REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Probate & Admin. Appeal 4 of 2004

IN THE MATTER OF THE ESTATE OF

BENSON MURIU KAMONDE .... DECEASED

BETWEEN

BENSON KINYUA .... APPELLANT

AND

MWANGI KAMONDE .... OBJECTOR

(Appeal from original Judgment in the Senior Resident Magistrate's Court at Karatina in Succession Cause No. 73 of 2001 dated 21st July 2004 by Mr. J. N. Nyaga – SRM)

R U L I N G

On 26th March 2007, this court struck out the instant appeal for want of prosecution and for being an abuse of the court process. This was on the application of the respondent both in the appeal and in the instant application. The said application was predicated upon the grounds that the appellant in the appeal and applicant herein had taken no steps to prosecute the appeal since its filing on 20th August 2004. That the appeal had unduly and indefinitely impeded the implementation of the confirmed grant issued by the subordinate court. That it was an abuse of the court process for a party to file proceedings without any intention for ever of prosecuting the same. Finally the respondent herein stated that the appellant was grossly advantaged by the prevailing status quo since he was utilizing the major portions of the estate. The application was also supported by a supporting affidavit in which the respondent reiterated and expounded on the grounds aforesaid.

The application having been served on the applicant herein was on 11th October 2006 by consent of the parties set down for hearing interparties on 26th March 2007. On the aforesaid hearing day **Mr. Kiama** for the applicant appeared. There was no sign of the respondent nor his counsel. The application having been called out severally and their being no response from the respondent nor his counsel and the respondent having filed neither grounds of opposition nor replying affidavit to the application, I conceded to the request to have the appeal struck out for want of prosecution and or being an abuse of the court process.

On 2nd April 2007 the applicant herein filed a Notice of Motion dated 2nd April 2007 seeking to set

aside the aforesaid order striking out the appeal and to readmit the appeal for hearing. Grounds advanced in support of the application were that the appeal was dismissed for non attendance, that the failure to attend and or omissions of the counsel should not be visited on the appellant and finally that failure to attend court was inadvertent. In support of the application, **Mr. James Njega Nderi**, learned counsel swore an affidavit in which he merely reiterated the grounds aforesaid. The respondent in opposition to the application filed grounds of opposition to the application to wit; that the application was fatally defective and or incompetent, that appellant's counsel's presence could have been superfluous as he had not filed any form of opposition to the application dated 20th February 2006. That the appeal was struck out for being an abuse of the court process and not for non-attendance. He concluded by saying that the application was frivolous, vextious and an abuse of the process of court.

The application came up for interpartes hearing before me on 24th May 2007 and when it was pointed out to the applicant that the appeal had been struck out for want of prosecution and not attendance, the application promptly withdrew his application.

However he was not done yet. On 24th July 2007 he filed yet another application seeking similar prayers as those in the application that he had withdrawn previously. He advanced the same grounds in support of the application. However this time around two affidavits in support of the application were sworn by the applicant himself and learned counsel **James Njega Nderi**. In that affidavit he conceded that the appeal was admitted for hearing on 24th May 2005 and that the application for dismissal was brought barely 9 months later. That thereafter he went to his place of work and temporarily lost touch with his advocates. That by the time he resumed contact with his lawyers, the application seeking to have the appeal struck out had been filed and fixed for hearing. He did not bother to attend court on the hearing of the application allegedly on the advise of his lawyers. It was only later that he learned that the appeal had been dismissed for non-attendance by his advocates. He deponed further that he had always been keen to pursue the appeal and was ready and willing to compensate the respondent in costs. The affidavit of **Mr. Nderi** was a replica to the one he had sworn in support of the application that was withdrawn earlier.

In response, the respondent filed similar grounds of opposition as those he had filed in respect to the earlier application which had been withdrawn.

In his oral submissions in support of the application, **Mr. Kamwenji**, learned counsel for the applicant opted to rely wholly on the affidavit of the applicant. He abandoned the affidavit of **Mr. Nderi**. He submitted that the application was not Res judicata. That the application dated 2nd April 2007 was struck out as it had been brought by way of Notice of motion and not chamber summons. He did not agree that the application was vexatious or abuse of the court process.

In response, **Mr. Kiama**, learned counsel for the respondent submitted that the application had been struck out for want of prosecution and not attendance. He discounted the grounds appearing on the face of the application as having no relevance. That similar application had been filed by counsel and was also struck out for being incompetent.

I have carefully considered the application, the supporting affidavit, the grounds of opposition and respective oral submissions by learned counsel. The record shows that the appeal was struck out on the application of the respondent. It was not struck out for want of attendance on the part of the applicant and or his counsel. The attendance of counsel for the applicant and or the applicant on that occasion would not have made any difference to the fate of the application as they had neither filed grounds of appeal nor replying affidavit to the application. The court having looked at the application which it deemed as unopposed in the absence of any grounds of opposition nor replying affidavit as well as the record and the law found favour with the application and granted it. The application had been brought under rule 73 of the Probate and Administration rules. That rules gives this court wide and unfettered power to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process. However whether that rule was applicable in the circumstances of this case is debatable. However in the absence of any documents in opposition to the application, this court was bound to allow the application. The

applicant seems to get it wrong all the time. The appeal was not struck out for want of attendance but for want of prosecution and or abuse of court process. It was on the basis of an application by the respondent.

The applicant, it would appear is bent on misleading the court. The application dated 2nd April 2007 was not struck by this court. Rather it was withdrawn by the applicant. Further it was not withdrawn or struck out as claimed by the applicant on the basis that it was brought as a Notice of Motion instead of a Chamber Summons. The applicant was compelled to withdraw the application when he was alerted by counsel for the respondent that his application was incompetent in that the appeal had been struck out for want of prosecution and not attendance as claimed in the application.

With the benefit of that information one would have expected that a subsequent application filed by the applicant will not meet with the same pitfalls. It would appear that such an assumption is misplaced for in the instant application, the applicant has repeated the very same grounds he had advanced in support of the withdrawn application both on the face of the application as well as the supporting affidavit. If the applicant withdrew the previous application on the basis that he got it all wrong as regards the reasons behind the striking out of the appeal, and in a subsequent and or instant application, he advances the very same reasons, what is there to stop this application from going the same way? I cannot think of any!

I think I have said enough to show that the instant application is staring at its waterloo. It is dismissed with costs to the respondent.

Dated and delivered at Nyeri this 30th day of June 2008

M. S. A. MAKHANDIA

JUDGE

Delivered by Hon. Lady Justice Kasango this 30th day of June 2008

MARY KASANGO

JUDGE