



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 8 OF 2019

WILSON KIMTAL.....1ST APPELLANT

JULIUS MBURUNGA M'RIMBERA MWIRI2ND APPELLANT

MWINIRA3RD APPELLANT

LEKAUS GALLORO.....4TH APPELLANT

VERSUS

JANE NKATHA KITHINJI (Suing a legal representative of the estate

of JAPHET KITHINJI MWIRABUA-Deceased).....1ST RESPONDENT

ISAAC KINOTI MARATE.....2ND RESPONDENT

CHARITY MBEGEGU SAMSON.....3RD RESPONDENT

ISABELLA KIBURIO SAMSON.....4TH RESPONDENT

DAVID MEME A. M'IMANYARA5TH RESPONDENT

RODA KAGWIRIA KITHINJI.....6TH RESPONDENT

RULING

1. Before me is a Notice Motion dated 10/12/2019 brought pursuant to Section 3, 3A and 63 E of the Civil Procedure Act, Order 12 Rule 7, and Order 51 Rule 1 of the Civil Procedure Rules, where the applicant is seeking orders to set aside/vacate the orders of 3/12/19 and 30/10/2019 and reinstate the Appeal as well as earlier orders.

2. The Application is based on the grounds on the face of it and on the Supporting Affidavit dated 10/12/2019 of Mercy Kaume, Advocate of the applicants herein, who stated that by the time the decree was availed, they were already outside the time to file the record of appeal and she was not aware of previous orders issued by this court. That her mistake should not be visited upon the innocent litigants and prays for an opportunity to ventilate the appeal.

3. The application is opposed via the replying affidavit dated 14/02/2020 of Christine Muriithi, advocate for the respondents. She avers that the counsels herein have appeared before court on numerous occasions and on each occasion the applicants were duly represented, at no particular time did counsel for the applicants inform court that they were unable to get a copy of the decree. That the applicant's continuous disregard of the courts orders is not a mere technicality and urges this court to dismiss the application with costs to the respondent.

4. I have carefully perused the application and the issues raised herein. An order of inhibition and injunction had been issued on 8/04/2019 for a period of one year. However the same lapsed as the advocate for the applicants despite numerous chances never filed the record of appeal and the court finally dismissed the appeal.

5. In **John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation) [2015] eKLR** Justice Gikonyo held that;

“The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of the Constitution. Article 50 coupled with article 159 of the Constitution on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the court.....”

6. The applicants’ counsel states the unavailability of the decree, miscommunication, her heavy workload and her mistakes as what caused the delay in filing the record of appeal and urges the court not to visit her mistakes upon her clients. A perusal of the records indicate that at no time before 1.11.2019 (when the appeal was to stand as dismissed as per orders of 30.10.2019) did the counsel for the applicant indicate to the court the difficulties they were encountering in getting a decree or any other document. However, it appears that this is a case where the applicants were not in the loop regarding the mistakes of their advocate. I am therefore inclined to allow the application on strict conditions. It is not lost to this court that the primary file is no longer in the file as it must have been transmitted back to the lower court.

Final orders

7. The application dated 10.12.2019 is allowed in the following terms;

- a) The record of appeal to be filed and served within 7 days, in default the appeal shall stand as dismissed**
- b) The earlier orders given on 8.4.2019 are not reinstated.**
- c) The appellant is given 5 months to prosecute this appeal, otherwise the same shall stand as dismissed,**
- d) The matter to be mentioned before the Deputy Registrar of the court on 18.3.2021 for purposes of calling back the lower court file.**
- e) The applicant is condemned to pay the costs of this application.**

DATED, SIGNED AND DELIVERED AT MERU THIS 3RD DAY OF MARCH, 2021

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Ruling was given to the advocates for the parties through a virtual session via Microsoft teams on 20.1.2021. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE