REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 54 of 2002

IN THE MATTER OF THE ESTATE OF NJOROGE WACHOKIRE (DECEASED)

NGANGA NJOROGE..... APPELLANT

VERSUS

JANE WATIRI.....RESPONDENT

RULING

This is an application by a Summons seeking a reinstatement of an appeal of this court for the non-attendance in court of the appellant and his counsel. I now find it necessary to tabulate the facts of the case before I make any conclusions.

The applicant herein was clearly dissatisfied with the order of the lower court in Thika S.R.M. Succession Cause No.192 of 2000 made by the Honourable H.A. Omondi (Mrs). He proceeded to file this appeal in this court on 2.12.2002 by a Memorandum of Appeal dated the same day. For various reasons to be found in the record, the appeal did not mature for a hearing until 2.11.2005 when it came before Aluoch, J (as she then was) for a hearing. On the material day, as the record confirms, the appellant was represented by Miss Mwangi whose brief was being held by Mr. Ochieng. Mr. Ochieng then addressed the court thus:-

Ochieng

"**I apply for adjournment on behalf of Miss Mwangi who is indisposed."**

Court

"**Where is the evidence of indisposition?"**

Ochieng

"**I do not have it"**

The court then proceeded to make the following order –

"**As there is no evidence Miss Mwangi is indisposed, I proceed to dismiss the appeal with costs to the respondent**."

The above is the situation under which the appeal was dismissed by this court.

The first question and issue this court requires to decide in my humble opinion, is whether the above order of dismissal is an exparte or inter partes order. The answer is important because if it is ex parte, then this court has jurisdiction to set it aside if the circumstances for setting aside are fulfilled. On the other hand, if the order is inter partes, then in my view this court would lack jurisdiction to set it aside even were the conditions to set it aside were present. This is so because this court has no jurisdiction to sit on appeal over orders made by a court of similar jurisdiction in this case a court presided by Aluoch, J then of this court.

The facts show that Mr. Ochieng advocate must have been still sitting in court when the court made the order dismissing the appeal. The court did not specifically say that it was dismissing the appeal for want of prosecution although that can be implied from the order of court.

In my humble opinion and with great respect to the court that made the order, the court should have proceeded to deal with the application for adjournment before it before handling the substantive appeal to dismiss it. Had the court done so, the result would in the circumstances of the above order, have most probably been a rejection of the application for adjournment. The court would then have invited Mr. Ochieng to prosecute the appeal on behalf of the Miss Mwangi or withdraw from holding her brief, in which case the court would proceed ex parte if Mr Ochieng withdrew.

In the circumstances of this case, it is difficult for the court to say that the appeal was dismissed ex parte when clearly the appellant's advocate was being represented by Mr. Ochieng whose application for adjournment was not addressed or dealt with by the court.

On the other hand, that court's order can be interpreted as meaning that since Miss Mwangi was absent without a documentary proof of indisposition, the court was entitled to proceed to deal with the appeal ex parte. This it did by dismissing the appeal, probably for want of prosecution. In the circumstances this court will regard the order dismissing the appeal as exparte since that is how that court, most probably, regarded the said order.

I have carefully and most anxiously considered what interpretation of the two interpretations above, this court should adopt for the ends of justice. I have come to the conclusion finally to adopt the one which regards the order dismissing the appeal as ex parte. This is because had Aluoch, J regarded Mr. Ochieng as fully representing the appellant or his counsel, she would not, as she did, have proceeded to dismiss the appeal impliedly, for want of prosecution.

Having come to this conclusion I will now move to consider the grounds for seeking the setting aside of the order of 2.11.05.

The applicant/appellant supports the application to set aside by an affidavit sworn by him on 7.4.08. The affidavit is not a supporting affidavit nor is it so entitled. The only reason given by the appellant in the affidavit is that the appellant/applicant is desirous of prosecuting the dismissed appeal although he was hampered in doing so by lack of funds since 2007 when he learnt of the dismissal. On the face of the application itself, the applicant gives two grounds for seeking to set the order of dismissal aside. These are that the applicant had filed the documentary proof the advocates indisposition on 2.11.05 which had prevented her from attending court. Secondly that the appellant himself was never informed of the hearing date and that therefore the fault lay with the advocate who had failed to notify him of the same, a reason which should not be visited on him as a party.

On the other hand the Respondent opposed the application to set aside. She averred that there was due delay in not only filing this application but also in prosecuting it. She also argued that although the delay in filing the application might have been caused due to failure of the counsel of the applicant to inform the applicant the fact of dismissal, nevertheless the applicant himself has shown indolence and lack of diligence in failing to inquire from his counsel the reason for delay in prosecuting the appeal. That had he done so, he would have learnt sooner of the dismissal and might have filed his application sooner instead of waiting for three years.

I have carefully considered the grounds for seeking the orders of setting aside. I am satisfied that there was undue delay of about 2 – 3 years before this application was filed. The appellant explained that it was because he did not know that the appeal had been dismissed until 2007. I am not however persuaded that he did not know of the dismissal earlier. This is because his advocate wrote to the Respondent's advocate offering to sign documents for subdivision as ordered by the lower court. And yet a doubt was raised to the effect that the applicant's counsel (whose standing and record in these proceedings is not positively impressive) wrote the letter without the applicant's instructions. There is also some evidence from the records that the lower court whose orders are appealed from, may have not fully considered the wishes of the deceased who is said to have physically demarcated the estate and given same to the parties herein before his death, which issue needs to be fully canvassed during the dismissed appeal.

It is the view and finding of the court therefore, that despite the delay in filing this application, the fault may probably lie with the applicant's first advocate. While this court has the feeling that the applicant may not himself have been wholly diligent, it is nevertheless feeling that his faults may be punished differently from denying him the right to prosecute his appeal.

Furthermore since this court had acted on the basis that the appellant's counsel's absence had not been properly accounted for lack of proof for indisposition and a doctor's prescription dated the same date was produced in support thereof, the court is not inclined to disregard it.

Considered as stated above this court concludes that the grounds for the appellant's and his counsel's absence have been so adequately explained that the appellant's right to be heard in support of his appeal need to be restored. In view also that this matter involves land inheritance which is very sensitive matter, this court will allow this application.

For the above reasons the order of dismissal dated 2.11.2005 is hereby set aside forthwith. The parties are directed to take a hearing notice in court after the delivery of this ruling. In view of the conduct of the appellant up to the time of the hearing of this application, he will not be given the costs of this application.

Orders accordingly.

Dated and delivered at Nairobi this 6th day of October, 2008.

D.A. ONYANCHA

JUDGE