**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 7 OF 2001**

**DORCAS WACEKE NJOMO ……..……. 1ST APPELLANT**

**IGERIA NJOMO …… 2ND APPELLANT**

**VERSUS**

**CATHERINE WACEKE NJOMO …..……...…… RESPONDENT**

**JUDGMENT**

The appeal subject to this application was filed in court on 11th January 2001.

On 30th November 2001 the same was placed before the Honourable Mr. Justice Visram for directions when it was ordered that the appellant do file and serve the record of appeal upon the respondent within 21 days from that date.

Unfortunately the appellant did not comply with this order and on 30th January 2002 the respondent, through counsel, filed an application to have the suit struck out or dismissed for failure of the appellant to comply with the court order made by Justice Visram on 30th November 2001.

The application was filed under Section 3(A) of the Civil Procedure Act and Order XLI rule 8(a)(4) and 32 of the Civil Procedure Rules.

The ground on the body of the application on which it was made was that the appellant had not complied with the court order of 30th November 2001.

The same reason was repeated in the supporting affidavit to the application deponed to by counsel for the respondent on 23rd January 2002 and that the appellant was not interested in prosecuting the appeal.

There was no replying affidavit to this application and it was heard ex parte by this court on 11th March 2002 and the order of dismissal was made.

On 21st March 2003 the appellant made an application to this same court for setting aside of the order of 11th March 2002 and that the appeal be reinstated for hearing on merit.

The reason given on the body of the application was that the dismissal of the appeal was due to the negligence of counsel instructed to lodge and prosecute the same.

That since the issue in dispute concerns land, a sensitive issue, the appellant should be given a chance to be heard on it.

The supporting affidavit to this application repeated the same reason as that on the body thereof and added that the appeal had very high chances of success or that if the appeal was not reinstated, the appellants would suffer irreparable loss and damages.

That the appellants should not be left to suffer due to the mistakes of their advocates who failed to file the record of appeal within the requisite period.

Counsel for the respondent replied to this application and stated that no good reason had been given to warrant setting aside the dismissal order of 11th March 2002 and that there was an inordinate delay in filing the application for setting aside the judgment.

That the appeal had no chances of success in view of the fact that the lower court shared the disputed land strictly in accordance with Section 40 of the Law of Succession Act.

The application was heard by this court on 3rd April 2003 when counsel for the parties appeared and either presented and/or opposed the same.

Counsel for the applicants stated that his clients relied on previous counsel, hence innocent parties and that since this is the final court of appeal in Succession matters, they – the appellants, should be given a chance to be heard on their appeal.

Counsel promised to expeditiously prosecute the appeal if the order of dismissal is set aside.

Mr. Kinuthia for the respondent opposed the application and stated that the long delay in prosecuting this appeal indicates that the applicants were satisfied with the status quo and that it has been the respondent going to court to get a date for directions, and that though the appeal was dismissed due to failure by the appellant to file the record of appeal within 21 days, no such record had been filed up to the time of hearing the application.

He prayed for the dismissal of the application.

To set or not a court order aside, and as in this application to reinstate the appeal to hearing is clearly a matter, within the exercise of the courts discretion.

But before the exercise of this discretion some basis must be laid to convince the court to do what is sought from it.

In this court the only reason given for the setting aside of the court order of 11th March 2002 is because it is the applicants' previous counsel who failed to file the record of appeal within 21 days as ordered by the court on 30th November 2001.

I note the order for filing of the record of appeal within 21 days was made on 30th November 2001. The record should have been filed by 22nd December 2001 but this was not done.

Then there was an application for dismissal of the appeal for failure to comply with the court order which was filed in court on 30th January 2002.

Though this application was served upon counsel for the appellant on 31st January 2002 he saw it not fit or proper to file a reply to it and this is why the same was heard exparte.

There is no record that this advocate is no longer in practice yet he has not sworn an affidavit to show why he did not file the record of appeal as ordered by the court.

And up to now new counsel has not made an application to extend the time for filing of the record of appeal.

The appellants then comes to this court to say they should not be penalized for the mistakes of their counsel. This is not good enough.

Once a client engages counsel to act for him in a case, he plays the role of an agent and the principal, in this case the client, is held responsible for wrong acts of the agent.

The principal must in such case take some positive step to ensure his/her agent is carrying out the responsibilities assigned to him. It is unconvincing for the principal to go to sleep, like in this case, not to go check what is going on in court just because an advocate has been engaged to pursue the appeal only to be woken up when execution is at hand.

That a client should not suffer for the wrong committed by his advocate is not one of the conditions for the court to exercise its discretion in setting aside its orders.

Nowhere in the supporting affidavit do the appellant say they at least visited the court registry to find out what was happening to their appeal or even to write a letter of inquiry about it.

Or else when did they visit the advocate's offices to inquire about the progress of their appeal? It would make some sense if the deponent to the supporting affidavit gave instances and dates when she met the advocate either at his offices or wherever it was and what inquiries she made or what the advocate told her he was doing about the appeal.

To simply say:-

> **"We filed the appeal on 11.1.2001 through Messrs Erick Ochieng and Co. Advocates hoping that he would do the needful to see that the same is heard",**
>
> **or**

**"That he kept on telling us that he was following the matter and saying that when the case is fixed for hearing he will inform us ".**

is not sufficient to convince this court that the appellants have made out a case for setting aside the order of 11th March 2002.

That the dispute subject to the appeal giving rise to this application is over land which is a sensitive issue is not enough to explain why the appellant's advocate failed to comply with the court order.

It is true there is no provision under Order XLI of the Civil Procedure Rules for the court to dismiss an appeal for failure to file a record of appeal, nor is there one for filing of the record of appeal.

However, it has become part of the court practice that a record of appeal be filed before such appeal is heard and where there is a specific order for such record to be filed but this is not done, then the court has a discretion to strike out the appeal or give the offending party more time to comply.

But in this application the appellants sought no extension of time to comply with the court order and it is my view they are not interested in pursuing this appeal.

I dismiss this application with no order for costs.

Delivered this 21st day of May, 2003.

**D.K.S AGANYANYA**

**PRINCIPAL JUDGE**