



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC APPEAL NO.17 OF 2019

JAMES OIGO MITEMA.....APPELLANT/APPLICANT

VERSUS

ZEPHANIA NYANGAU SAGWE.....RESPONDENT

VERSUS

PHILIP NYAMOITA

NYAMOTA NYANCHOKA

JAMES MOSE NYABWARI.....DEFENDANTS

RULING

INTRODUCTION

1. This Ruling is in respect of the Appellant's Notice of Motion dated 19th April, 2021 seeking to set aside the order of dismissal issued by this Court on 9th March, 2021 so that the Applicant can be granted an opportunity prosecute his Appeal on merit.
2. The application is brought pursuant to Order 12 Rule 7 of the Civil Procedure Rules sections 1A, and 3A of the Civil Procedure Act and Article 159 of the Constitution of Kenya, 2010. The same is supported by the grounds set out on the face of the application and the Applicant's Supporting Affidavit sworn on 19th April, 2021.
3. In the said affidavit the Applicant avers that on 9th March, 2021 his Advocate appeared in open court only to be informed by the Advocate for the Respondents that his Appeal had been called out and dismissed for want of prosecution. He contends that the Record of Appeal was ready though it was yet to be filed. It is his further contention that he should not be punished for the non-attendance of his advocate.
4. He argues that he has a good Appeal with high chances of success and he should be granted an opportunity to prosecute it. He is of the view that the application has been filed timeously and that the Respondent will not be prejudiced in any way if the application is allowed.
5. In response to the application, the Respondent filed an Affidavit sworn by his Advocate Mr. George Joseph Mogaka Masese. Mr. Masese averred that the Appeal herein was filed way back in September, 2018. By then the Respondent had already obtained an Eviction Order against the Appellants which order was stayed by the lower court pending the hearing and determination of the Appeal.
6. By January 2020, the Applicant had not filed his Record of Appeal and on 14th January, 2020 the Respondent herein filed an application seeking to have the Appeal dismissed for lack of prosecution.
7. When the said application came up for hearing on 26th February, 2020 the Court directed the Applicant to file his Record of Appeal within 30 days failing which the Appeal would stand automatically dismissed.
8. Mr. Masese avers that on 28th July, 2020 he wrote to the Court enquiring whether the Appellant had filed the Record as directed by the court and the court gave a further mention date on 3rd November, 2020 for the Appellant to comply.
9. When the matter came up for mention on 3rd November, 2020 the Appellant had not complied with the order of the court issued on 26th February, 2020 and thus the court gave another mention date on 9th March, 2021 to confirm compliance.

10. He avers that the Appellant having failed to comply by filing his Record of Appeal, the Respondent successfully moved the court to dismiss the Appeal.

11. He contends that this matter dates back to 1985 when the Appellant brought a suit against the Respondent and lost and the application is merely intended to delay the execution of the judgment the Respondent obtained against the Appellant way back in 2014. He adds that the Appellant has not attempted to explain why the Court Order was not adhered to.

12. On 6th June, 2021 this court directed that the application be canvassed by way of written submissions. The Appellant/Applicant filed his written submissions on 15th July, 2021 while the Respondent filed his written submissions on 2nd August, 2021.

ISSUES FOR DETERMINATION

13. The only issue for determination is whether this court should set aside the order of dismissal issued on 9th March, 2021.

ANALYSIS AND DETERMINATION

14. It is trite that the court exists to do justice to all the parties and it has unfettered discretion to set aside its orders upon terms. In *Shah Vs. Mbogo and another [1966] EA 166, Harris J* set out the guiding principle on a Judge’s discretion to set aside its orders thus:

“I have carefully considered the principles governing the exercise of the courts’ discretion to set aside a judgment obtained Ex parte. This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertent or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice.”

15. From his Supporting Affidavit, the Applicant seems to be raising his advocate’s non-attendance as the reason why the suit was dismissed. However, the court record is very clear that the Appeal was dismissed because the Appellant had failed to file his Record of Appeal, despite the court granting him 30 days on 26th February, 2020 to file the same, failing which the suit would stand dismissed for want of prosecution.

16. Even after the order of 26th February, 2020 the court further indulged the Appellant by granting him more time to put his house in order but he failed to do so. Justice looks both ways and the interests of the Respondent must also be taken into account. This is a case where the Appellant has deliberately delayed the cause of justice. He is undeserving of the court’s discretion, therefore litigation must come to an end.

17. Even though learned counsel for the Applicant in his submissions alluded to the challenges brought about by the COVID-19 pandemic, it is clear that the court took this into account and that is why the court did not dismiss the appeal earlier.

18. In view of the foregoing, the application dated 19th April, 2021 is unmerited and therefore the same is dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT KISII THIS 8TH DAY OF FEBRUARY, 2022.

.....

J.M ONYANGO

JUDGE