



REPUBLIC OF KENYA



KENYA LAW
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**Mwingirwa v Nkuraru & 2 others (Environment and Land Appeal
E003 of 2023) [2024] KEELC 6910 (KLR) (16 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6910 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E003 OF 2023
CK NZILI, J
OCTOBER 16, 2024**

BETWEEN

MBIRITHI JEREMIAH MWINGIRWA APPELLANT

AND

M'MAILUTHA NKURARU 1ST RESPONDENT

DISTRICT LAND ADJUDICATION SECTION -TIGANIA ... 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. The court, by an application dated 25.7.2024, is asked to reinstate the appeal struck out on 22.7.2024 for non-compliance for hearing on merits. The reasons are contained in the affidavits of Charles Nyambati and Mercy Kaume, advocates sworn on 28.7.2024. It is averred that Mr. Nyambati had been appointed to represent the appellants on the last day of compliance and was only able to do so with the assistance of the information communication technology officer on 24.1.2024. Mr. Nyambati says that the former law firm on record was not aware of the difficulties and urges the court to reinstate the appeal in the interest of justice. The cumulative effect of the affidavit of Mercy Kaume is that the blame was on both technology and the court, which is against fair hearing and substantive justice.
2. By replying affidavit of M'Mailutha Nkuraru the 1st respondent in the appeal sworn on 5.9.2024 opposes the application on the basis that the application is full of lies and was by an applicant who has demonstrated the highest conduct of ignorance of court directions and orders. Further, the 1st respondent avers that no change of advocate had been filed except mere theatrics to cover up for taking the court in circles and the failure to take court orders seriously. The respondent avers that this is the 2nd time the reinstatement is being sought.
3. The respondent avers that he has never been served with the alleged record of appeal. That the blame leveled against the court registry and CTS was an afterthought for counsel(s), for the appellant was



in court personally and was warned of the impending striking out of the appeal for non-compliance; otherwise, blame should not be shifted to irrelevant factors.

4. The 1st respondent avers that the former lawyer left the court session on 22.7.2024 and, therefore, the affidavit of Mercy Kaume contains extreme falsehood.
5. It is crucial to perhaps look at the affidavit. Mercy Kaume advocate avers that though she has been on record for the appellant, she was replaced on 17.7.2024 and had an honest belief that the document had been uploaded on the system on time by 19.7.2024 only to be told on 22.7.2024 that they were not in the Court Tracking System (CTS).
6. Learned counsel averred that enough, although she was given up to noon to upload the Record of appeal CTS was slow, and the court declined to accept a physical copy which she had in open court.
7. Further the learned counsel avers that she later on realized that they were not able to upload; hence sought the assistance of Mr. Lagat, the court I.C.T. officer. Learned counsel avers that the technology let her down; her client was innocent; rules of natural justice were not accorded to him as stipulated in the Constitution; he will suffer grave loss for he will forever lose his land; the court was unjust, the 1st respondent did not ask for the dismissal but the court acted on its own mistakes of counsel should not be visited upon innocent litigants, and since the record of appeal is already uploaded it will take a short time to hear the matter.
8. In view of the accusations leveled by the applicant over the court, perhaps there is a need to look at the court file and set the record straight. This appeal was admitted for hearing on 6.3.2024, and the appellant was directed to file and serve a record of appeal within 60 days. A mention was placed for 20.5.2024. Prior to this interim orders had been granted on 18.7.2023. By a ruling dated 1.11.2023, the application for interim stay was dismissed. The matter was placed before the Deputy Registrar on 30.11.2023, 26.1.2024 and 29.2.2024.
9. Come 20.5.2024, no record of appeal had been uploaded or filed. The appellant did not show up the respondent sought dismissal of the appeal for non-compliance. The court struck the appeal out with costs as requested. By an application dated 11.6.2024, the court was asked to reinstate the appeal. The matter was fixed for hearing on 4.7.2024. Similarly, no record of appeal had been filed by then. The court, despite opposition by the respondents, reinstated the appeal for hearing and ordered that the record of appeal be filed and served within 14 days. A mention date was fixed for 22.7.2024. No record of appeal had been filed and served. The appellant appeared at 9.00 am and was given up to noon to comply. There was no uploaded notice by noon or appearance by the appellant or counsel representing him. Similarly, the appellant did not avail any physical or electronic copy as of noon.
10. Come 24.7.2024, the instant application was filed and directed to be heard on 18.9.2024. On the said date, learned counsels for the applicant did not show up. Miss Asumah, for the respondent, orally submitted that allowing the application for the second time would set a bad precedent, demonstrate exceptional treatment to the applicant, open a pandora's box for similar matters, there are no exceptional circumstances, failing to comply with court orders was not a mere technicality, for it goes to the hearing of the matter that the applicant was given several opportunities to prosecute his appeal but in vain, that the court cannot force parties to comply with court orders and that a party who is given an opportunity and fails to utilize it cannot be heard to say that he was denied a fair hearing.
11. The parameters to consider on whether to reinstate an appeal struck out include whether there is sufficient reason for non-compliance, prejudice to the opposite party if it is in the interest of justice to reinstate it, and whether justice can still be done to the parties. In this appeal, the applicant was



