REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HCA NO. 87 OF 2000

JOSEPH GATHUNGU RUGENDO & ANOTHER..... PLAINTIFF

VS

STANLEY KABUGI.....DEFENDANT

RULING

The application herein is dated 1 /2/2011 commenced by way of Notice of Motion which the applicant seeks orders that the order of the honourable Justice Sergon made on the 4th June 2010 for dismissal of the appeal together with all consequential orders be reviewed varied and/or set aside and the appeal herein be reinstated and the applicant be allowed to file a supplementary record of appeal out of time.

The application is based on grounds that the order of dismissal made on 4th June 2010 was made through no fault or wrong doing on the part of the applicants but through the fault of the Advocate instructed by it advocates on record and that the applicants are keen on prosecuting their intended appeal as they still feel aggrieved by the decision of the trial magistrate. The applicants believe that the appeal is meritorious and it is in the interest of justice that the same be determined on merits.

The application is supported by the affidavit of Lucia Muthoni Lugendo who states that she is aware that the application for leave to file a supplementary record of appeal out of time was not duly filed hence the dismissal. She instructed the firm of Magee Wa Magee to file appeal in respect of the judgment delivered in the lower court and was charged a fee for the same by the advocates. The record of appeal was not legible and therefore dismissed. She informed by an associate in the said firm that they were given leave to file supplementary record of appeal with view to include the legible proceedings within 21 days from 27th July 2009. She visited their offices before 21 days and the said advocate assured her that they were preparing the said supplementary record of appeal and that they would file them within 21. She later visited the said office of Magee Wa Magee Advocates who informed her that they had taken a mention date with a view of taking a hearing date. When she visited the said firm on 5th May 2010, she was informed that they had taken a mention date on 4th June 2010 with a view of filing a supplementary record of appeal. However, she was later informed that the said appeal had been dismissed on basis that they had not filed supplementary record of appeal within 21 days. She later instructed the the firm of Igati Mwai to come on record and informed him of the said dismissal of the appeal. That the said advocate now on record informed her that the said mistake of counsel cannot be visited on client . That she stands to suffer prejudice if this appeal is not allowed as they are still aggrieved and dissatisfied with the judgment of the subordinate court and would like to prosecute the appeal to logical conclusion. She believes that the respondent is not likely to suffer any prejudice and prays that the alleged legible record of appeal be deemed as duly filed within time.

In the replying affidavit the 2nd Respondent, Gabriel Njiraini Kamurwa who was authorized by

his brother, the 1st Respondent to make the affidavit swore that that on 4th June 2010 the appeal herein was struck out for want of prosecution. Prior to its being struck out the appeal had been pending in this court for 10 years and after it was struck out the applicant went to sleep and only made his application after 10 months which is an inordinate and unexplained delay in the prosecution of the appeal and also in the filing of this application. He believes that he would be greatly prejudiced if this appeal is reinstated as he would be made to bear the failings of the Applicant and her counsel .During the pendency of this appeal the first appellant herein passed on and no attempt was made to substitute him or have his name removed from the record.

The ***gravamen*** of the submission by ***Mr Igati*** is that the failure to file the record of Appeal within the stipulated time was occasioned by the mistake on the part of the applicant's advocate on record then and the same cannot be visited on the client who stands to suffer prejudice if the appeal is not re- instated as she is still aggrieved by the decision of the lower court. Mr. Igeti relied on the decision of the Court of Appeal in ***NAI 141 of 2004 Walter Amuoth Ayuki vs Hesbon Sule Okoth.***

On extension of time the file the supplementation record, the applicant, urged the court to exercise its discretion to allow the application. The gist of his argument on this issue is that the applicant came to learn about the dismissal of the appeal when she visited the Law firm on record.

The respondents also filed written submissions whose import was that the application was brought under non existent law at the time of filing of the same. On this ground, they argue that the application was brought under order XLIV and XLIX which ceased to exist on 15/12/2010 upon commencement of the Civil Procedure Rules 2010.

