



REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

HCA NO.42 OF 2008

(Appeal from Kadhi Mr. M. A. Bokoko in Bungoma Court in Succession Cause no.2 of 2008)

**ZAINABU TEMBUKO.....1ST
APPELLANT/APPLICANT**

**ASMAN ALI.....2ND
APPELLANT/APPLICANT**

**MOHAMED ALI.....3RD
APPELLANT/APPLICANT**

**SAIBU ALI.....4TH
APPELLANT/APPLICANT**

**IDRIS ALI.....5TH
APPELLANT/APPLICANT**

VS

**ALI.....RUKIA
RESPONDENT**

RULING

On 23/6/2008 the Kadhi's Court at Bungoma gave a judgment regarding the estate of the deceased Ali Wasike. It found, among other things, that the 1st Appellant/1st Applicant was not a widow of the deceased and therefore could not benefit from the estate. The Appellants/Applicants were aggrieved by the decision and appealed to this court in a Memorandum of Appeal filed on 21/7/2008. On 25/11/2008 the Applicants filed a motion seeking stay of execution of the Kadhi's decision. The application was argued and ruling given granting it. On 4/11/2010 the Respondent (whom the Kadhi's Court had determined she was only legal widow of the deceased and entitled to inherit the estate) filed a motion to dismiss the appeal for want of prosecution. Her ground was that since 9/6/2009 the Applicants had not taken any action in the appeal. Her contention was that they had lost interest in the appeal. The application was served but did not elicit any response. On 23/5/2011 the same was heard and granted. The appeal was dismissed with costs. The Applicants and their advocates did not attend the hearing, although served.

On 24/10/2011 the present application was filed seeking to set aside the order dismissing the appeal. It sought the reinstatement of the appeal so that it could be heard and determined on merits. Grounds were filed opposing the application. In the grounds in support of the application the 2nd Applicant swore an affidavit to say that they entrusted the appeal on their advocates, Mohamed & Lethome Advocates, and only came to know of the dismissal when auctioneers visited them to attach for costs; that they expected their advocates to prepare records of appeal and have the appeal set down for hearing but came to find out that no action had been taken. When they learnt of the dismissal they instructed their present advocates to take over the matter and make the present application. Mr. Situma for the Applicants pleaded that the failure of the earlier advocates should not be visited on the clients. M/s Mumalasi for the Respondent took the view that it was the responsibility of the Applicants to keep checking with their advocates to make sure the appeal was being processed for hearing and resolution.

I consider that the appeal was in regard to an estate whose benefit the Applicants had been kept out by the Kadhi's court. The appeal sought to determine their stake in the estate.

There is no dispute the appeal was filed through Mohammed & Lethome Advocates. Ideally it was their responsibility to process the appeal expeditiously and ultimately have it heard and determined. They certainly failed their clients. The Applicants must certainly bear their part of blame if they failed to keep checking with their advocates about the position of their appeal.

I consider that the application to dismiss the appeal was brought about five months after the last action by the Applicants. It was after the ruling to grant them stay of execution. The appeal had been filed about one year earlier. I do not think that the delay in prosecuting the appeal was inordinate. In any case, the Applicants have reasonably explained what happened. Justice requires that the substance of all disputes in any case or appeal be investigated and decided on merits and that errors and lapses should not unnecessarily bar a litigant from the pursuit of this right, but there is also the equal consideration that litigation should come to an end (**Kuwinda Rurinja and Company Ltd v. Kuwinda Holdings Company Ltd and Others [1998] LLR 827 (CAK)**).

I have considered all these matters, including the contention by M/s Mumalasi that the application was

not brought under the proper provisions of the Civil Procedure Rules, and determine that the interests of justice will be better served by allowing the application. The appeal is reinstated. Costs of this application shall be paid by the Applicants who have been indulged.

Ruling delivered in open court this 15th day of March, 2012.

A. O. MUCHELULE

JUDGE