REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Appeal 127 of 1993

JASON MUNGAI KAMAU……..……APPELLANT

VERSUS

JANE WANJIRU KAMAU & 4 OTHERS…….RESPONDENT

(Appeal from the Ruling and Order of the Senior Resident Magistrate's Court at Kerugoya (F.F. WANJIKU – S.R.M) in S.R.M.CC. NO.63 of 1987 dated

3rd December, 1991.)

R U L I N G

The appellant filed this appeal against the respondents on 26th November, 1993. The appeal was against the ruling and order of the Senior Resident Magistrate's Court at Kerugoya delivered on 3rd December, 1992. By the said Ruling the learned Senior Resident Magistrate (Wanjiku F.F.) set aside the award read to the parties in court on 3rd September, 1991. She further ordered that parties fix a mention date when they would inform the court whether the case is to be referred again to the arbitration or be heard in court. Being aggrieved by that decision the appellant lodged the instant appeal on the date aforesaid.

Having so lodged the appeal, the appellant took no steps to prosecute the same even after it was admitted for hearing on 15th September, 1994. Seven years down the line, the appeal remained unprosecuted and on the 19th October, 2001 the court on its own motion and pursuant to the provisions of *order XLI Rule 31 (2)* of the Civil Procedure Rules, proceeded to dismiss the appeal for want of prosecution.

The court then believed that it had brought the proceedings to finality. It would appear that, that believe was misplaced and or premature as five years plus later on 4th December, 2006, the appellant whom I shall now hereinafter refer to as "*the applicant*" brought an application, the subject matter of this ruling against the respondents hereinafter referred to as "*the respondents*" seeking that the dismissal of this appeal on 19th day of October, 2001 be set aside.

The application was supported by the affidavit of the applicant. In pertinent paragraphs he deponed as follows:-

"3. That during the proceedings of this appeal the respondents in this appeal filed a Succession Cause in Nairobi High Court vide Nairobi High Court Succession Cause No.406 of 1987.

4. That the respondents filed the said Succession Cause in Nairobi court for letters of Administration for the estate of our late father GEORGE KAMAU KIHARA (deceased) and while they were listing the assets of our late father and filed them in court which would be distributed to the families after obtaining Letters of Administration they included my parcel of land now known as MUTIRA/KANYEI/257.

5. That I objected for my parcel of land not to be included in my late father's estate and by the order of Honourable Judge Lady Justice Aluoch dated 20th April, 1989 it was ordered by consent that land parcel number MUTIR/KANYEI/257 is not part of the assets of the deceased George Kamau Kihara.

6. That while the same Succession Cause was still proceeding for hearing it was also noted by the Honourable Mr. Justice Kuloba that land parcel number Mutira/Kanyei/257 is not part of the assets of the deceased George Kamau Kihara.

7. That the parcel of land already mentioned herein above involves this appeal which appeal was appealed against the ruling of Senior Resident Magistrate, Kerugoya and unless this appeal is dealt with and finalized the respondent will continue living on my parcel of land for the rest of their lives and deprive me all my rights of my parcel of land and I shall continue suffering for ever if the respondents will not be evicted from my parcel of land as they entered therein illegally.

8. That as has been explained herein my advocates on record did not fail to prosecute the appeal as I had lost the contact with them to give them the fate of the Succession Cause which was in High Court Nairobi as I was waiting the out come of my parcel of land which was included in my father's estate by the respondents.

9. That since it was not a deliberate to have not briefed my advocates on the record about this appeal due to the facts adduced herein before and since this appeal was on 19th October, 2001 dismissed for want of prosecution I pray to this Honourable court to set aside the dismissal of this appeal and the same be reinstated to enable my advocates on record to proceed further with the appeal."

When the application was served on the respondents, they reacted by filing grounds of opposition as well as a replying affidavit. The grounds of opposition were to the effect that the application was incompetent and improperly before court, the delay in prosecuting the appeal was inordinate and unexplained and finally that the application lacked merit.

In the replying affidavit sworn by the 3rd respondent on behalf of the other respondents, he deponed as follows in relevant paragraphs:-

"4. That it is true that Nairobi High court Succession Cause number 406 of 1987 dealt with the estate of our father GEORGE KAMAU KIHARA.

5. That the said Nairobi High Court Succession Cause number 406 of 1987 has no bearing to this appeal as the two suits were conducted in different courts at different times.

8. That I am advised by our advocate on record and which advice I verily believe that the applicant was duly informed on 16.9.94 by the court about admission of his appeal.

9. That I am further informed by our advocate on record and which information I verily believe that after notification of the admission of the appeal the applicant did not lodge his record until 18th September, 1995 a period of more than 1 years.

10. That I am advised by our advocate on record and which advice I verily belief that the said record was filed only after the applicants had been notified that his appeal was listed for dismissal on 3.11.95.

11. That upon filing of the record of appeal the applicant went to sleep until his appeal was dismissed for want of prosecution on 19th October, 2001.

12. That I am further advised by our advocate on record and which advice I verily believe that the applicant was notified about the said dismissal.

13. That after the said dismissal the applicant again went to sleep and only filed this application more than 5 years later on 4.12.2006.

14. That there is inordinate and unexplained delay of more than 7 years between the date of admission of the appeal and the date of its dismissal and 5 years between the date of dismissal of the appeal and the date of this application."

At the hearing of the application, the applicant and respondents were represented by Mr. Wambugu and Muchira respectively. In support of the application, Mr. Wambugu simply reiterated orally the contents of the affidavit in support of the application. The only addition being that the delay of 5 years in bringing the instant application had been sufficiently explained in the supporting affidavit.

