REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (MILIMANI LAW COURTS

CIVIL APPEAL 151 OF 1992

MUNGUTI KIMOTHO…..……..(DECEASED)

MASIKA KIMOTHO (DECEASED)……..APPLICANT

VERSUS

SAMWEL NGEWA……...RESPONDENT

RULING

There is on record an application by way of chamber summons dated 16th day of April 2008. It is brought under order XXIII rule 2, and 12, order XVI rule 6, XLI rule 31 (2) section 3A of the CPA and all other enabling provisions of the law. Three prayers were being sought namely:-

1. That the order of dismissal of this appeal dated the 10th day of April 2001 be set aside and the appeal be reinstated to hearing.

2. That Kiilu Masika, the applicant herein be substituted as the second Applicant in place of Masika Kimotho alias Masika Kimotho Kiraba his father who was the second appellant in this appeal and is now deceased.

3. *That the costs of this application be costs in the cause.*

Prayer 2 was settled by consent of the parties on the 10th day of June 2009.

The grounds in support are set out in the body of the application, supporting affidavit and written skeleton arguments filed herein. The sum total of the same are that;-

-The appeal was dismissed under order XVI rule 6 CPR and yet it is not a suit.

- The proper procedure that should have been invoked should have been order XLI rule 31(2) which requires that notice of intention to dismiss be given, before the action is taken.

-The subject matter of the appeal is land, and the respondent will be greatly prejudiced if the dismissal order is not set aside.

-The second appellant has since passed on. The applicant herein is the deceased's son. He has letters of administration adlitem issued on March 2008, upon which issuance he moved swiftly to present this

application.

-By reason of the issuance of the said grant ad litem him applicant has locus standi to prosecute the pending appeal.

In their written skeleton arguments, the counsel for the applicant reiterated the grounds in the body of the application and supporting affidavit and then stressed the following.

-That the appeal was wrongfully dismissed under order XVI rule 6 which does not require notice to issue to the parties, not withstanding the fact that it is not a suit.

-That had the court, invoked the correct provision for dismissal, this should have been order XLI rule 31 (2), under which notice would have issued to them to show cause. They were here and have accordingly appeared before court, and addressed the court, as regards the none prosecution of the said matter.

-By dismissing their appeal without giving them an opportunity to show cause, It amounted to breach of the rules of natural justice in their favour.

-Maintain that the dismissal was wrong and has thus prejudiced their rights.

-The court, is urged to accede to their plea not to dismiss the appeal on points of technicalities, but reinstate the same so that the same is disposed off on its own merits.

-That reinstatement will remedy the injustice to be suffered by the second appellant

-The appeal should be reinstated more so when the subject of appeal is land.

Turning to the replying affidavit, they contend that the same is defective as it is not dated.

-Should the court, find that the technicality mentioned above is not fatal, they state that the alleged notice of dismissal mentioned in the replying affidavit has not been exhibited.

-There is exhibited a consent given under section 284 confirming the existence of the appeal.

-Maintain the applicant was not aware of the dismissal orders, until he obtained the letters of administration and moved to this court, to fix the same for prosecution.

-Citing a wrong provision of the law is no ground for dismissing an application.

-If the dismissal was under a wrong provision of law, then in effect there was no dismissal at all.

-By reason of what has been stated above the courts', inherent jurisdiction is invoked for ends of justice to be met.

The respondent to the appeal who is also the respondent to the application filed a replying affidavit and skeleton arguments herein. The salient features of the replying affidavit are:-

-The appeal relates to land, under Adjudication and consent obtained to agitate it in this court, is limited to the agitation of the application only.

-That the relevant consent from the area land Adjudication officer was not given as such, there is no jurisdiction on the part of the court even to entertain the application.

-Maintains that notice to dismiss the suit for want of prosecution was duly given.

-The delay in filing the application has not been explained.

-The applicant has come to court, with unclean hands.

-That although the court, of appeal has ruled that citing a wrong provision of law, is no ground for dismissing an application, non the less they should not be used to set aside an order properly made herein.

- The remedy of setting aside is not available to the applicant. He should have appealed or filed a fresh suit.

In response to the replying affidavit, there is a supplementary affidavit whose salient features are as follows:-

-Concedes that he is aware that the area where the land subject of these proceedings is situated has been declared an Adjudication area and still is an Adjudication area, but maintain that consent to prosecute the appeal has been given as per the annexed copy.

-Maintains notice of appeal was duly served on them.

-Non attendance of the court, at the dismissal level was necessitated by the fact that no notice of the same was given to them.

-Maintains he was not aware of the dismissal of the suit until he obtained letter of administration herein.

-The said dismissal was done exparte as none of the parties were present.

