



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT GARISSA

ELC APPEAL NO. 8 OF 2017

ZEINAB DAGANE GALAL.....APPELLANT

-VERSUS

RABAI YUSSUF MOHAMED.....RESPONDENT

RULING

The Appellant/Applicant, **Zeinab Dagane Galal** approached this Honourable Court vide a Notice of Motion dated 19th December, 2019 seeking the following orders;

(1) Spent.

(2) That this Honourable Court be pleased to set aside the order issued on 24th July, 2018 in which this appeal was dismissed and reinstate the same and be pleased to make an order for expeditious hearing and determination of the appeal on merit.

(3) That an order of stay of the execution of the decree issued on 5th November, 2019 and that issued on 4th December, 2014 and all orders and or process consequential thereto herein be granted pending inter-parties hearing of this application.

(4) That costs of this application be in the cause.

GROUND IN SUPPORT OF THE APPLICATION

1. On the 24th July, 2018, the Hon. Justice E.C. Cherono was pleased to dismiss the Applicant's Appeal, not on merit but on the Appellant's failure through the Appellant's erstwhile Advocates to compile and file a record of appeal in a timely fashion.

2. It was the cheer negligence of the said advocates in representing the Appellant herein that occasioned the current state of affairs and difficulties on the part of the Appellant and the same should not be visited upon the Appellant, who is desirous, willing, ready and able to prosecute the appeal to its logical conclusion.

3. The said advocates failed to bring the foregoing to the attention of the Appellant timeously, and all this while being unknown to the Appellant, the Appellant only belatedly got wind of the status of affairs of the appeal that the same was dismissed.

4. Pursuant to the dismissal, it has been brought to the attention of the Appellant that the Respondent has vide letter dated 5th December, 2019 written a request to the legal officer of the County Government of Garissa, to be registered as the rightful proprietor of the suit property, to wit, plot No. Garissa/Bulla/250.

5. That said letter erroneously indicates that both the trial subordinate court and this Appellate Court found that the suit property belongs to the Respondent and is in the process of execution, which can be done at any time the Appeal having been dismissed.

6. It is just and equitable that this application be heard on priority basis in order for the Applicants appeal to be determined on its merit as failure to do so will draw the Applicant, who has a right of fair trial and right to be heard, from the seat of judgement exposing the Applicant to grave prejudice and irreparable detriment.

7. It is in the interest of justice for the court to move with speed to avoid the hardship that will be occasioned on the Applicant on the basis of an impending transfer of the suit property into the name of the Respondent.

8. The draft memorandum of appeal annexed to this application on the face of it manifestly raises substantial triable issues which ultimately raises a prima facie appeal that should go for trial *ex debito justitiae*.

9. The Applicant is already heavily prejudiced by the dismissal of the appeal herein as the same is an affront to her right to fair hearing under Article 50 of the Constitution.
10. The failure to prosecute this appeal was not inordinate, unreasonable and intentional at the instance of the Applicant, but its erstwhile advocates, and the same is therefore excusable in the interest of justice.
11. The cause of action in the appeal herein is substantial and raises serious and triable issues which the Honourable Court ought to hear and determine on merit.
12. Allowing this appeal to be heard on merit will not give rise to substantial risk to fair trial or cause any serious prejudice to the Respondent.
13. It is in the interest of justice that the order dismissing this appeal be set aside *ex debito justitiae* and the suit be reinstated.
14. The Appellant urges the court to exercise its discretion to restore the appeal so that it can be heard on merit for the reason that she has not lost interest in the appeal.
15. The Appellant is seeking for stay of execution of decree because it is apprehensive that the Respondent would execute it anytime since any earlier stay granted lapsed upon the appeal being so dismissed.

APPLICANT'S SUMMARY OF FACTS

The Applicant in her supporting affidavit deposed as follows;