In opposing the application, Mr. Muchira apart from relying on the grounds of opposition as well as the replying affidavit went on to submit that the provisions of law cited in the application were inapplicable. That the only reason for delay according to the applicant was the Succession Cause filed in Nairobi. However counsel submitted that the said cause was filed 6 years before this appeal. That the said cause had no bearing to this appeal. That there is inordinate and unexplained delay at every stage of these proceedings. Finally counsel submitted that much as the applicant has title, the respondents have contested the same and filed a counterclaim and that the last order in the file before the subordinate court was that the matter be mentioned for the parties to inform the court whether they still preferred that the matter be arbitrated upon afresh or be heard in court.

I have carefully considered the application, the supporting and replying affidavits and the annextures thereto, the grounds of opposition and the respective oral submissions. I have also considered the law.

The application was expressed to have been brought under *section 3A* of the Civil Procedure Act and *Order XLIX Rule 5* of the Civil Procedure Rules. I note that the application was drawn by a Senior Advocate. With tremendous respect to the said advocate, he got it all wrong with regard to the provisions of the law on which the instant application should have been anchored. It is neither *section 3A* of the Civil Procedure Act nor *Order XLIV Rule 5* of the Civil Procedure Rules. *Section 3A* of the Civil Procedure Act is designed to assist a litigant where there is no specific rule or procedure in the Civil Procedure Act and the rules made thereunder for the contemplated application or where the ends of justice demand and or to prevent abuse of the process of court. In the circumstances of this case there are specific provisions of the law allowing for the reinstatement of an appeal which has been dismissed pursuant to *order XLI rule 31(2)* of the Civil Procedure Rules. Further *Order XLIX Rule 5* cited does not

deal with reinstatement of dismissed appeals. Rather it deals with power to enlarge time. I would have been forgiving if the application had been drawn and filed by the applicant in person; not so when it is drawn and filed by a seasoned advocate, the provisions of *Order L rule 12* of the Civil Procedure Rules and *section 3A* notwithstanding. It is also not lost on me that though the issue of the wrong provisions of the law being cited in support of the application was raised early enough the applicant through his counsel had no response to the same. He did not bother at all to seek to amend the application or even orally submit in response to that particular issue. I can only assume that the applicant had no response to the said submission. On that ground alone this application should fail.

Even if I am wrong on the foregoing, I would still have dismissed the application on the basis that there was inordinate and unexplained delay in prosecuting the appeal as well as in filing the instant application. As already stated, the appeal was filed on 26th November, 1993 and not on 18th September, 1995 as erroneously deponed to by the applicant. An appeal is commenced by the filing of the memorandum of appeal and not record of appeal. In this case the memorandum of appeal was filed on 26th September, 1993. It is the record of appeal that was subsequently filed as 18th September, 1995. The appeal was then admitted on 15th September, 1994. The last step taken in the prosecution of the appeal thereafter according to the record was on 3rd November, 1995 when both Mr. Ghadially then counsel for the applicant and Mr. Muchira appeared before Justice Ang'awa and the learned Judge with consent of the parties directed that the appeal proceeds for directions. No directions were subsequently obtained. Between 3rd November, 1999 and 19th October, 2001 when the appeal was dismissed for want of prosecution, there was no movement at all in the appeal. No satisfactory explanation has been given for this inaction on the part of the applicant. The applicant has made reference to the Succession Cause in Nairobi filed by the respondents as contributing perhaps to the delay in prosecuting this appeal. I do not however see the relevance of that submission. In any event going by annexture "*JMK2"* and "*JMK3"* in the supporting affidavit it is apparent that the issue as to the ownership of land parcel Mutira/Kanyei/257 was settled as way back as 9th march, 1989 and 11th February, 1999 respectively. Justice Aluoch made the order on 9th March, 1989 whereas Justice Kuloba reinforced the same on 11th February, 1999. This appeal was filed on 26th November, 1993. I therefore do not see how that issue would have caused the delay in the prosecution of the appeal and or this application. I would have perhaps understood if there had been a court order staying proceedings in this appeal to await the outcome of the Nairobi Succession Cause. That is not the case here though.

Following the dismissal of the appeal which fact was known to the applicant courtesy of the Notice of dismissal of appeal dated 20th September, 2001, the applicant went to sleep only to resurface after 5 years on 4th December, 2006 with the instant application. As correctly submitted by Mr. Muchira, there is inordinate and unexplained delay at every stage of the prosecution of the appeal as well as the instant application. The instant application was brought 5 years after the event and there is absolutely no explanation for the delay. The applicant is obviously indolent. This court does not aid the indolent.

It is the duty of the applicant in applications of these nature to satisfy the court that he acted with dispatch in the prosecution of the appeal and or the application. I am far from being satisfied that the applicant has shown proper diligence that this court has come to expect of those who seriously pursue their right of appeal. There is a certain limit as to how long a successful party can be kept out of the fruits of his judgment. Public policy also demands that there be an end to litigation. It would be unfair to re-open litigation on a litigant who considers the matter to have been dead and buried only for the same to be resurrected 5 years later. In my view it would be a travesty of justice and gross abuse of the process of the court to re-open this matter once more.

The applicant has submitted that the situation is absurd in that he is the registered proprietor of the suit premises yet he cannot utilize it as it is occupied by the respondents. That does not however explain the inordinate delay. Yes the situation may be absurd but it is of his own making. This court cannot therefore assist him. All is not lost though as the proceedings in the lower court are still open. The last order in the proceedings before the subordinate court that culminated in this appeal was that;

"…….parties to get a mention date when they will inform the court whether the case is to be referred

again to arbitration or the case will be heard in court. The choice is for the parties."

Therein lies the applicant's remedy and not the resurrection of this appeal.

The application stands dismissed therefor with costs to the respondents.

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

M.S.A. MAKHANDIA

JUDGE

Delivered by;

MARY KASANGO

JUDGE