



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 588 OF 2013

BOTUL IBRAHIM AHMED SAID.....APPELLANT/RESPONDENT

VERSUS

ALRED RATEMO.....RESPONDENT/APPLICANT

Being an Appeal from the Ruling of the Honourable Mr. Nditika SPM, delivered on 21st October 2011 in respect of an application to strike out and/or mark the suit as abated.

IN

CMCC NO. 4035

BETWEEN

ALFRED RATEMOPLAINTIFF

VERSUS

BOTUL SOMOYO.....1ST DEFENDANT

AHMED IBRAHIM 2ND DEFENDANT

RULING

1. The application before this Court is a Notice of Motion dated 8.8.13 brought under Section 1A, 1B and 3A of the Civil Procedure Act. The Applicant seeks for the following orders:-
 - a. **THAT** this Honourable Court be pleased to strike out the Respondent's Memorandum of Appeal dated 16th November 2011 and filed on 17th November 2011.
 - b. **THAT** costs of this application be provided for
2. The application is grounded on the grounds that;
 1. Judgment was entered in the Applicant's favour on 18th November 2009 in CMCC No. 4035 of 2008, Alfred Ratemo versus Botul Somoyo and Ahmed Ibrahim, whereby the Defendants were ordered to hand over the possession of L.R. No. NAIROBI/BLOCK 61/721 to the plaintiff.
 2. The Respondent filed an application dated 28th July 2011 seeking Orders that the suit be marked as abated against the Defendants and which application was dismissed by Honourable Nditika SPM on

21st October, 2011.

3. The Respondent filed a Memorandum of Appeal on 17th November 2011 from the Ruling of Honourable Nditika SPM.
 4. The Respondent herein has failed to file a record of appeal in time or at all.
 5. The Respondent has not provided reasons for his failure and/or delay in filing the Record of Appeal in time or at all.
 6. Its almost 2 (two) years since the Appellant filed his Memorandum of Appeal but is yet to file the Record of Appeal.
 7. The Appellant and his agents and/or servants have persisted in remaining on the Applicant's premises in total disregard and contempt of the Court Orders issued in CMCC No. 4035 of 2008 on the pretext that he has filed a Memorandum of Appeal.
 8. The pendency of this appeal continues to prejudice the Applicant.
 9. It is in the interest of justice that orders sought herein be granted.
3. The applicant's application was supported by an affidavit sworn by Alfred Ratemo dated 8/8/2013 in it he reiterates the grounds on the face of the application.
 4. The respondent opposed the application and filed a replying affidavit sworn by Botul Ibrahim Ahmed Said an advocate at Gitonga Kinyanjui & Co. Advocates ;he deponed that he was the legal representative of the 2nd Defendant the Appellant as well as the Personal Representative of the 1st defendant, conversant with the facts of this matter and therefore competent to swear the affidavit; he admitted that the appeal was filed as deponed by the applicant but explained that the file went been missing from 18.11.11 when they informed the Executive Officer, Chief Magistrates Court (Milimani) of their intention to file an Appeal against the Order issued on 21.10.11 by Honourable P. Nkitika; that on 20-7-12 the Executive Officer wrote to them advising them to pay for typed proceedings which amount was duly paid on 11.10.12, and shortly after the file went missing; that the file was only located on 11.7.13 and they obtained a letter from the High Court Civil Appeal Registry directing the Chief Magistrates Court to furnish the latter with a Record of Proceedings which letter was placed on file immediately and the file promptly move to the Proceedings Room for typing of the Record of Proceedings where the same is still pending owing to the backlog of work; that the Executive Office would issue them with a Certificate of Delay once the proceedings are ready.
 5. In response to the allegation that the appellant have persisted in remaining in the premises in total disregard and contempt orders issued in CMCC no 4025 on the pretext that he has filed a Memorandum of appeal, counsel argued that the statement is false and baseless, as a respondent /applicant a judgment entered against the deceased litigants against whom an action had already abated and the Appellant/Respondent his agents could not be in Contempt of Court. He further deponed that the Applicant/Respondent's rights have not been prejudiced and it is really the Appellant/Respondent whose rights have been prejudiced with an unjust decision; that the Respondent/Applicant filed pleadings on 1.10.09 against the 1st Defendant in the main suit: six years after her untimely demise on 11-2-2003 and the 2nd Defendant in the main suit passed on 10-11-2009 during the pendency of the Original Suit, which suit abated on the 2nd Defendant's demise; that the Appellant/Respondent has strong grounds of appeal with a high probability of success and has moved the administrative machinery of the Court for the Appeal to be heard; that the case has not been admitted for Appeal thus this Application and the prayers sought therein are misplaced and that the applicant will suffer substantial loss unless the orders sought are granted.
 6. The application came for hearing on 12th June 2014. Miss Ngeresa for the respondent /applicant

and Miss Njuguna for the appellant/respondent made oral submissions. Miss Ngeresa submitted that the appellant was using the memorandum of appeal to disobey the Court order in CMCC 4035/2008 which stated that they hand over the suit premises and have not filed an application for stay either in the lower Court or High Court.

7. Miss Njuguna submitted that the delay in serving the record of appeal was due to circumstances beyond their control as the file was missing and despite applying for the proceedings on 11.10.2012 they only got them this year (2014). She also argued that the defendants are deceased and the plaintiff has not substituted the parties. She urged the Court to dismiss the application and sought the leave of Court to file their record of appeal.
8. Miss Ngeresa in reply argued that the appellant did not indicate when they got the records and when they intended to file the same. She urged the Court to grant the application with cost to them.
9. I have considered the parties affidavits and oral submissions. From the annexures attached to the replying affidavit of the respondent there is a correspondence dated 11/11/2011, 20/7/2012 and 21/5/relating to proceedings in CMCC 4035 of 2008 the subject of appeal before this Court. It could be as explained by the respondent that the Court file has been missing and thus I will give them the benefit of doubt and a chance to prosecute their appeal. The respondent shall prepare their record of appeal and fix the matter for directions within 45 days from the date of this ruling failure to which the Memorandum of Appeal dated 16/11/2011 and filed on 11/11/2011 shall stand dismissed. Costs shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 19th day of September ,2014.

R.E. OUGO

JUDGE

In the presence of:-

.....For the Plaintiff/Respondent
..... ..For the Defendants/Applicant
.....Court
clerk