-Still maintain that a wrong procedure for dismissing suits was employed as opposed to the procedure to have been employed which, should have been that an applicant seeks an order for the dismissal of appeal and as such they have a genuine complaint.

-They have put forward sufficient material to warrant this court, granting them the relief they are seeking.

In their written skeleton arguments to court, the respondents reiterated the grounds in the replying affidavit and then stressed the following:-

-The history of the matter is that the Respondent herein had instituted a suit against the appellants at Vaani District Magistrate Court, being L.42 of 1972.

-The issue of the said suit land being a boundary dispute.

-The Hon Magistrate allowed the claim.

-The appellants being dissatisfied with the decision, appealed vide Machakos case number L. 30 of 1973 which appeal was disallowed with costs on 14th April 1992.

-The present appeal was filed as a second appeal on the 11th day of May 1992.

-The current appeal was filed as a second appeal.

-Since 1992 no steps were taken to prosecute the same. It was dismissed on 10th April 2001, 9 years after the filing of the appeal.

-The present application has been presented 7 years after the dismissal order.

-The a fore set out state of facts demonstrate clearly that the applicant here in were disinterested in prosecuting this matter for a period close to 16 years now.

-The appellant just substituted died 6 years after the dismissal order was made and no explanation has been given as to why no action was taken for 6 years after the deceased died.

-There is accumulative delay of 16 years since the appeal herein was filed and for which no explanation has been given.

-There has been no demonstration of the efforts made by the appellants to have the appeal fixed for hearing and disposal.

-By reason of what has been stated above, the applicant has come to this court, with unclean hands and has thus become disentitled to the relief being sought herein.

-The annextures allegedly relied upon by the applicants have served no other useful purpose other than confusion and as such they should be ignored.

-Agreed that indeed the appeal was dismissed under order XVI rule 6 CPR as opposed to order XLI rule 31(2) but that in itself is not a ground for setting a side a valid court order.

-Lack of knowledge on the dismissal orders on the part of the applicant does not assist much considering that there was counsel on record, who should have taken steps to move speeedily to set aside the dismissal orders.

-Maintains that what is centrol to the arguments in so far as the assertion that the appeal was dismissed under a wrong order, the court is invited to apply the spirit of the law and not the letter which spirit of the law is to the effect that there has been unreasonable delay in the circumstances of this case.

-Turning to the provisions of section 3A of the CPA, it is their stand they agree that this provision gives the court unlimited jurisdiction to make orders as it may think fit. But their contention is that the application herein is an abuse of the due process of the court, and the court being bestowed with power to prevent abuse of the due process of the court, should employ those powers to dismiss the application herein which is an abuse of the due process of the court.

The plaintiffs counsel, responded to that submission by filing a reply to the same in writing. The salient features of the same for purposes of the record are as follows:-

-Since the applicant's father was the appellant herein, the current applicant could not do nothing about the appeal.

-When the father died, he took steps to have his name on the record so that the same could be proceeded with.

-There is no record to show that before the appeal was dismissed, parties were invited to show cause why the appeal should not be dismissed.

-The provisions of the relevant law, should not be overlooked by hiding under delay and unclear hands.

-It is not the respondents who moved to have the appeal dismissed, the court, moved on its own motion, and as such the respondent has no reason to complain.

-Maintain the applicant did not delay in presenting the current application after discovering that the appeal had been dismissed which is the criteria that the court, is to use in determining whether the applicants is guilty of laches or not.

-The delay for 16 years is not for the applicant to explain, but his late father as he never handled the appeal during his late father's life time. As such that delay cannot be attributed to him.

-By reason of what has been demonstrated herein, the applicant should not be deprived of his rights before being heard..

-KM1 the consent from the land Adjudication officer was filed in court, before the appeal was dismissed, and as such it is a proper candidate for consideration herein. It is also clearly marked as per the requirements of the law.

-Interest of justice herein demands that the applicant is entitled to revive the said appeal.

-Maintains that the proper position in law demands that notice should have been sent to the parties before the dismissal of the suit.

-Maintain that natural justice has been violated in this dismissal and as such the court, should not allow these breaches to stand before correction. That is why section 3A of the CPA are available for such correction.

-To them it is not an abuse of the process of the court, for one to come to court, and allege that the appeal was wrongly dismissed. Had the converse been the position, then provision of law relating to the setting aside of orders and judgement would not have found its way into the legal provisions. All that the applicant wishes this court, to do is to correct an injustice.

On the courts', assessment of the facts herein, it is clear that there are certain common grounds not indispute herein and which the rival arguments have enjoined this court, to take into consideration when determining the issues in controversy herein. These are:-

-That the appeal herein was filed way back in 1992.

