In re Estate of Peter Charagu Ngero (Deceased) (Succession Appeal 70 of 2012) [2024] KEHC 9588 (KLR) (7 August 2024) (Ruling)

Neutral citation: [2024] KEHC 9588 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

SUCCESSION APPEAL 70 OF 2012

SN RIECHI, J

AUGUST 7, 2024

IN THE MATTER OF THE ESTATE OF PETER CHARAGU NGERO

(DECEASED

BETWEEN

ELIZABETH WANJIKU CHARAGU ..... 1ST APPELLANT

JOSEPH NGERO CHARAGU ..... 2ND APPELLANT

AND

MARTHA NJERI KARINGA ..... RESPONDENT

RULING

1. The application for determination is dated 18.9.2019 seeking for orders that the honourable court be pleased to re-admit the appellant' appeal without any throw away costs on the part of the appellants. The application is premised on the grounds on face of it and supporting affidavit sworn by the appellants on even date.

2. The respondent opposed the application and filed a Replying Affidavit dated 17th October 2022 in opposition to the application.

3. The appellants case is that they had engaged the firm M/S M dwiga & Company Advocates to represent them in the appeal which was dismissed on 11th July 2019. The Appellants stated that they were not informed by their advocates on record at any time before the case came up for dismissal for want of prosecution. That the mistake of an advocate on record should not be visited on a litigant.

4. The respondent opposed the application and averred that the appellants despite filing the appeal failed to file the record of appeal as a result the respondent filed an application to strike out the memorandum of appeal on the 30th April 2015 the respondent referred to annexed a copy of the application dated 28th April 2015 marked as R.K.C.1.

5. The respondent averred that the appellants record of appeal was finally filed on 23rd September 2015 three years after the judgement of the lower Court. It is the respondent's case that even after the filing of the record of appeal the appellant never bothered to fix the appeal for hearing and it is respondent's firm that took time to fix the appeal for hearing.

6. The respondent stated it was the duty of the appellants to fix this matter for hearing and referred to annexed marked as R.K.C.2 several notices for mention and for hearing which respondent had to serve upon the appellant Advocates after they failed to fix a date. The respondent stated further that on the 11th July 2019 when the appeal came up for hearing the appellants and their advocates failed to attend court and the matter was dismissed.

7. The respondent stated further that even after the matter was dismissed on 11th July 2019 it took the appellants four months to file the current application which was filed on the 27th November 2019. It respondent's case after filing of the said application it is respondent who has been taking dates for hearing and referred copies of notices annexed and marked R.K.C.3.

8. The respondent stated appellants should not blame their former Advocates because they had duty to follow up the matter at their Advocates offices and even court. The respondent stated the application is an abuse of the Court process and ought to be dismissed.

9. By consent of parties the application was canvassed by way of written submissions. The appellant filed written submission and the respondent did not file submission.

10. The appellants briefly submitted that before the Appeal was dismissed the Appellants former Counsel had filed the record of Appeal but on the material day when the Appeal came up for hearing the Appellants former Counsel was not present. The appellants submitted that while acting in person filed independent Applications each dated 18th September. 2019 for re-admission of the Appeal. The appellants relied on provisions of Order 42 Rule 21 of the *Civil Procedure Rules*.

11. The appellants also relied on Article 50 of the *Constitution* of Kenya, 2010 provides that. "every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court, or if appropriate, another independent and impartial tribunal or body." The Appellants urged this court to exercise its discretion to re-admit their appeal and placed reliance decision in *Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium -vs- M.D. Popat and others* /2016| eKLR,

12. The appellants submitted that their former Counsel had the Appeal certified ready for hearing. The only mistake was that on the set date 11th June 2019 when the matter came up for hearing of the Appeal, the former Counsel did not attend to the hearing leading to the Appeal being dismissal. The appellants submitted that the Appellants stand to lose their inheritance in the deceased estate if the Appeal is not re-admitted.

13. The appellants submitted that the court should exercise its discretion cautiously so as to Administer Justice to the Appellants for a mistake which should at least not be visited on them. The appellant submitted that that the Respondent will not be prejudiced by the said re-admission of the Appellants Appeal since the Respondent has continued to farm/use the said 3.2 acres in all that land Known as land parcel. Number/Ndumberi/929 to the detriment of the Appellants. The appellant submitted that they stand to lose their rightful share in the deceased estate.

