



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL APPEAL NO 67 OF 2015

SIMON MBOCHA KINYATI.....1ST APPELLANT

ELIZABETH NJANGO.....2ND APPELLANT

VERSUS

PHOEBE NJERI KAMAU.....1ST RESPONDENT

CITY COUNCIL OF NAIROBI.....2ND RESPONDENT

RULING

1. This is the Notice of Motion dated 18th December 2019 brought under section 1A, 1B, 3A and 63 of the Civil Procedure Act, Order 42 rule 21 and order 51 rule 15 of the Civil Procedure Rules, 2010, Section 159 of the Constitution and all other enabling provisions of the law.

2. It seeks orders:-

1. Spent.

2. Spent.

3. That the order of the honourable Lady Justice L. Komingoi issued on 19th September 2019 dismissing the appeal for want of prosecution be set aside and/or reviewed and the appeal be re-admitted.

4. That the court be pleased to enlarge time for the appellant to file the written submissions annexed to the supporting affidavit filed herewith.

5. That the costs of this application be provided for.

3. The grounds are on the face of the application and are set out in paragraph (a) to (p).

4. The application is supported by the affidavit of Guandaru Thuita, advocate of the appellants sworn on the 18th December 2019.

5. The application is opposed. There is a replying affidavit sworn by Phoebe Njeri Kamau, the 1st respondent herein sworn on the 12th October 2020.

6. On the 21st July 2020, the court with the consent of the parties directed that the application be canvassed by way of written submissions.

7. Consequently, the appellants filed the submissions dated 14th October 2020 while the 1st respondent's are dated 17th November 2020.

8. I have considered the notice of motion and the supporting affidavit. I have also considered the replying affidavit, the written submissions filed and the authorities cited. The issue for determination is whether this application is merited.

9. I have gone through the affidavit of Guandaru Thuita Advocate, sworn on the 18th December 2019 in particular paragraphs 8 to 10. I am

satisfied by the reasons advanced by the advocate.

10. In the case of **Philip Chemwolo & Another vs Augustine Kubede [1982-88] KAR 103 at 1040** Apoloo J (as he then was) stated as follows:-

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of the imposing discipline”.

It is clear that the appellants herein did not contribute to the mistake leading to the dismissal of the appeal. They ought not to be punished.

11. It is the appellants’ advocate submission that they are willing to shoulder the burden of throw away costs.

12. It is in the interest of justice that this appeal be heard on its merit. The subject matter is land which remains an emotive issue in our country.

13. I will reluctantly allow the notice of motion dated 18th December 2019 with conditions.

14. Accordingly, I grant the orders as follows: -

(a) That the orders of this honourable court issued on 19th September 2019 dismissing the Appeal for want of prosecution are hereby set aside and the appeal is re-admitted.

(b) That the appellants’ advocates shall pay the 1st respondent throw away costs of Kshs.15,000/-.

(c) That the appellants do file their submissions within twenty one (21) days from the date of this ruling.

(d) The 1st respondent shall have costs of this application.

It is so ordered.

Dated, signed and delivered in Nairobi on this 29th day of April 2021.

L. KOMINGOI

JUDGE

In the presence of:-

Mr. Thuita for the Appellants

Mr. Orlando for the Respondents

Phyllis – Court Assistant