

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

LAND CASE APPEAL NO. 32 OF 2019

NELSON K. TENGECHAAPPELLANT

VERSUS

ESTHER CHEPKURUI KERICH (As Administrator Of The

Estate Of Paul Kerich Bor, Deceased) RESPONDENT

RULING

1. In the application dated 16/12/2021 the appellant seeks the following prayers:

1. Spent.

2. That the Honourable Court be pleased to issue an order to reinstate the appeal herein Civil Appeal No. 202 of 2018 for hearing and determination on merit.

3. That the costs of this application be provided for.

2. It is apparent that the appellants appeal was dismissed for want of prosecution on 5/10/2021 and that the appellant desires it reinstated for reasons in his supporting affidavit sworn on 16/12/2021 and the grounds at the foot of the instant motion. Those grounds are that the delay in the prosecution of the appeal was occasioned by the delay in typing of proceedings of the subordinate court which the applicant has now obtained. The appellant states that the instant appeal has been mentioned a number of times due to lack of typed proceedings. The appellant also blames world wide web connectivity glitches for the non-appearance of his advocate online on 5/10/2021 when the matter was dismissed, and avers that the dismissal was thus occasioned by circumstances beyond his control. He avers that the proceedings having been received on 25/11/2021, the record of appeal has been compiled ready for filing at any time if this court grants the instant application.

3. The respondent filed a sworn replying affidavit in which the following grounds were advanced, namely: that the appellant has not demonstrated that he paid for the typed proceedings; that the appellant's advocate had been indulged a number of times for failure to file a record of appeal; that even if delay in obtaining the proceedings were taken to be the reason for delay in prosecution of the instant appeal, it is an excessive delay that calls for an demonstration as to what steps counsel for the appellant took in following up proceedings which he has not satisfactorily done; that the internet connectivity issues are not a good ground for failure to comply with court orders and that the application was filed after an inordinate delay.

4. Despite the order that parties file submissions none were filed. Nevertheless, this is an application in which this court will exercise its discretion and deal with on the merits as the grounds for the application are plainly decipherable from its face.

5. I have considered the application and the response thereto. The instant appeal was filed within time. The original **Molo SPM's** file record has been availed to this court and it is attached to the instant appeal. I have examined the annexures to the affidavit of the appellant and I am persuaded that he sought the certified typed proceedings timely in a letter bearing the date of the filing of the instant appeal. There is a court stamp on the face of the letter showing that it was received on 17/1/2019. It has to be appreciated that the period in between is normally taken up by the court vacation and the Christmas holidays. Besides, the appellant now states that despite the delay the record of appeal is now ready and may be filed instantly if allowed.

6. A court of law must endeavour in so far as is possible to determine a matter on its merits. In the present case I find an appellant who is seeking to be heard on the merits which cannot be done unless the dismissal order is set aside. I am of the view that in the circumstances of the instant case, the interests of justice demand that the dismissal order be set aside to pave the way for the hearing. I am also satisfied that the respondent will not suffer any prejudice if the instant application is granted.

7. The upshot of the foregoing is that the application dated 16/12/2021 is found to have merit and the same is granted in terms of **prayer no (2)** thereof. The appellant shall file and serve his record of appeal within **14 days** of this order. The costs of the instant application shall be in the cause. This appeal shall be mentioned on 11/5/2022 for directions.

DATED, SIGNED AND ISSUED AT NAKURU VIA ELECTRONIC MAIL ON THIS 28TH DAY OF APRIL, 2022

MWANGI NJOROGE

JUDGE, ELC, NAKURU

