



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC APPEAL NO. 90 OF 2008**

**PAUL GAKURA .....APPELLANT/APPLICANT**

**VERSUS**

**ZAKAYO MBAABU.....RESPONDENT**

**RULING**

1. This appeal was filed in court vide the memorandum of appeal on 15<sup>th</sup> September, 2008. The appeal was dismissed on 18<sup>th</sup> January 2021 for want of prosecution. The Appellant approached this court vide a Notice of Motion dated 2<sup>nd</sup> February 2021 brought pursuant to Section 3A of the Civil Procedure Act, Order 12 rule 1 and 7 of the Civil Procedure Rules and Article 159(1)(d) of the Constitution of Kenya 2010. The applicant seeks orders to set aside the orders made on 18<sup>th</sup> January 2021 dismissing the appeal and he prays for the reinstatement of the same.

2. The application is based on the grounds on the face of it and on the supporting affidavit of the applicant's advocate. The deponent avers that she communicated to the respondent's advocate that she would not be available on the day the matter was dismissed as she was to travel to Nairobi to attend the Law Society Special General Meeting which was being held on the same day. She also informed her client that they would not be proceeding with the matter hence his attendance was not required.

3. It is further argued that the lower court file had not been availed at the time of dismissal, and the matter could not have proceeded with the hearing without the pleadings and proceedings. It is also stated that an application was duly filed before the lower court for the reconstruction of the lower court file. It is averred that the applicant has a strong appeal with high chances of success and he should not be condemned unheard due to the mistake of his advocate.

4. The application is unopposed.

5. The issue before court for determination is whether the court should exercise its discretionary power to set aside the order of 18/01/2021 and reinstate this appeal.

6. Section 3A of the Civil Procedure Act gives this court inherent power to make such orders as may be necessary for the ends of justice to be met. The court's discretionary power should be exercised judiciously, with the overriding objective of ensuring that justice is done to all the parties.

7. The guiding principle in the court's exercise of this judicial discretion was laid down in **Mbogo & Another Vs Shah EALR 1908**. The court's discretion to set aside an ex-parte order in the nature of a dismissal order is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error. In the same vein, this discretion is not intended to assist a litigant who deliberately seeks to obstruct or delay the course of justice.

8. It is noted that the applicant has dwelt on the circumstances surrounding the absence of the advocate and the applicant himself on the date of 18.1.2021 when the suit was dismissed. However, the history of the matter cannot be wished away. This suit had never been set down for hearing during its lifespan of about 12-13 years in court. The matter had primarily stalled because the lower court file had been missing. Thus on 14.10.2019, the court gave the following orders;

***“The appellant can apply for the reconstruction of the lower court file to enable this matter to move. Mention on 27.1.2020. Last mention”***

9. However, nothing had been done by 27.1.2020 prompting the court to give further directions as follows;

***“The appellant is given a last chance to demonstrate that he moved the lower court for purposes of having the file reconstructed failure to which this matter shall stand as dismissed. Mention 3.6.2020.”***

10. It is clear that through the above mentioned directions, the appellant was put on notice that the suit faced imminent dismissal by 3.6.2020 unless the orders of the court were complied with. The application which was filed before the lower court (annexure "SWM2") was filed on 6.7.2020 long after the date of 3.6.2020.

11. Even if the applicant had filed the application before the trial court for reconstruction of the court file albeit late, there is still nothing to show that he took steps to have the same prosecuted.

12. What resonates from the circumstances of this case is that even if this suit was to be reinstated, there is no certainty that it would be prosecuted, despite the fact that the matter has been in court for a period of 13 years!.

13. "**Justice delayed is justice denied**" so goes the 17<sup>th</sup> century maxim which resonates well with the provisions of **Article 159 (2) (b) of the Constitution**. If justice is not provided in a timely manner to the parties, it loses its importance and it violates the human rights of the litigants and their families. The delay exhibited in the prosecution of this matter is unexplained, inordinate and inexcusable. To this end, I decline to exercise discretion in favour of the applicant. The end result is that the application dated 2.2.2021 is hereby dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 26<sup>TH</sup> DAY OF MAY, 2021 IN PRESENCE OF:**

C/A: Kananu

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**