- (1) That I am a female adult of sound mind and the Appellant/Applicant herein therefore competent to make and swear this affidavit.
- (2) That I have read and understood and where necessary had explained to me by my new Advocates on record the contents of the Notice of Motion application to which this affidavit is in support of and wish to depone as hereunder.
- (3) That on the 24th July, 2018, the Hon. Justice E.C. Cherono was pleased to dismiss the appeal, not on merit but on the failure of my erstwhile Advocates to compile and file a record of appeal in a timely fashion (Annexed hereto and marked "ZDG-1" is a copy of the decree issued on 5th November, 2019)
- (4) That my appeal was to set aside the judgement and orders of the trial court delivered on the 4th December, 2014 by the Hon. M. Wachira in the Chief Magistrate's Court at Garissa.
- (5) That it was the sheer negligence of my said Advocates in representing me that occasioned the current state of affairs and the predicament I am currently facing and the same should not be visited upon me, for I am still desirous, willing, ready and able to prosecute the appeal to its logical conclusion.
- (6) That the said Advocates failed to bring the foregoing to my attention timeously, and all this while unbeknown to me, I only belatedly got wind of the status of affairs of the appeal that the same was dismissed.
- (7) That pursuant to the dismissal, it has been brought to my attention that the Respondent has vide letter dated 5th December, 2019 written a request to the legal officer of the County Government of Garissa, to be registered as the rightful proprietor of the suit property, to wit, Plot No. Garissa/Bulla/250 (Annexed hereto and marked "ZDG-2" is a copy of the letter dated 5th December, 2019).
- (8) That the said letter erroneously indicates that both the trial subordinate court and this appellate court found that the suit property belongs to the Respondent and consequently the Respondent is in the process of execution, which can be done at any time, the appeal having been dismissed.
- (9) That I am advised by my advocates which advice I believe to be sound that it is just and equitable that this application be heard on priority basis in order for the appeal to be determined on its merits as failure to do so will draw me, as a right of fair trial and right to be heard from the seat of judgement exposing me to grave prejudice and irreparable detriment.
- (10) That it is in the interest of justice for the court to move with speed to avoid the hardship that will be occasioned on me on the basis of an impending transfer of the suit property into the name of the Respondent.
- (11) That the draft memorandum of appeal annexed to this application on the face of it manifestly raises substantial triable issues which ultimately raises a prima facie appeal that should go for trial *ex debito justitiae* (Annexed hereto and marked "ZDG-3" is a copy of the draft memorandum of appeal)
- (12) That I am advised by my said new Advocates that I am already being heavily prejudiced by the dismissal of the appeal herein as the same is an affront to my right to fair hearing under Article 50 of the Constitution.

- (13) That the failure to prosecute this appeal was not inordinate, unreasonable and intentional at my instance, but rather my erstwhile advocates, and the same is therefore excusable in the interest of justice.
- (14) That the cause of action in the appeal herein is substantial and raises serious and triable issues which the Honourable Court ought to hear and determine on merit.
- (15) That allowing this appeal to be heard on merit will not give rise to substantial risk to fair trial or cause any serious prejudice to the Respondent.
- (16) It is in the interest of justice that the order dismissing this appeal be set aside *ex debito justitiae* and the suit be reinstated.
- (17) That I urge the court to exercise its discretion to restore the appeal so that it can be heard on merit and order for stay of execution until the appeal is heard and determined.
- (18) That I am seeking for stay of execution of decree because I am apprehensive that the Respondent would execute it any time since any earlier stay granted if any had lapsed upon the appeal being so dismissed.
- (19) That the fact that I had timeously filed this appeal is a clear indication that I am willing, ready and able to prosecute the appeal of which I haven't lost interest in the same.
- (20) That I am advised by my said new advocates that this court ought to weigh the prejudice that is likely to be suffered if this appeal is not reinstated and that the injustice of dismissing this appeal is graver than the justice of the case in that the court is conscious of the constitutional imperative that the right of appeal and therefore the right to be heard on appeal as exercised by myself is a constitutionally guaranteed right which should not be taken away by the strike of a pen where sufficient cause has been shown why there was delay in prosecuting the appeal.
- (21) That I am further advised that the right to a hearing has always been a well-protected right in our constitution and is also the corner stone of the rule of law. An inherent injustice is likely to be occasioned to me if the application is declined.
- (22) That I am advised by the Applicant's advocates on record which advice I verily believe to be sound that failure to allow this application without hearing the appeal on merit is draconian with the ultimate consequence of drawing the Appellant from the judgement seat. Justice can still be done despite the delay. The delay should not prevent the Honourable Court from doing justice to all parties, the Respondent included, lest justice be placed too far away from the parties.
- (23) That what is deponed to hereinabove is true to the best of my knowledge save for information and sources whereof have been disclosed and matters deponed on belief, whereupon the grounds have been given.

RESPONDENT'S SUMMARY OF FACTS

The Respondent did not file any response to the application.

LEGAL ANALYSIS AND DECISION

I have considered the affidavit evidence contained in the supporting affidavit and the provisions of law invoked by the Applicant.

