



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC APPEAL NO. 62 OF 2019**

**GEORGE KIRIMANA ABUABA.....APPELLANT**

**VERSUS**

**KENYA NATIONAL HIGHWAYS AUTHORITY.....RESPONDENT**

**RULING**

1. Before me is a notice of motion dated 17/02/2021 brought pursuant to Article 159 (2) (d) of the Constitution of Kenya 2010 and Order 12 rule 7 of the Civil Procedure Rules, where the applicant /appellant is seeking orders;

1) Spent.

2) That this Honorable court be pleased to review, vary, set aside the orders of 3<sup>rd</sup> February 2021 dismissing the entire Appeal.

3) That this Honorable court be pleased to reinstate the main ELC Appeal NO. 62 of 2019 to be heard on merits.

4) That cost of this application be provided for

2. The application is premised on the grounds on the face of it and on the supporting affidavit of the applicant. He avers that the court dismissed his appeal for non-compliance, but he has always been ready to prosecute this appeal and he had complied with courts orders issued on 19/01/2021. The only hitch is that he indicated the wrong appeal number in his document. The confusion came about because there were 2 appeals involving the 2 parties, that is Appeal no. 62 of 2019 and Appeal no. 12 of 2020. That he has since corrected the mistake by preparing a fresh Record of Appeal and if this application is not allowed, he stands to suffer tremendous loss and damage and it would only be just, fair and equitable that this application be allowed.

3. The application is opposed vide a replying affidavit dated 11/03/2021 sworn by Norah Beatrice Odingo, the respondent's corporation secretary and head of legal services. She avers that this is not the first time the appellant has failed to comply with court directions or even attempted to apply unorthodox means to prosecute his matters. That this court on 27/02/2020 issued explicit orders about the filing and service of the Record of Appeal which directions the appellant failed to comply with, he then sought the court's indulgence to file his Record of Appeal and the same was granted with a 14 days stipulation period failure of which the appeal would stand as dismissed. Instead, the applicant filed documents which are not the subject matter herein.

4. Further, he was also directed to serve this instant application upon the respondents which he did but failed to serve the annexures as set out in the supporting affidavit. He has also not explained why he has failed to comply with the court orders for a period of over one year, yet the court has extended the hand of mercy to the appellant on several occasions but he has failed to comply at all instances. The respondent also states that the substratum of the Appeal has been spent as the boundary wall in issue has since been demolished by the appellant himself and the respondent prays for the dismissal of the application with costs.

**Determination**

5. The appellant filed a further affidavit on 31.3.2021 without leave of the court and no such leave was sought at any later stage to regularize the same. In the circumstances, the said document is expunged from the court record.

6. This court has discretion to set aside a judgment or order. The exercise of this discretion is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice; See- **Shah vs Mbogo & Another (1967) EA 116.**

7. The provisions of **Section 1A (3) of the Civil Procedure Act** provides that;

***“A party to civil proceedings or an advocate for such a party is under a duty to assist the court to further the overriding objective of the Act, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court”***

8. The applicant was well aware of the existence of the other matter where he was the respondent. In the current matter, he is the appellant and he therefore had a duty to comply with the court’s orders as he is the one who initiated this case.

9. It is not lost to this court that on 27.2.2020, the court gave directions for the two files, Appeal no. 12 of 2020 and the current suit to be heard at the same time. After all, the appeals arise from the same ruling and the parties are the same. Due to none compliance by the applicant, the file no. 12 of 2020 has gone its own separate path where judgment is due on 14.7.2021. The court does not wish to give conflicting or absurd orders where competing interests of the parties are handled at different stages and forums.

10. The overall view of this court is that the prayer for reinstatement of the suit is not merited. This application is hereby dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 14<sup>TH</sup> DAY OF JULY, 2021 IN PRESENCE OF:**

C/A: Kananu

Kimaita for respondent

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**