



**Nyoike (Suing as the legal representatives of the Estate of Nyoike Nganga (Deceased)) v  
Nganga (Civil Appeal E194 of 2021) [2024] KEHC 12864 (KLR) (4 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12864 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E194 OF 2021  
DO CHEPKWONY, J  
OCTOBER 4, 2024**

**BETWEEN**

**JOHN NGANGA NYOIKE ..... RESPONDENT  
SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF NYOIKE  
NGANGA (DECEASED)**

**AND**

**GATURU NGANGA ..... APPELLANT**

**RULING**

1. What is before this court is the Notice of Motion application dated 5<sup>th</sup> September, 2023 seeking the following orders:-
  - a. Spent.
  - b. That this Honourable Court be and is hereby pleased to vary or set aside its ruling delivered on 5<sup>th</sup> July, 2023 dismissing the Appellant's/Applicant's appeal hereof and reinstate the same for hearing.
  - c. Spent.
  - d. That this Honourable court be and is hereby pleased to order stay of execution of the ruling delivered on 5<sup>th</sup> October, 2021 in the SPM Court at in Kikuyu Miscellaneous Application Case No.15 of 1998 before Hon. D. N. Musyoka and all consequential orders made therein pending hearing and determination of the Appeal.
  - e. That this Honourable court be and is hereby pleased to reinstate the Applicant's Notice of Motion dated 15<sup>th</sup> October, 2021 and the orders of stay issued therein pending the hearing and determination of this application.



- f. That costs of the application be in the cause.
2. The Application is based on the grounds as set out on its face and the Supporting Affidavit sworn by Gaturu Nganga on 5<sup>th</sup> September, 2023. It is the Applicant's case that when the ruling of the trial court was delivered in Kikuyu SPMCC No. 15 of 1998, he was dissatisfied with the same and he instructed his advocates to file a Memorandum of Appeal and an application for stay of execution. That his advocate informed him that she would be going for maternity leave and could not continue representing him. He was thus forced to get another advocate to handle the matter. The Applicant states that he thus instructed the Firm of M/S J.O. Otieno & Co Advocates and believed that he was acting for him until he received a ruling dismissing the appeal. It is the Applicant's contention that the mistake of the advocate should not be visited upon the client.
  3. The Applicant has urged the court to reinstate his appeal on account of being +-a ninety-year-old man who stands to suffer substantial loss if orders of stay of execution are not granted because he has lived on the suit property for more than sixty (60) years. That it would only be just if the court would reinstate his appeal so that it can be heard on merit.
  4. The Applicant contends that he was never served with any documents and that the ruling showed that the Respondent had indicated that it had served the Applicant's Advocates, which he denied. According to the Applicant, no prejudice will be occasioned on the Respondent if the Appeal is reinstated as he has filed the application without any delay since he was just served with the ruling.
  5. In response, the Respondent opposed the application vide a Replying Affidavit as well as Notice of Preliminary Objection both dated 12<sup>th</sup> September, 2023. The Respondent avers that the application is incompetent, misconceived and an abuse of the court process and contends that the Applicant's Advocate is not properly on record since it offends Order 9 of the Civil Procedure Rules as there is a Notice of Change of Advocates dated 4<sup>th</sup> January, 2022 from J.O. Otieno Co Advocates seeking to replace M. W. Kimani & Co Advocates and the said M. W. Kimani & Co Advocates has not filed another Notice of Change of Advocates to come back on record.
  6. The Respondent further holds that following the court's ruling of 5<sup>th</sup> July, 2023, the application offends the doctrine of *functus officio*. It is his contention that if he was dissatisfied with the ruling, the Applicant ought to have filed an appeal at the Court of Appeal. According to the Respondent, the Applicant has been taking him in circles over the years and he is using his advanced age (90 years old) to seek the court's sympathy. The Respondent states that the Applicant was duly served with the court documents and he is therefore deceiving the court. The Respondent has therefore urged the court to dismiss the application.

### **Analysis and Determination**

7. The court has read through and considered the parties respective argument in their affidavits alongside the proceedings in this case and finds the issue for determination being whether the Applicant's prayer is meritable?
8. The main factor that the Appellant attributed the delay is the inaction of his advocate to take a step. It is trite also that a case belongs to a litigant and not the advocate which means that a litigant has a duty to prosecute his case to completion and not leave everything to the Advocate. In the case of Savings



& Loan Limited –vs- Susan Wanjiru Muritu Nairobi (Milimani) HCCC No.397 OF 2002, the court stated thus: -

“Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former advocate’s 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 or on account of such advocate’s failure to attend court. It is the duty of the litigant to constantly check with her advocate on 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 favor, 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 favor of such a litigant.”

9. Also in the case of Duale Mary Ann Gurre –vs – Amina Mohamed Mahamood & Another [2014]eKLR, Hon Justice Mutungi held as follows:-

“An advocate is the agent of the party who instructs him and such instructing client as the principal continues to have the obligation and the duty to ensure that the agent is executing the instructions given. In the case of litigation, the suit belongs to the client and the client has an obligation to do follow up with his Advocate to ensure the Advocate is carrying out the instructions as given. The litigation does not belong to the Advocate but to the client. If the Advocate commits a negligent act the client has an independent cause of action against the Advocate.”

10. In view of the above-cited decisions, this Court finds that there is no reason to reinstate the Appeal as it is evident from his conduct that the Appellant has not had any interest in prosecuting the same. The court cannot sympathize with him just because he is ninety-year-old since the law must be followed at all times. The upshot is that the Application dated 5<sup>th</sup> September, 2023 lacks merit and the same is dismissed with costs to the Respondent.

It is so ordered.

**RULING DELIVERED, DATED AND SIGNED AT KIAMBU THIS 4<sup>TH</sup> DAY OF OCTOBER, 2024.**

**D. O. CHEPKWONY**

**JUDGE**

**In the presence of:**

M/S Kimani counsel for Appellant

Mrs Onchangu counsel for Respondent

Court Assistant – Martin

