



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 36 OF 2002

MARY WATIRI KINYUA..... 1ST APPELLANT

ALEX NJUGUNA RUBIA.....2ND APPELLANT

DAVID KIARIE 3RD APPELLANT

VERSUS

JULIUS NDUNG’U RUBIA..... RESPONDENT

RULING

By summons take out under rules 49 and 73 of the Probate and Administration Rules made under the Law of Succession Act (Cap.160) and filed in the High Court on 08.07.04, the applicant, Julius Ndung’u Rubia who is the respondent in the above captioned appeal sought the following orders:-

1. That this Honourable Court be pleased to dismiss this appeal with costs for want of prosecution.
2. That the costs of this application be provided for.

The grounds on which the application is based are:-

- a) The appeal herein was filed way back on 28.06.02
- b) Since then, the appellants have not taken any steps whatsoever to have this appeal heard and/or admitted for hearing.
- c) It is in the interest of justice that this appeal be dismissed with costs for want of prosecution.

The application is supported by the applicant’s affidavit sworn on 10.06.04 whose purport is that it is almost two years since the appeal was filed, without any steps being taken by the appellants to prosecute their appeal and that this is a clear indication that the appellants have no interest in the appeal. Accordingly, the applicant urged this court to dismiss the appeal for want of prosecution.

In a replying affidavit sworn by the 2nd appellant, Alex Njuguna Rubia on 07.10.04, the 2nd appellant deponed that the delay in prosecuting the appeal was occasioned by non-availability of the appellants’ previous advocate, M/S Kimani Macharia whom the deponent said he and his co-appellants failed to locate during the time their appeal remained dormant. The 2nd appellant added that he and his coappellants visited the said advocate’s office at Mercantile House, Koinange Street, Nairobi only to find the office closed. That after a long period of time the appellants learnt that the said advocate had been employed elsewhere and only retained his office on part-time basis. That the appellants have learned from

reliable sources that their said previous advocate has since relocated to Tanzania without informing them and that they (appellants) have to date not been able to retrieve their file from their previous advocate. The appellants craved this court's indulgence to allow them to prosecute their appeal in the interests of justice saying that they are laypeople with limited legal knowledge and that their efforts to prosecute the appeal were obstructed by their previous advocate, Kimani Macharia.

The applicant was represented in this application by learned counsel, Mr. K. Njoroge while the appellants who are respondents to the application were represented by Mr. D.K. Mwangi.

In urging dismissal of the appellants' appeal, applicant's counsel stressed the long delay in prosecuting the appeal and complained that the applicant was thereby prevented from executing the orders given by the lower court in his favour because of the pending appeal. The order in question states:

“The land will be divided as earlier agreed to by the deceased's survivors and the petitioner shall get more of the land by 0.5 acres.”

Counsel for the appellants who are respondents to the application told this court that his law firm was instructed by the appellants on 08.09.04 after learning through the applicant who is their step-brother that he had filed the present application for dismissal of their appeal for want of prosecution. The appellants then obtained a copy of the application from court and proceeded to instruct their present counsel as aforesaid. Counsel said there are triable issues in the appeal to be determined by the High Court; that this is a succession matter and the delay in prosecuting the appeal is not solely of the appellants' making; that the appellants are ready and willing to prosecute the appeal and that the court should be lenient with the appellants.

In reply, applicant's counsel pointed out that Alex Njuguna Rubia's replying affidavit gave no details of dates or times of the appellants' alleged visits to their previous advocate's office in Mercantile House, Koinange Street, Nairobi. Applicant's counsel further pointed out that the appellants did not avail any information about any efforts made by them to ascertain from the Law Society of Kenya whether the Society could trace their previous advocate. Finally, applicant's counsel informed this court that the present application was served on the appellants' previous advocate, Kimani Macharia on 29.07.04 at the address given by the appellants and service of the application was duly acknowledged by a rubber stamp whose impression reads as follows:

“Kimani Macharia & Co. Advocates

P.O. Box 56064

NAIROBI”.

Applicant's counsel furnished the court with a copy of the summons and affidavit bearing the above rubber stamp. There is a signature appended against the rubber stamp impression plus the date 29.07.04. Applicant's counsel, therefore, contended that the reason given by the appellants that they could not prosecute their appeal owing to nonavailability of their previous advocate is untrue. Applicant's counsel urged that the appellants' appeal be dismissed for want of prosecution.

I have given due consideration to the application for dismissal of the appeal of the appellants who are respondents to the present application. I note that their appeal was filed on 28.06.02. They did nothing thereafter until 07.10.04 after learning of the present application for dismissal of their appeal for want of prosecution. That is a delay of over two years – a very long slumber indeed. Alex Njuguna Rubia's affidavit in reply to the application for dismissal of the subject appeal makes vague statements that the appellants made visits to their previous advocate's office and missed him. Appellants did not bother to specify dates and times of the alleged visits. The question then arises as to whether any visits were made by the applicants to their previous advocate's office as alleged by them. And how come that the applicant was able to find someone in the said advocate's office who acknowledged service of the present application on 29.07.04 while the appellants claim that they always found the said office closed? The

appellants have taken the matter of their appeal very casually. Such indolence and inordinate delay cannot enure to their benefit.

The appellants' appeal is hereby dismissed for want of prosecution, with costs to the applicant.

It is so ordered.

Delivered at Nairobi this 27th day of October, 2004.

B.P. KUBO

JUDGE