-The dispute arose way back in 1972.

-The original second appellant has since passed on. As per the death certificate KM1, the deceased passed on , on the 07/05/07.

-The grant ad colligenda bona is dated 12th March 2008.

-The application subject of this ruling was filed on the 16th day of April 2008.

From the record the following is evident, namely:-- The appeal was admitted to hearing on 20/7/92. It was fixed for hearing on 26/1/98, when it was fixed for hearing on 18/2/98 on which day it was marked stood over generally.

-On 2/11/98, deferred to 20/1/99.

-On 22nd February 2000 the appeal was fixed for hearing on 6th day of June 2000.

-On 10/4/2001 the following order was made:-

"*As no steps has been taken by either party for the last three years, this appeal be and is hereby dismissed under order XVI rule 6 of the civil procedure rules.*

Before dealing with the merits of the application it is necessary to set out both the case law as well as the provision of law relied upon by either side.

There is the case of GATU VERSUS MURIUKI (1986) KLR 211, A court of appeal decision, on an application for setting aside the dismissal order, declined by the superior court, the CA held interalia that:-

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

2. That the application had quoted a wrong provision of law in his application to re-instate his suit was hardly a sound basis for dismissing the motion"

The case of MURTAZA HUSSEIN BANDALI t/a SHIMONI ENTERPRISES VERSUS PA WILLS (1991) 2KLR 269 also a decision of the CA in which it was held inter alia that:-

1. It was proper to invoke the inherent power of the court, in order to correct injustices and the judge had in this case exercised his discretion correctly.

Order XVI rule 6 CPR Reads:-

"*6 In any case not otherwise provided for in which no application is made or steps taken for a period of three years by either party with a view to proceeding with the suit. The court, may order the suit to be dismissed, and in such case the plaintiff may subject to the law of limitation bring a fresh suit"*

Where as order XLI rule 31 (1) (2) provides:-

31(1) Unless within three months after the giving of the directions under rule 8B, the appeal shall been set down for hearing by the appellant, the respondent shall have be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.

(2) If within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal"

Due consideration has been made by this court, of the rival arguments herein in the light of the principles of case law and provisions of the civil procedure rules relied upon by either side and it is of the opinion that a number of questions have arisen for determination herein namely:-

1. Whether the proceedings herein are competent.

2. Whether the dismissal was done under the correct provision of law.

3. Whether the appellant ought to have been heard before the dismissal order was made.

4. Whether the appellant is guilty of laches and thus disentitled to this courts', exercise of its discretion in his favour.

The issue of the competence of the appeal arises because it is common ground that the subject matter of the appeal is situated in an adjudication area. It is conceded by both sides that in accordance with the provisions of the land Adjudication Act cap 284 laws of Kenya, once an area is declared an Adjudication area, all litigation in court, stand discontinued until and unless sanctioned by the area land Adjudication officer. Herein the respondent relies on annexture SNMI to the replying affidavit as the correct position whereas the appellant/applicant relies on annexture KMI to the supplementary affidavit as evidencing the correct position. Annexture SNM is dated 11th September 2008, signed by one Nyanga C.A. for the District land Adjudication and settlement officer Makueni. It reads;-

"*Ref No. LA/MKN/SEE/VOL 1/60/80*

To whom it may concern

RE: UVUU ADJUDICATION SECTION

This is to inform you that Uvuu Adjudication section has not been finalized.

The process of land Adjudication is still on going although it is in the final stages awaiting issuance of title deeds.

Please assist where necessary.

Signed

Nynga C.A.

For District Land Adjudication and settlement Officer Makueni District"

Whereas annexture KMI appears to be a photocopy of a certified copy of the original dated 18th day of May 1998 filed in the high court in the civil Registry in September 1998. A reading of the same reveals *that consent was given to proceed with the prosecution of the current appeal. KM1 was meant to comply with the provisions of section 30 of cap 284. It reads:- "section 30 (1) except with the consent in writing of the Adjudication officer, no person shall institute, and no court, shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for the adjudication section has become final in all aspects under section 29 (3) of this Act.*

(2) Where any such proceedings were began before the publication of the notice under section 5 of this Act, they shall be discontinued, unless the adjudication officer, having referred to the stage which the proceedings have reached otherwise direct"

Applying that provision to the content of KM1 and SNM1, it is clear that there is no doubt that the Adjudication officer exercised his discretion under section 30 (1) (2) of the said Act to allow the appeal proceedings to continue. Until KM1 is proved not to have been authenticated by the area land adjudication officer, the same is valid authority for the continuation of the proceedings herein. Further, such objection to the competence and or legality of the appeal should have been taken at the directions stage. In the absence of that the appeal is properly in court. SNM1 does not say that no consent was ever given for the continuation of the appeal. It simply says that the Adjudication process is still ongoing.