14. The appellants submitted that from the forgoing they pray that the Appellants Applications for re-admission of the Appeal be allowed and that this Honourable Court grants the Appellants a timeline within which the Appeal should be prosecuted and the Appellants will be obliged to comply. The

appellants pray that the door to justice is not closed on them because a mistake had been made by a person who ought to have known better.

15. From the application, affidavits and the submissions I find that the main issue for determination is whether the applicant is entitled to an order setting aside dismissal of the appeal for want of prosecution.

16. The Application has been brought under Order 42 rules 20 and 21 of the *Civil Procedure Rules* among other orders.

17. Order 42 Rule 20 provides: -

> Where on the day fixed or on any other day to which the hearing may be adjourned the Appellant does not appear when the Appeal is called on for hearing, and has not filed a declaration under Rule 16 the court may make an order that the Appeal is dismissed."

18. While Order 42 Rule 21 provides: -

> Where an appeal is dismissed under Rule 20 the Appellant may apply to the court to which such Appeal is preferred for the re-admission of the Appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the Appeal was called or for hearing, the court shall re-admit the Appeal on such terms as to costs or otherwise as it thinks fit"

19. Order 42 Rule 20 refer to dismissal of Appeal for the Appellant's default. When an Appeal has been dismissed under Order 42 Rule 20 the court can have it re-admitted where it is proved that the Appellant was prevented by any sufficient cause from appearing when the Appeal was called out for hearing.

20. In the Application before me, all what the Appellant is required to show is that there was sufficient cause of his failure to attend court. The explanation given by appellants in the Affidavit in support is that their advocate failed to attend court non the material the hearing date. The appellant further stated that their former advocate failed to inform them before the case came up dismissal for want of prosecution. The appellants also stated that even after dismissal their advocates on record did not inform her client of the dismissal. The appellants submitted that the mistake of an Advocate on record should not be visited on a litigant.

21. The respondent on his part has stated that the appellants had a duty to follow up on their case and that the appellants application is abuse of the court process.

22. The counsel for the Appellants made a mistake by not attending court on hearing date and also failed to inform the appellants about the dismissed appeal. In the case of *Belinda Murai & Others Vs Amos Wainaina* , [1978] LLR 2782 Madan J.A. (as he then was) described what constitutes a mistake in the following words: -

> A Mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by Senior Counsel. Though in the case of Junior Counsel, the court might feel compassionate more readily. A blunder on appoint of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring

> in their interpretation of law and adoption of a legal point of view which courts of appeal sometimes overrule....”

23. The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights... it would seem that the main purpose of litigation namely the hearing and determination of disputes, should be fostered rather than hindered. See the case of *Branco Arabe Espanol Vs Bank of Uganda* (1999) 2 EA 22 (SCU). The same sentiments were echoed in the case of *Bamanya Vs Zaver* (2002) 2EA 329 (CAU) where the Judge observed: -

> The other principle governing the application .... is that administration of justice requires that all substances of disputes should be heard and decided on merits and for the aforesaid reasons, errors or faults of the counsel should not necessary debar a litigant from enforcing his rights.”

24. The court went on to say, the right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality. The Appellants in this case content that the mistake of their former advocates should not be visited on them, I have no choice but to allow this appeal as disallowing the same would go against the spirit of the overriding objectives and also the provisions of Article 159 of the *Constitution*. I also note that the respondent herein will not suffer prejudice if the appeal is readmitted.

25. I also note that the Appellants have not been keen in prosecuting the Appeal. It is an old matter which should have been concluded by now, but purely in the interest of justice, I will give the Appellant a chance to prosecute his appeal.

26. In the upshot, the Application dated 18th September, 2019 is hereby granted and I make the following orders: -

    1. The orders issued on the 8th August 2019 by Deputy Registrar dismissing the appeal herein for want of prosecution are hereby set aside.

    2. The Appeal is hereby re-admitted to hearing and the orders of stay of execution are also reinstated.

    3. The Appellant do prosecute the appeal within sixty (60) days from the date hereof.

    4. The Appellant to pay costs of Ksh.15,000/- to the Respondent within twenty one (21) dates from the date hereof.

    5. Failure to comply with orders 3 and/or 4 above, the Appeal shall stand dismissed.

DATED AT NAIROBI THIS 7TH DAY OF AUGUST 2024.

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S. N. RIECHI

JUDGE