



**REPUBLIC OF KENYA**

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

**ELCA APPEAL 33 OF 2018**

**GEOFFREY MWORIA .....APPELLANT**

**VERSUS**

**JULIA KANANA M'MBOGORI..... RESPONDENT**

**RULING**

1. By an application dated 18.5.2021 the appellant seeks review, or reversal of orders made on 14.4.2021 and the reinstatement of the appeal.
2. The application is supported by an affidavit sworn on 18.5.2021 by Geoffrey Mworia. The reasons given that mistakes of counsel should not be visited upon the appellant, shall stand prejudiced if the appeal is not heard on merits.
3. Further it is averred the appellant due to Covid pandemic did not attend to his advocates chambers until later when he learned he had been employed by the government.
4. The appellant filed his appeal on 28.8.2018. The court admitted the appeal for hearing on 18.9.2019 and directed the record of appeal be filed. This was done on 19.9.2019. The parties appeared before the court on 25.11.2019 and agreed to hear the appeal through written submissions. Each party was given 30 days to comply, with the appellant to file and serve by 10.1.2020 and the respondent by 25.2.2020. A mention for 20.4.2020 was given.
5. The matter came before court on 23.6.2020. There being no compliance the court gave parties another chance by 12.10.2020. The appellant prayed for one more week to comply which the court allowed with a rider that non-compliance shall result to the appeal being dismissed automatically. The deadline was 12.11.2020 for the appellant while that of the respondent was on 12.12.2020. The appellant was ordered to effect service upon the respondent for a mention on 26.1.2021.
6. On 26.1.2021 the appellant failed to attend court and gave no explanation hence a judgment date of 14.4.2021 was given.
7. The record indicates the appellant filed written submissions on 14.12.2020 which was outside the deadline set by the court.
8. Whereas the court has powers to re-admit the appeal which has been dismissed for non-prosecution and non-attendance, sufficient reasons must be given why the court should exercise such discretion in favour of the applicant.
9. **Order 42 rule 11** requires an appellant to take action towards prosecution of his appeal within 30 days upon the filing of the record of appeal. **Order 42 rule 35 (2)** states unless within three months after the giving of directions under **Rule 13**, an appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.
10. **Order 42 rule 35 (2)** further provides if within a year the appeal is not set down for hearing the registrar shall on notice to the parties list the appeal before a judge for dismissal.
11. The record of appeal was filed on 19.9.2019 and initially directions given on 25.11.2019. Exactly a year later the applicant had not complied with those directions to fast track the hearing of the appeal. The court was kind enough to extend time twice yet there was no compliance at all. Therefore, there was obviously a delay of over one year and which delay has not been explained at all.
12. In ***Leonard Mutura –vs- Peter Gathenya Mwariri [2019] eKLR***, the court held the court has powers to dismiss an appeal where it is satisfied that the appeal was filed in bad faith with no intention of ever prosecuting it or that the appellant had abandoned the same and its pendency amounted to a clog on the wheels of justice.
13. The appellant blames his lawyers for lack of communication and or non-compliance with court directions. The appeal does not belong to

the lawyers. The duty is upon the appellant to give his lawyers sufficient instructions to prosecute the matter. The orders for compliance were given initially on 25.11.2019 prior to Covid pandemic. The appellant has not stated when he last talked or visited the chambers of his lawyers since filing the appeal. Had he been vigilant in 2018, 2019 and 2020, the appellant would have known the progress of his appeal.

14. The appellant seeks review and reversal of orders made on 14.4.2021. In *Pancras T. Swai –vs- Kenya Breweries Ltd [2014] eKLR* the Court of Appeal held an applicant must bring new and important matter discovered or evident which if the court had known would not have dismissed the appeal. The applicant has not given sufficient reasons why written submissions were not filed for close to a year which was against the directions given by the court on 25.11.2019.

15. The orders of 14.4.2021 was a culmination of litany of non-compliance of previous orders. I see no explanation why the appellant did not adhere to the timelines. He has not said he had any impediments.

16. In *Council Jomo Kenyatta University of Agriculture and Technology –vs- Joseph Mutuura Mberia & 3 Others [2015] eKLR* the Court of Appeal held a lawyer cannot plead ignorance and consequential inaction and if guilty of inaction, such a mistake cannot be excusable. The court is urged to ignore such mistakes, yet the said law firm has not given any explanation why they were unable to comply for over a year.

17. In *Bains Construction Co. ltd –vs- John Mizare Ogowe [2011] eKLR* the court held that though mistakes of counsel should not be visited upon a party, a counsel is an agent of the principal, who is the client and if the principal does not vest counsel with authority, and if the agent does not perform the duty, the principal should bear the consequences.

18. The appellant makes claims that his lawyer was employed by the government hence the reason he did not comply and or get in touch with him. The record indicates that on 25.11.2019, 23.6.2019 and 12.10.2020, the appellant was duly represented by counsel. On 12.10.2020 the said counsel sought for one week to comply but the court gave him 30 days to do so the deadline being 12.11.2020.

19. Instead of filing submissions within 7 days as he pledged, he filed 31 days later while aware there was a self-executing order for the appeal to stand dismissed. There cannot be any explanation other than that the appellant and his counsel were less concerned in prosecuting the appeal as held by the court in similar scenario in *Heritage Insurance Ltd. –vs- Joy Bathrooms Ltd [2020] eKLR*.

20. The upshot is the application lacks merit and is hereby dismissed with costs.

File closed.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 20<sup>TH</sup> DAY OF DECEMBER, 2021**

**In presence of:**

Mokua for the appellant

Gichunge for the respondent

Court Assistant - Kananu

**HON. C.K. NZILI**

**ELC JUDGE**