is not granted the appeal will be rendered nugatory.

4. It was supported by the affidavit of the applicant JOSEPH MWANIKI KINGORI in which he deponed that he had been ailing for more than ten (10) years and had not been able to follow up on his appeal and that his previous Advocates never informed him of the dismissal of the appeal which he assumed was suspending.

5. It was further deponed that it was only on the 16th September 2013 that he perused the subordinate

court file to discover that an order was made that his interest in L.R. NO. THEGENGE/IHITHE/520 be sold to satisfy the decree in CMCC No. 126 of 1999 and upon perusal he learned that the appeal was dismissed long time ago and that the said property was registered in his deceased father and is the subject matter of High Court Succession Cause No. 187 of 1997.

6. The respondent filed ground of opposition to the application herein on 2nd October 2013 and stated that

1. The application is misconceived and incompetent.

2. Fatally defective and bad in law.

3. There is no appeal pending

7. There was also a replying affidavit in which JOSEPHINE MWIYERIA MWANU deponed that there cannot be a stay since there is no appeal the same having been dismissed by Makhandia J as he then was on 3rd October 2008 and that the applicant has been hiding in Nairobi to avoid arrest and only moved to court through misrepresentation to avert the sale of his land.

8. It was further deponed that the application does not meet the granting of orders of review under order 45.

SUBMISSIONS

9. It was submitted by Mr. Muthui that the respondent filed suit against the applicant in 1999 and judgment was entered in default of appearance which he applied to set aside but the application was dismissed causing him to file the appeal.

10. That between 2001 the applicant had been sick and that the respondent has hatched a plot to take his land and that of his brothers. He submitted that the appeal has merit since what was being claimed was Ksh. 69,000/- which is now alleged to stand at Ksh. 800,000/- and that the respondent will suffer no prejudice if the appeal is reinstated.

11. Mr. Wahome for the respondent submitted that the application is brought under wrong provision of the law order 22 rule 22 and that order 45 (b), applies where the appeal is pending while in this case there is no appeal.

12. It was submitted that there are no documentary evidence to support the reasons given for delay since there is no evidence of admission to hospital and that the delay is inordinate in support thereof Mr. Wahome submitted the following case:

a) REDLAND ENTERPRISES LTD V PREMIER SAVING & FINANCE LTD - (2000)KLR pg 139-141 Where Khaminwa J held that the appeal must be balanced against an equally weighty right that the plaintiff enjoy the fruits of his judgment and there must be just cause for depriving him of that right.

b) MACHIRA t/a MACHIRA & Co. ADVOCATES v EAST AFRICA STANDARD (2002)2klr 63-68 where Kuloba J held that a successful party at whatever stage should have access to his consequences of that judicial finding and decision.

c) KWAHOLA PHARMACY v COPY CAT COAST LTD (2002) 2KLR pg 269-274 it is the responsibility of the applicant to establish that he has an arguable appeal.

13. From the affidavit evidence and submissions herein it is not in dispute that the appeal herein was dismissed by Makhandia J as he then was on 3rd October 2008. The only issue which is not clear is whether the applicant and or his advocates then on record were served with notice for intention to dismiss

the appeal on 8th March 2008.

14. From the court record on 2nd November 2005 an application for direction was fixed for hearing but neither the Advocate for the appellant and respondent were present in court and the matter was duly adjourned.

15. In the absence of any such evidence on court record and in view of submissions by Mr. Muthui that the applicant's advocate then on record informed him that he had not received any notice for dismissal this to my mind is an appeal which ought to be reinstated as a matter of right.

16. In the case of GATU V MURIUKI (1986)KLR 211 the court of appeal had this to say:

“The court should exercise its discretion to allow an application if it is satisfied that no harm would result to the respondent if it did , the same was capable of being compensated in cost.

I take the view that the matter herein is one where no harm would be suffered by the respondent should the appeal herein be reinstated.

17. On the issue of stay it is clear from the nature of the proceedings appealed against that should the respondent proceed with execution the appellant stands to suffer substantive loss which can not be adequately compensated by way of damages and that the appeal herein will be rendered nugatory.

18. Whereas the respondent is entitled to the fruits of his judgment, the appellant is also entitled to be heard on merits on the appeal herein as was stated by Kuloba J in the case of MACHIRA t/a MACHIRA & Co. ADVOCATES (supra) this is a clear case where the court ought to exercise its discretion through judicially by suspending the enjoyment of the consequential benefits of ones success.

19. I would therefore allow the application herein and reinstate the dismissed appeal on the following terms:

a. The appeal to be fixed for hearing on priority basis and not later that sixty (60) days from the date herein.

b. The appellant not to dispose of LR NO. THEGENGE/IHITHE/520 until the final determination of the appeal herein.

c. The applicant to pay the respondent cost of this application.

d. There be a stay of execution of the decree issued in Nyeri CMCC No. 126 of 1999 pending the hearing and determination of the appeal herein.

Signed, dated and delivered at Nyeri this 4th day of April 2014.

J. WAKIAGA

JUDGE

A. Kariuki for Mr. Wahome for respondent.

No appearance for Muthui for the appellant.

Court: Ruling read in open court in the presence of Mr. Kariuki and in the absence of Mr. Muthui and the appellant.

J. WAKIAGA

JUDGE