For the reasons given above, the court, is satisfied that it is properly seized of the matter herein.

As regards the issue of whether the dismissal was done under the correct procedure or not, the court, notes that it is common ground that the same was done under order XVI rule 6 dealing with dismissal of suits. As such it has been faulted. 2ndly the reason given for the dismissal that no action had been taken in the matter for the last three years is not correct, because there is an entry on the record whereby on 22nd day of February 2000 the appeal had been fixed for hearing on the 6th day of June 2000.

As for requirement of the notice to the appellant, the court agrees with the submissions of the applicants counsel that the relevant provisions under which correct action should have been taken namely order XL1 rule 31 (2) requires notice to issue to the parties. No such notice was issued and as such the applicant has a genuine complaint.

As for the in ordinate delay, the court, agrees with the sentiments of the respondent that there has been an in ordinate delay in the finalization of this matter. However as submitted by the applicants counsel, blame goes to the deceased appellant, his counsel and partially the respondent and his counsel too, as the dismissal herein was not initiated by the respondent but the court. Indeed no explanation had been given by counsel for the applicants who has been on the record all along for failure to prosecute the appeal. However, it has to be noted that the delay cannot be pinned on to the current applicant as there was no contractual relationship between the current applicant and the said counsel then. As such laxity on the part of the said counsel cannot be a contributing factor towards the denial of justice to the current applicant. The same thing applies to the delay and or in action by the deceased appellant. What is of importance now is whether the incoming applicant has moved diligently to take remedial steps herein.

It is on record as set out herein, that the grant colligenda Ad litem was granted in March 2008, and the application presented in April 2008. A period of one month cannot be said to be an in ordinate delay.

As regards the exercise of the court's, discretion to correct an injustice, this court, has judicial notice of the fact that the principles which are applicable to the exercise of this judicial discretion are now well settled namely:-

-The exercise of the same is unfettered.

-The only fetter to it is that the same has to be exercised with reason and judiciously.

Applying these to the argument herein, the court, is satisfied that it is inclined to exercise the discretion in favour of the applicant for the following reasons:-

(a) The delay caused by the deceased appellant and his counsel cannot be attributed to the incoming applicant, because as a stranger to the proceedings he had no locus standi to pursue the matter in his personal capacity.

(b) He moved swiftly to step into the shoes of the deceased appellant as soon as he was vested with the relevant instrument clothing him with locus standi.

3. There is on record a consent order allowing him to come into the proceedings and failure to allow him agitate the appeal will amount to giving him a relief with once hand, that is to take over the prosecution of the appeal in the place of the deceased appellant, and then taking it away with the other hand by failing to set aside the dismissal order.

For the reasons given in the assessment, the court, is inclined to allow the applicants application dated 16th day of April 2008 and filed on the 23rd day of April 2008 for the following reasons:-

1. Consent of the area land Adjudication officer to continue the proceeding was obtained vides KM1. As long as KM1 has not been demonstrated not to have been authenticated by the area land adjudication officer, this court, is properly seized of the matter herein.

2. The appeal was wrongly dismissed on two fronts namely:-

(i). By invocation of a procedure applicable to civil suits namely order XVI rule 6 CPR.

(ii). By erroneously stating that three years had elapsed before taking any action leading to the dismissal and yet action had been taken in February 2000 fixing the appeal for hearing.

3. Delay for non prosecution of the appeal lies solely with the deceased appellant and his counsel and as such it cannot be visited on the incoming appellant who had no locus standi to process the appeal for hearing.

4. The applicant has just been brought on board through a consent order and denying him a right to agitate the appeal will amount to giving him a relief by one hand and taking it away with another.

(ii) He has moved diligently to present the application soon after being clothed with locus standi.

5. There is no justification for this court, to excuse non compliance with the provisions of order XLI rule 31(2) of giving notice to the parties to show cause why the appeal should not be dismissed.

6. The respondents contributed partly to delay in that they too took no steps to have the appeal either determined or dismissed.

7. The respondents will be compensated for by way of costs.

8. Room exists for granting conditional reinstatement and this is a proper case for such an order to be made. The applicant is allowed leave to prosecute the appeal on condition that the same is fixed for hearing on priority within the next 60 days from the date of the reading of the ruling.

9. For the reasons given in No. 1,2,,3,4,5,6,7 and 8 above the dismissal order of 10/4/01 be and is hereby set side. The appeal is reinstated for disposal. The respondent will have costs.

DATED, READ AND DELIVERED AT NAIROBI THIS 18TH DAY OF SEPTEMBER 2009.

R.N. NAMBUYE

JUDGE