The brief history of this case is that the Appellant had lodged appeal after she was aggrieved by the judgement of the trial court Hon. Margaret Wachira Chief Magistrate delivered on 4/12/2014. The appeal was lodged in the High Court of Kenya in Nairobi and registered as HCCA No. 36 of 2014. The appeal was later transferred on 18/12/2017 for hearing and disposal by this Honourable Court.

On 7/5/2018, this matter was listed before me for directions while sitting in this court on circuit where M/s Balqesa holding brief for Mr. Salah was present. There was no attendance by the Respondent and/or her legal representative. The matter was for further mention for directions on 23/5/2018. On the said 23/5/2018, the court was not sitting and Balqesa Advocate took another mention dated on 27/6/2018. Again, on the said date, Mr. Otieno was present for the Respondent and M/s Balqesa holding brief for Salah for the Appellant was also present. The parties took the following directions by consent:-

- (1) The Appellant is granted 21 days within which to compile and file the record of Appeal failing which this Appeal will stand dismissed.
- (2) Mention on 24/7/2018 for further orders.

On 24/7/2018, only M/s Balqesa holding brief for Salah for the Appellant was in attendance. The Respondent and/or her advocates were absent. The learned counsel M/s Balqesa informed the court that the record of appeal had not been compiled and filed as directed by the court. She attempted to give explanations for failure to comply with the consent order but because the consent which the parties had filed contained a rider upon failure by the Appellant to comply, the court correctly confirmed the dismissal of the appeal as per the consent order.

The present application is seeking to set aside the dismissal of the consent order which the parties entered into on 27/6/2018. The Applicant has invoked Section 1A, 1B, 3A and Order 17 Rule 2 (2), Order 51 Rule 1 CPA and all enabling provisions of the law.

Order 17 Rule (4) and (6) CPR provides as follows;

“(4) The court may dismiss the suit for non-compliance with any directions given under this order.

(6) A party may apply to court after dismissal of a suit under this order.”

After the parties through their counsels agreed by consent to take directions on how to dispose this appeal in an expeditious and fashionable manner, the Appellant/Applicant failure to comply with the directions whereby the appeal was dismissed by this Honourable Court on 24/7/2018. The authority to set aside a dismissal order under Order 17 Rule 6 CPR is a discretionary power which is given to the courts to be exercised judicially and not whimsically. The court which has been called upon to exercise such authority must be satisfied that reasonable and satisfactory explanation has been given by the party seeking the exercise of such authority for failure to comply with the directions/orders of the court.

In the instant application, the Appellant/Applicant was granted leave to compile file and serve a record of appeal within 21 days. The reasons given by the Applicant for failing to file her record of appeal is given in paragraph 5 and 6 of the supporting affidavit where she deposed as follows;

“5. THAT it was the sheer negligence of my said advocates in representing me that occasioned the current state of affairs and the predicament I am currently facing and the same should not be visited upon me, for I am still desirous, willing, ready and able to prosecute the appeal to its logical conclusion.

6. THAT the said advocates failed to bring the foregoing to my attention, timeously, and all this while unbeknown to me, I only belatedly got wind of the status of affairs of the appeal that the same was dismissed.”

My literal reading and understanding of the portions of the supporting affidavit is that the Applicant’s dismissal of her appeal was attributed to the negligence of her erstwhile advocates and that the mistakes of her advocates should not be visited on her.

Considering this matter in light of the reasons given, I find the Appellant/Applicant is the one who chose her erstwhile advocates who failed to comply with the directions given by consent, to compile and file the record of appeal within the stipulated period. The consent order carried a rider to have the appeal dismissed in default of compliance. The Appellant’s erstwhile advocates have not sworn an affidavit explaining why they did not compile and file the record of appeal within the given timeline.

The Applicant has not also sought leave for extension of time within which to compile and file the record of appeal. She has not even annexed a draft record of appeal to the present application. This application in my view is a proper case

where an advocate should bear the consequences of their own professional negligence for failure to comply with directions given by this Honourable Court on behalf of their own client. Similarly, the client who is the Applicant should bear the consequences for the choice of her legal counsel. I am not satisfied that there are sufficient grounds to set aside the dismissal of this appeal.

I therefore decline to exercise the courts discretion in favour of the Applicant. Consequently, I dismiss the Notice of Motion dated 19th December, 2019 with no order as to costs. It is so ordered.

DATED, DELIVERED VIRTUALLY AND SIGNED AT GARISSA THIS 1ST DAY OF OCTOBER, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. Mr. Nura for the Applicant.
2. Respondent/Advocate: Absent
3. Fardowsa: Court Assistant.