



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ISIOLO

ELCA. NO. 014 OF 2021

ANNA AMINA (Suing as the administrator of estate of Elema Bonaya (Deceased)).....APPELLANT

-VERSUS-

ROBA ELAMA BONAYA.....RESPONDENT

RULING

1. This application is dated 4th June, 2021 and seeks Orders:

- i. That the application herein be certified as urgent and the same be heard ex-parte in the first instance due to its nature.
- ii. That this Honourable court be pleased to set aside and vary the dismissal order dated 4th May, 2021 of the Appellant's appeal dated 1st July 2020 and any subsequent order thereof.
- iii. That this Honourable Court reinstates ELC Appeal No. (Sic) of 2021 and that the Appeal be heard on its merits.
- iv. That the annexed record of Appeal be deemed properly filed upon payment of the requisite fees.
- v. The costs be in the cause.

2. The application is supported by the affidavit of IAN MOKOTSI, the applicant's advocate sworn on 4th June, 2021 and has the following grounds:

- a) That the Applicant/Appellant being dissatisfied with the Judgement and Decree of Hon. SRM Mbayaki Wafula Delivered on 24th June, 2020 in Marsabit PMCC No. 32 of 2018 filed the subject Appeal at Meru ELC Court.
- b) That the Applicant, after filing the Memorandum of Appeal, wrote to the Marsabit Law Courts requesting for typed proceedings and Judgement on the 24th June 2020 and subsequently on the 13th of August 2020.
- c) That the Applicant/Appellant was unable to file the Record of Appeal in time largely due to the e-filing bureaucracy at the registry and the handicap occasioned on the Appellant by the slow assessment of online filings.
- d) That the decision to dismiss the Appeal was made without notice to neither of the Appellant nor her advocates on record.
- e) That even upon failure to get necessary proceedings, the Applicant decided to prepare a new Record of Appeal without the typed proceedings after being informed through a phone call that the file was no longer at Marsabit Court but in Meru and proceeded to serve the same online for assessment and payment, which process has never yielded any fruits.
- f) That the date which the Appeal was dismissed was taken ex-parte, the Appellant and her advocates unaware that the matter was coming up on that date. The Appellant's advocates were never served with a Mention or Hearing Notice.
- g) That the Appeal was primarily dismissed on a technicality, one which would have been cured if the Appellant or her Advocates were informed of the impending dismissal.
- h) That it would be in the interest of justice if the Appeal is reinstated and heard on its own merits.

i) That the Honourable Court has the discretionary powers to grant the orders sought herein.

3. The order which spawned this application is reproduced herebelow

WHEREAS this matter coming up for pretrial directions on **5th of May, 2021** before Lady Justice Lucy N. Mbugua and in the presence of Miss Ndegwa holding brief for Ondari for the Respondent and in the absence of the Applicant.

AND UPON HEARING the counsel for the Respondent:

IT IS HEREBY ORDERED THAT:

1) **THAT** there being no Record of Appeal filed as per directions given on 2/3/2021 and having confirmed that the Appellants were duly served via their Advocates, then this appeal is hereby **DISMISSED** with costs to the Respondents.

HON. E NGIGI

PRINCIPAL MAGISTRATE

26/10/2021

FOR DEPUTY REGISTRAR

E.L.C ISIOLO

4. From the record of the proceedings in this file, it is pellucid that since filing the Memorandum of Appeal dated 1st July 2020 on 3rd July, 2020, the intended appellant has never filed a record of appeal. As a result the intended appeal has never been admitted. This is a situation that cannot be countenanced by the court. An Appeal cannot be filed just for the purpose of a pending suit in court.

5. The record shows that in 2020, this matter came up for mention 4 times and despite knowledge of the mention dates, the intended appellant and/or his advocate did not come to court. On 28/1/2021 the matter was mentioned in court and despite evidence of proper service, the intended appellant/applicant did not come to court. A further mention was fixed for 18/3/2021 and again the applicant did not come to court.

6. This matter was mentioned before me on 15/11/2021. This time, advocate Waititu was holding brief for Makosi for the intended appellant. It was agreed by the parties that the application would be canvassed by way of written submissions. The applicant was directed to file her submissions within 14 days. The respondent was to do so within 14 days after receipt of the applicant's submissions. Directions after confirmation of filing of submissions were to take place on 24th January, 2022.

7. On 24/1/2022, the applicant had not filed written submissions. Nevertheless the respondent had filed his. The respondent argued that the applicant had not explained why she had not filed the apposite record of appeal within the stipulated time and why she had failed to attend court during many mentions. In a nutshell the respondent submitted that the intended appeal was dismissed properly in accordance with the law. He pointed out that the fact that no record of appeal had been filed since 23/2/2021 buttressed the meritocracy of the dismissal of the intended appeal.

8. I agree with the grounds of opposition filed by the respondent. The applicant has also been indolent in her prosecution of the application. I find that the impugned dismissal of the appeal was properly done. The dismissal was a legal undertaking and not a technicality.

9. In the circumstances:

a) This application is hereby dismissed.

b) Costs are awarded to the respondent.

DELIVERED IN OPEN COURT AT ISIOLO THIS 7TH DAY OF MARCH, 2022 IN THE PRESENCE OF

Court Assistant: Balozi

Ashava h/b Ondari for the Respondent

Appellant absent

HON. JUSTICE P. M. NJOROGE

JUDGE