Secondly the respondent argues that the applicant failed to attach the decree or order which she seeks to review contrary to the provision of Order 45 (1) of the CPR 2010 of ***Obunyo vs Were and 5 others 2004 K.L.R at 489.***

On merit he argues that the applicant has not demonstrated disclosing of a new fact or material which after the exercise of diligence was not with the knowledge or could not be produced by the parties at the time when the decree was passed or order made.

Moreover, that the applicant has not demonstrated that there is an error apparent on the face of record. He further submits that there is unreasonable delay because the application was made 10 months after delivery of the ruling.

The respondent submitted correctly that the appeal was struck out for want of prosecution and not for failure to file a supplementary affidavit.

This court finds that on ***28/4/2010*** Caro for Magee wa Magee advocate for applicant and Lucy for P.M. Muchira advocate for respondent appeared and by consent fixed the appeal for mention on ***4/6/2010.*** On the ***4/6/2010*** there was no appearance for Magee for appellant whilst Muchira appeared for the respondent and applied for the appeal to be struck out despite being a mention date.

The honourable Judge held "This date was taken by consent, the appellants and their counsel are absent. The order given on 27/7/2009 has not been complied with. The appeal is ordered dismissed and struck out under XLI rule 31 (s) of the CPR."

On the 27/7/2009 the Court had granted leave to the appellant to file a supplementary record of appeal within 21 days from the date thereof to regularize the mistakes in the record of Appeal. There was no order that failure to do so the record of Appeal would be deemed as struck out. There was no application seeking the striking out of the Appeal.

This honourable court dismissed the appeal and also struck it out. Order XLI rule 31 of the Civil Procedure Rules under which the appeal was dismissed and struck out provided that before an appeal is dismissed for want of prosecution, an application ought to be made by way of summons. Alternatively,

if the appeal is not set down for hearing within one year, the registrar shall on notice to the parties list the appeal before the Judge in chambers for dismissal. The rule is now comprised in order 42 rule 35 (1) and (2) of the CPR 2010.

Mr. Muchira for the respondent is not sure whether it was dismissed for want of prosecution or striking out of the record of Appeal for being illegible.

This court has perused the record and come to a conclusion that the Judge might have fallen into error when the matter was placed before him when he believed that the same was for hearing when the record clearly showed that it was for mention and that is why he observed that the appellant and his counsel were not in court. This court finds that there are so many errors apparent on record thus substantive orders being made on a mention in the absence of the appellant. The respondent applying for the strucking out of the appeal orally, but the honourable Judge dismissing the appeal for want of prosecution and then finally striking out the same.

I have carefully considered the appellants submissions and do agree with Mr. Igati Mwai that the appellant should not be punished for the mistakes of his counsel moreover this court is inclined to grant the appellant the extension of time to file a supplementary record of appeal to enable the court make an informed decision on the merit of Appeal and also to enable the applicant obtain substantial justice.

The submissions by the respondent on procedural technicalities are rejected as the respondent is not prejudiced by the failure by the applicant to refer to the proper Rules in the Civil Procedure Rules.

Though the appellant referred to order XLI of the CPR, this court observed that the appeal was dismissed under the said rules. However the rules were revised to read order 42 of the CPR 2010 . Article 159 of the constitution of Kenya envisages such procedural technicalities and guides the court not to put undue regard on the same.

On the issue of failure to extract the order or decree, the court finds that it will amount to an injustice to dismiss the application on this ground when the order sought to be renewed is on record. Moreover, this court is guided by Article 159 of the Constitution on exercise of judicial authority thus to ensure that ends of justice meet.

The upshot of the above is that the application dated 1 /2/2011 is allowed in its entirety. The supplementary record of Appeal be filed and served within 14 days. Costs of the application in the appeal.

DATED AND DELIVERED AT NYERI THIS 11TH DAY OF DECEMBER 2014

ANTONY OMBWAYO

JUDGE