



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CIVIL APPEAL NO. 106 OF 2013

(FORMERLY EMBU CIVIL APPEAL NO. 86 OF 2009)

MICHAEL KANYI MWARANO.....APPELLANT

VERSUS

FESTUS MURIMI MWARANO.....RESPONDENT

RULING

1. The applicant herein vide a Notice of Motion dated and filed on 18th March, 2021 is seeking the following orders: -

(a) **That this Honourable Court pleased to reinstate the appeal which was dismissed on 26th April, 2016.**

(b) **That the case be in the cause.**

APPLICANT'S CASE

2. The applicant's application was supported by the applicant's affidavit sworn on 18th March, 2021 and further affidavit sworn on 23rd July, 2021.

3. The applicant deponed that he lost contact with his advocate Mr. Gitonga D N and that the notice was served to his former advocate of which he could not communicate.

4. He also deponed that he is old and has been ailing up to date and that the mistakes of his advocates should not be meted against him.

5. He stated that the order from the lower court was clear that the suit land be shared equally between him and the respondent. However, the respondent misrepresented facts to the authorities so as to be registered as the sole proprietor thus this is reason enough to grant him a chance to have his day in court.

6. He thus prayed that this Honourable Court reinstates the appeal so that justice can be served.

RESPONDENT'S CASE

7. The Respondent opposed the said application vide a Replying Affidavit and Supplementary Affidavit sworn on 11th June, 2021 and 29th September, 2021.

8. The respondent prayed that the application be dismissed with costs on grounds that: -

a. The appellant filed the appeal herein on 13th July, 2009 and has never prepared record of appeal or list the appeal for directions.

b. The court dismissed the appeal on 26th April, 2016 and the appellant did not show cause why the appeal should not be dismissed though served.

c. Since 13th July, 2009 until 26th April, 2016 when the matter was dismissed, the appellant did not take action to prosecute the appeal.

d. Further, it has taken the appellant more than 5 years after the appeal was dismissed to bring the present application.

e. The treatment notes are not reason enough for not prosecuting the appeal as they are for diverse dates and the appellant was not admitted from 13th July, 2009 to 26th April, 2016 to warrant him not prosecute the appeal.

f. The appeal has already been overtaken by events as the decree of the lower court has already been executed.

PARTIES' SUBMISSIONS

9. When the application came up for hearing on 23rd July, 2021 the parties through their advocates on record agreed that it be disposed of by way of written submissions.

APPLICANT'S SUBMISSIONS

10. The applicant filed his submissions on 15th September, 2021.

11. He submitted that he had an advocate on record who failed to update and advise the applicant on the progress of the case which prompted him to file a Notice to Act in person on 15th December, 2014. However, he fell ill and has been in and out of hospital.

12. He submitted that he was not crying foul of the fact that there were mistakes, he was willing to pursue the appeal.

13. He further submitted that the application was brought without unreasonable delay as he has for quite some time now been in and out of the hospital which has drained him emotionally and financially. However, immediately he recuperated, he embarked on having the suit reinstated.

14. The applicant submitted that he had demonstrated that the Respondent exhibits traits of mischief in that whilst the respondent obtained favourable orders, he ensured that he took it all.

15. He submitted that he sought to have a day in court and substantiate the merits of the appeal and why he should be the sole proprietor of the suit land.

16. He further submitted that the Respondent had not demonstrated how he is likely to suffer prejudice if the application is allowed.

17. The applicant prayed that the application be allowed as prayed as he was willing to abide by the conditions that may be set out by the court as regard to the prosecution of the appeal.

RESPONDENT'S SUBMISSIONS

18. The Respondent filed his submissions on 7th October, 2021.

19. In the said submissions the respondent prayed that the application be dismissed as the appeal has been overtaken by events as the lower court decree has already been executed as the court had ruled that the land parcel No. Kiine/Kibingoti/Nguguine/43 being clan land should be shared equally between the appellant and the respondent who are biological brothers.

20. The respondent submitted that the applicant has not explained why the appeal was not fixed for directions and that his sickness does not suffice as he had an advocate on record and neither was he admitted in hospital.

21. He submitted that the court dismissed the matter after a period of close to 7 years had lapsed and thus his illness is not a sufficient reason for inaction of close to 7 years given that he was never admitted in hospital.

22. He submitted that he was willing to have half of the suit land transferred to the appellant and thus litigation should come to an end.