- unable to comply with the initial order dated 6.3.2024 by 22.5.2024. The court reluctantly reinstated the appeal, but unfortunately, there was non-compliance on time for the second time.
12. Instead of owning up to the mistakes, the applicant is shifting blame to the court registry, CTS, and the court. The appeal belongs to the applicant, who must play by the Rules. There is no evidence that between 4.7.2024 and 22.7.2024, there were downtime problems with the CTS system. Evidence of seeking assistance before 22.7.2024 is unavailable. The applicant was asked by the court to display the physical copy on the morning of 22.7.2024 but in vain. The court placed the file for mention at noon. There was no appearance by the applicant's counsel at noon to offer any explanation for the difficulties she was experiencing in availing or uploading the record of appeal.
 13. The applicant waited until 26.7.2024 to file this application. Uploading the record of appeal on 24.7.2024 cannot be termed as compliance by 22.7.2024. The applicant blames the court yet it is not the court that delayed or obstructed him from complying with the court directives between 4.7.2024 and 22.7.2024. The court is there to enforce its orders and directives and expedite the delivery of justice according to the law.
 14. Sections 1A, 1B & 3A of the *Civil Procedure Act* and Article 159 of the *Constitution* equally expect parties and their advocates to help the court achieve its objective to expedite the hearing and determination of suits. By failing to comply with the filing and service of a record of an appeal for the second time in a row, it is evident that the applicant has been complacent, indolent and out to derail the cause of justice. Instead of owning up to the mistakes, the applicant still insists that he shoulders no blame.
 15. The sword of justice cuts both ways. The respondents are equally entitled to have their rights to fair hearing safeguarded. The applicant has not addressed the issues raised by the 1st respondent in his replying affidavit and the oral submissions on 18.9.2024. The applicant did not even attend the hearing of his application on the said date. The conduct of the applicant throughout the lifetime of this appeal shows that he has little regard for court orders or directives. A case belongs to a litigant but not his lawyers on record. Kaberia Arimba and Co. Advocates have not filed a notice of change to replace the firm of M.G Kaume for the appellant. The record of appeal is, therefore, filed by a law firm improperly on record if at all is filed.
 16. The applicant has not sworn any supporting affidavit to the application herein. Therefore, the lawyers who have sworn the affidavits cannot rule out the applicant for his innocence or, lack of technical knowledge or inordinate delay. The alleged loss, lack of justice and inaction squarely fall on the appellant. A party is equally liable for mistakes of counsel especially if he fails in his duty to ensure that his or her case is handled in the best way and within the law.
 17. The upshot is that I find no merits in the application. It is dismissed with costs to the 1st respondent.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 16TH DAY OF OCTOBER, 2024

HON. C K NZILI

JUDGE

In presence of

C.A Kananu

Asuma for Mutembei for the 1st respondent

M.G. Kaume for applicant

