



REPUBLIC OF KENYA

IN THE ENVIRONMENT LAND COURT AT MACHAKOS

ELC APPEAL NO. 75 OF 2017

ROSE NDUNGE MASILA.....1ST APPELLANT

SUSAN MUMBE MASILA.....2ND APPELLANT

VERSUS

LUKENYA RANCHING & FARMING COOPERATIVE

SOCIETY LIMITED.....1ST RESPONDENT

JOSEPH MUNYAO KIILU.....2ND RESPONDENT

RULING

What is before Court for determination is the Appellants' Notice of Motion application dated the 17th March, 2021 where they seek the following orders:

1. Spent
2. That the dismissal of the Appeal herein granted on the 19th day of February 2021 be set aside and the appeal reinstated and the Applicant, be allowed to prosecute the case.
3. That this Honourable Court be pleased to reinstate the stay of execution of the award and resultant decree of the Cooperative Tribunal in CTC NO 297 OF 2006 NAIROBI as consented by the parties through their respective Advocates on record on the 17th February, 2012.
4. That this Honourable Court be pleased to give directions as to the hearing of the Appellant's Appeal herein by way of the parties filing and exchanging written submissions for highlighting of the same.
5. That the Honourable Court be pleased to make such further and or other Order(s) and or give such direction(s) as it may deem just and expedient to so make and/or give in the circumstances.
6. That costs of the Application be provided for.

The application is premised on the grounds on the face of it and the supporting affidavit of SUSAN MUMBE MASILA who explains the proceedings in respect to the Appeal herein before its dismissal. She confirms that the Advocates on record for the parties herein entered into a consent for the stay of execution of the award and resultant decree of the Cooperative Tribunal in CTC NO. 297 OF 2006 NAIROBI. She avers that her erstwhile advocates failed to attend court to prosecute the instant appeal on their behalf. Further, they tried on numerous occasions to obtain documents and communication on the progress of the appeal from the said advocates but it was in vain. She contends that their current advocates upon perusing the court file discovered the Appeal had been dismissed for want of prosecution on 19th February, 2021. She reiterates that unless the orders sought are granted the Respondents will proceed to sell Plot No. 5 (currently known as 3221); No. 442 (currently known as No. 316); No. 747 (currently known as No. 385) and No. 37 Ngalalia all in connection with membership No. 460 with the 1st Respondent herein and render the appeal nugatory. She states that the negligence of their previous advocates ought not to be visited upon them. Further, that it is in the interest of justice that the Appeal is reinstated for hearing.

The Application is opposed by the 2nd Respondent who filed a replying affidavit where he avers that the application is basically an afterthought solely geared towards sanitizing the Appellants' high level of indolence. Further, that the period between 23rd November, 2017 when the Court delivered its Ruling and 19th February, 2021 when this Appeal was dismissed for want of prosecution is approximately over

three (3) years hence the Appellants have exhibited inordinate and/or inexcusable delay. He contends that the Appellants have lost interest in this matter and the instant application is an abuse of the court process. Further, no meaningful and useful purpose will be served in reviving the Appeal. He reiterates that the Application does not raise new issues as required by law.

The application was canvassed by way of written submissions.

Analysis and Determination:

Upon consideration of the Notice of Motion application dated the 17th March, 2021 including the respective affidavits and rivaling submissions, the following are the issues for determination:

- Whether the Appeal should be reinstated.
- Whether the Court should grant a stay of execution of the award and resultant decree of the Cooperative Tribunal in CTC NO 297 OF 2006 Nairobi.

The Appellants in their submissions reiterated their averments above and insist the dismissal of the appeal was made unprocedurally. Further, no notice was given to either parties by the Registrar of any intention to have the appeal dismissed for want of prosecution. They contend that the laxity or indolence of their erstwhile Advocate should not be visited upon them. They aver that the Respondents would not suffer if the appeal is reinstated. To support their arguments, they relied on the following decisions: **Elem Investment Ltd V John Mokora Olwoma (2015) eKLR; Rosarie (EPZ) Limited V Stanlex Mbithi James (2015) eKLR; Harrison Wanjohi Wambugu V Felista Wairimu Chege & Another (2013) eKLR; Ghehona Seventh Day Adventist Church of East Africa Union (2013) eKLR; Mwangi Kimenyi V Attorney General & Another (2014) eKLR and John Nahashon Mwangi V Kenya Finance Bank Limited (in Liquidation) (2015) eKLR.**