ANALYSIS

23. I have considered the pleadings, the submissions and the authorities proffered by the parties herein.

24. From the records of this court the appeal herein was dismissed on 26th April, 2016 under **Order 17 Rule 2 of the Civil Procedure Rules** whereby **Sub-section 1** provides that: -

“(1) “In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit dismissed, and if cause is not shown to its satisfaction, may dismiss the suit”.

25. On the said day, there was no appearance by either of the parties. The applicant has alleged that the notice was served upon his former advocates on record who did not inform him.

26. The applicant has submitted that his former advocates failed to update and advise him on the progress of the case which prompted him to file a Notice to Act in person on 15th December, 2014.

27. In the case of **Edney Adaka Ismail Vs Equity Bank Limited [2014] e KLR**, the Honourable Court held as follows: -

“11. The question then, that arises is whether the Plaintiff has offered sufficient reason to persuade this Court to exercise its discretion in his favour and reinstate the application.

It is true that where the justice of the case mandates, mistakes of Advocates even if they are blunders, should not be visited on the clients when the situation can be remedied by costs. In the Case of Lucy Bosire Vs Kehancha Div. Land Dispute Tribunal & 2 Others (supra) Odunga J. held as follows:-

“It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits. See Philip Kepto Chemwolo & Another Vs Augustine Kubende [1986] KLR 492; [1982-88] 1 KAR 1036 at 1042; [1986-1989] EA 74.”

However, it is not in every Case that a mistake committed by an Advocate would be a ground for setting aside orders of the Court. In Savings and Loans Limited Vs Susan Wanjiru Muritu Nairobi (Milimani) HCCS No. 397 of 2002 Kimaru, J. expressed himself as follows:-

“Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates failure to attend Court on the date the application was fixed for hearing, it is trite that a Case belongs to a litigant and not to her Advocate. A litigant has a duty to pursue the prosecution of his or her Case. The Court cannot set aside dismissal of a suit on the sole ground of a mistake by Counsel of the litigant on account of such Advocate's failure to attend Court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present Case, it is apparent that if the Defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the Defendant to be prompted to action by the Plaintiff's determination to execute the decree issued in its favour, is an indictment of the Defendant. She had been indolent and taking into account her past conduct in the prosecution Of the application to set aside the default judgment that was dismissed by the Court, it would be a travesty of justice for the Court to exercise its discretion in favour of such a litigant. (Emphasis added)

12. I fully agree with the above holding. It is not enough for a party to simply blame the Advocate but must show tangible steps taken by him in following up his matter”.

28. Further in the case of **Rukenya Buuri Vs M'arimi Minyora & 2 others [2018] e KLR**, the Honourable Court held that: -

“Blaming his former advocate is not enough. A litigant must be diligent enough to follow up how his case is being handled by his advocate.”

29. From the above authorities it is evident that since a case belongs to a litigant, it is not sufficient for the litigant to blame his former advocates for failure to prosecute a matter without showing the tangible steps taken to prosecute the matter.

30. I find that the applicant has not demonstrated the steps taken to follow up the matter with his former advocates on record.

31. Even after filing the Notice to act in person on 15th December, 2014 the applicant went to slumber and failed to prosecute his appeal which led to the dismissal.

32. I also find that the applicant's sickness is not sufficient reason to warrant the delay.

33. It is evident that the applicant is an indolent litigant since upon dismissal of his appeal in the year 2016, he brought this application approximately 4 years later. By this time the impugned order had already been executed as demonstrated by the respondent herein.

34. This Honourable Court is guided by the maxim of equity that Equity aids the vigilant and not the indolent.

35. I notice that there was fault on part of the respondent in execution of the impugned order. However, I believe the explanation offered by the respondent that he took measures to have the same rectified and the same was stalled by the stay of execution orders issued on 12th November, 2010.

36. It is in the interest of justice of both parties herein that the litigation which commenced approximately 15 years ago be brought to an end.

CONCLUSION

37. In the circumstances, I find that the Notice of Motion dated 18th March, 2021 does not have merit and the same is hereby dismissed with costs.

RULING DATED, DELIVERED IN OPEN COURT AT KERUGOYA AND SIGNED THIS 5TH DAY OF NOVEMBER, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. *Ms Ndungu holding brief for Ms Wangechi Munene*
2. *Mugo for the Applicant*
3. *Kabuta, Court clerk.*