



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC APPEAL NO. 56 OF 2015**

**MAROCO PROPERTIES LIMITED.....APPELLANT**

**VERSUS**

**1. AMIN SHERALI MAWANI**

**2. ASMAT AMIN MAWANI**

**3. CITY COUNCIL OF NAIROBI.....RESPONDENTS**

**RULING**

On 2<sup>nd</sup> February, 2021, the court ordered the appellant to file its submissions within 14 days from the date of the order in default of which this appeal was to stand dismissed with costs to the respondents. The court thereafter fixed the matter for mention on 20<sup>th</sup> April, 2021 to fix a judgment date. The appellant filed its submissions dated 12<sup>th</sup> February, 2021 on 17<sup>th</sup> February, 2021. When the matter came up for mention on 20<sup>th</sup> April, 2021, the appellant's advocate informed the court that the appellant had filed its submissions as had been directed by the court. The respondents' advocate did not attend the mention. Since the respondents had already filed their submissions, the court fixed the appeal for judgment on 16<sup>th</sup> December, 2021.

What is now before me is a Notice of Motion application by the respondents dated 28<sup>th</sup> April, 2021 seeking an order that this appeal stands dismissed in terms of the orders made by the court on 2<sup>nd</sup> February, 2021 and the setting aside of the order made on 20<sup>th</sup> April, 2021 fixing the appeal for judgment on 16<sup>th</sup> December, 2021. The application which is supported by the affidavit and supplementary affidavit of the respondents' advocate Sharon Mbithe sworn on 28<sup>th</sup> April, 2021 and 4<sup>th</sup> October, 2021 respectively has been brought on the grounds that pursuant to the orders made by the court on 2<sup>nd</sup> February, 2021, the appellant was to file its submissions by 16<sup>th</sup> February, 2021 in default of which its appeal was to stand dismissed. The respondents have averred that the appellant filed its submissions on 17<sup>th</sup> February, 2021 outside the time that was limited by the court. The respondents have averred that as at 17<sup>th</sup> February, 2021, the appeal had stood dismissed and as such there was no appeal in respect of which the said submissions could be filed. The respondents have averred that since the appeal stood dismissed on 16<sup>th</sup> February, 2021, there is nothing left for the court to determine and it is on that basis that the court has been called upon to set aside its order fixing the appeal for judgment on 16<sup>th</sup> December, 2021.

The application is opposed by the appellant through grounds of opposition dated 24<sup>th</sup> August, 2021 and a replying affidavit sworn by the appellant's advocate Njugi Gachogu on 24<sup>th</sup> August, 2021. In its grounds of opposition, the appellant has termed the application an abuse of the process of the court. The appellant has contended that its submissions were filed within time and that in any event, the orders made on 20<sup>th</sup> April, 2021 sought to be reviewed have not been extracted and a copy annexed to the affidavit in support of the application. In the replying affidavit, the appellant's advocate has averred that he made attempts to file the submissions on 16<sup>th</sup> February, 2021 but was unable to do so. The appellant's advocate has stated that although he posted the submissions on 16<sup>th</sup> February, 2021, it was until 17<sup>th</sup> February, 2021 that he was issued with an invoice for the filing of the said submissions that he settled immediately. The appellant's advocate has stated that the delay if any in the filing of the said submissions was not occasioned by the appellant but was due to the e-filing system failure. The appellant's advocate has stated further that the last date for the filing of the said submissions was 17<sup>th</sup> February, 2021 and not 16<sup>th</sup> February, 2021 as claimed by the respondents and as such, the submissions were filed within time. The appellant averred that should the court find that the submissions were filed outside the time that was prescribed by the court, the court has unfettered discretion to enlarge time as the justice of the matter may require.

I have considered the application together with the affidavits filed in support thereof. I have also considered the grounds of opposition and replying affidavit filed by the appellant in opposition to the application. The following is my view on the matter. I am in agreement with the respondents that the time within which the appellant was to file its submissions lapsed on 16<sup>th</sup> February, 2021. I am also in agreement with

the respondents that the appeal herein stood dismissed with costs to the respondents on 16<sup>th</sup> February, 2021 when the appellant failed to comply with the orders made by the court on 2<sup>nd</sup> February, 2021. It follows therefore that there was no appeal as at 17<sup>th</sup> February, 2021 when the appellant filed its submissions and on 20<sup>th</sup> April, 2021 when the court fixed the appeal for judgment on 16<sup>th</sup> December, 2021.

The appellant has called upon the court to consider extending or enlarging the time that was fixed on 2<sup>nd</sup> February, 2021 within which it was to file its submissions. I am in agreement with the respondents that there is no appeal in existence in which time can be extended for the appellant to file submissions. The appellant has to deal first with the order dismissing the appeal before it can seek enlargement of time. In other words, time can only be enlarged after the appeal is reinstated. I have no application for the reinstatement of the appeal before me. I am therefore unable in these proceedings to reinstate the appeal and enlarge the time within which the appellant was to file its submissions.

The upshot of the foregoing is that the respondents' Notice of Motion application dated 28<sup>th</sup> April, 2021 has merit. The court makes the following orders in respect thereof;

1. This appeal stands dismissed with costs in terms of the orders made on 2<sup>nd</sup> February, 2021.
2. The order made on 20<sup>th</sup> April, 2021 fixing the appeal for judgment on 16<sup>th</sup> December, 2021 is set aside.
3. The judgment date of 16<sup>th</sup> December, 2021 is vacated.
4. The respondents shall have the costs of the application.

**DELIVERED AND DATED AT NAIROBI THIS 4TH DAY OF NOVEMBER 2021**

**S. OKONG'O**

**JUDGE**

**RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO  
CONFERENCING PLATFORM IN THE PRESENCE OF:**

**MR. NJUGI FOR THE APPELLANT**

**MS. MWANZIA FOR THE RESPONDENTS**

**MS. C. NYOKABI - COURT ASSISTANT**