The 2nd Respondent in his submissions insists that the dismissal order dated the 19th February, 2021 should not be set aside. Further, that the stay orders of 17th February, 2012 and Appeal should not be reinstated. He avers that the Appellants were taking advantage of the stay orders dated 17th February, 2012 and only blaming their erstwhile advocates. He claims reinstating the Appeal is prejudicial to him. To buttress his arguments, he has relied on the following decisions: **Rose Ndunde Masila & Another V Lukenya Ranching & Farming Cooperative Society Limited & Another (2017) eKLR; Habo Agencies Limited V Wilfed Odhiambo Musingo (2015) eKLR and Charles Alexander Kiai V Frasih Wangui Gicheru & 4 Others (2015) eKLR.**

As to Whether the Appeal should be reinstated.

The Appellants have sought for the Appeal to be reinstated and blamed their erstwhile Advocate for failing to update them on the progress of the Appeal. The Respondent has opposed the instant application and insists the Appellants lost interest in the Appeal.

From the averments of the Applicants in the supporting affidavit, it is clear the erstwhile advocates failed to inform them of the progress of the Appeal. Further, from the proceedings in the court file, after the dismissal of an application on 23rd November, 2017, the Appellant's erstwhile Advocates failed to set the Appeal down for directions. The court later proceeded to dismiss the Appeal for want of prosecution. The Appellants submit that they should not be condemned unheard. The 2nd Respondent on the other hand insists the Applicants have failed to demonstrate how they were following up on their case.

Order 12 rule 7 of the Civil Procedure Act provides that: **'Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.'**

From the Court file, I am unable to get a copy of an affidavit of service confirming the previous counsel on record for the Appellants was indeed served by the Notice to Show Cause why Appeal should not be dismissed for want of prosecution. In the case of **MWK Vs AMW (2016) eKLR**, Justice Ngugi observed as follows: **'...dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits...'**

Further in the case of **Bilha Ngony Isaack Vs Kembu Farm Limited & Another Civil Appeal No. 145 of 2014**, Justice Mulwa held that: **'A court's discretion to set aside its ruling is not restricted but should not be so exercised not to cause injustice to the opposing party. It is incumbent upon the Court's favour to adduce sufficient and plausible reasons that are demonstrable and persuasive to court.'**

Further, Article 50 (1) of the Constitution provides that: **'(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.'**

In so far as the Appellants never furnished court with an affidavit from their previous counsel but I am unable to ignore the fact that there is no copy of the affidavit of service to prove service upon the Appellants' erstwhile counsels. It is trite law that mistake to counsel should not be visited upon the Appellants. Further, the Appeal had never been set down for directions in accordance with Order 42 Rule 13 of the Civil Procedure Rules. In associating myself with the two decisions cited above as well as the quoted legal provisions, I will exercise my discretion and in the interests of justice proceed to set aside the order dated the 19th day of February 2021. I will proceed to reinstate the Appeal for hearing and determination on its merits.

As for the prayer for stay of execution pending appeal, I note the Appellants and the Respondent had initially entered into a consent on stay of execution of the award and resultant decree of the Cooperative Tribunal in CTC NO 297 OF 2006 NAIROBI on the 17th February, 2012. Further, the said order subsisted until the Appeal was dismissed for want of prosecution 19th February, 2021. Order 42 Rule 6 (2) of the

Civil Procedure Rules provides that: ‘ *No order for stay of execution shall be made under subrule (1) unless— (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.*’

Based on the materials before me and in relying on these legal provisions I find that in so far as the Respondent vigorously opposed the application for stay of execution, however on perusal of the proceedings herein, I find that this appeal will be rendered nugatory if the said stay is not reinstated.

In the circumstances, I will grant the same.

It is against the foregoing that I find the Notice of Motion application dated the 17th March, 2021 merited and will allow it. The Appellants are directed to set the Appeal down for directions within 30 days from the date hereof, failure of which the Appeal stands dismissed for want of prosecution and the Orders of stay of execution will be vacated.

Costs will be in the cause.

DATED SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 7TH DAY OF FEBRUARY, 2022

CHRISTINE OCHIENG

JUDGE