REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURURU

CIVIL APPEAL NO. 07 OF 2018

AS HEARD TOGETHER WITH HCCA 06/2018

SALIM SAID...1ST APPELLANT

ISAAC GITHIRI..2ND APPELLANT

JOHN GITHIRI MWANGI...3RD APPELLANT

VERSUS

JEDIDAH WANGUI GACHIE & ANOTHER (legal administrator of the estate of the late

STEPHEN WANGUI GACHIE)...RESPONDENT

RULING

1. The matter pending before Court is the application dated 8th February, 2021 filed by Salim Said, Isaac Githiri, and John Githiri Mwangi, the Appellants/ Applicants herein seeking for orders that the Court be pleased to reinstate the appeal for hearing. The application sought for the following orders:-

> ***i. Spent.***
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> ***ii. Spent.***
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> ***iii. Spent.***
>
> ***iv. That this appeal being Nyahururu HCCA No.7 of 2018 Salim Said, Isaac Githiri John Githiri Mwangi v Jedidah Wangui Gachie & Peter Gachie Njuguna (legal administrators of the estate of the late Stephen Njuguna Gachie) be and is hereby reinstated for determination in the normal way.***
>
> ***v. That this honorable court do make such further order(s) and issue any other relief it may deem just to grant in the interest of justice.***
>
> ***vi. That the cost of the application be in the cause.***

2. Which application is based on the grounds:-

> ***i. That on 9th December of 2020 the Appellants were served with a ruling notice of the Respondent's application seeking to dismiss the instant appeal for want of prosecution.***
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> ***ii. That the Appellants were never served/ nor were they aware of any application for dismissal and as such the Appellants did not respond to said application.***
>
> ***iii. That as such the Appellant's advocates were never aware that the Respondent had filed any application before this honorable court.***

iv. That we only got to learn that the appeal herein had been dismissed when the Respondent's advocate sent a letter requesting for the judgement sum in the lower court.

v. That indeed the Appellants have never lost interest in prosecuting the instant appeal.

vi. That the Appellants wrote to the executive officer of the lower court requesting for certified copies of the decree, judgement and typed proceedings to enable the file a record of appeal. However, the said letter has not elicited any response for some time.

vii. That the Respondent's advocate is now demanding payment in this matter.

viii. That it is only just and fair that the appeal be reinstated / readmitted and heard in the normal way.

ix. That unless the appeal is reinstated the Appellants stand to suffer irreparable loss and damage and their appeal on quantum will be rendered nugatory.

x. That it is in the interest of justice that the appeal be reinstated and the same be heard to a logical conclusion.

xi. That this application will not occasion any prejudice to the Respondent or any damage that cannot be compensated by way of costs if this application us allowed.

xii. That this application had been made without unreasonable/inordinate delay.

3. Parties were directed to canvass same application via submissions which they filed and exchanged.

APPELLANTS' SUBMISSIONS

4. In a nutshell, the Appellants through their written submissions dated 16th April 2021 stated that this application is simply premised on the grounds that the appeal was dismissed for the reason the Appellants were not served/ nor were they aware of any application for dismissal and as such they did not respond to the said application.

5. The Appellants urged the court to exercise its discretion to restore the appeal and give a date for directions. They asserted that the Respondent had not shown any prejudice that is likely to be suffered if the appeal is reinstated. They relied on the cases of ***Richard Ncharpi Leiyagu vs IEBC & 2 Others CA 18/2013*** and ***Philip Chemwolo & Another vs Augustine Kubede (1982-88) KAR 103*** to support their application.

RESPONDENT'S SUBMISSIONS

6. The Respondent reiterated that on 9th December 2020, this honorable court delivered a ruling dismissing the appeal being Nyahururu HCCA 6 of 2018. Dismissal orders were granted pursuant to the application dated 28th February 2020 by the Respondent in which she sought dismissal for want of prosecution. The Respondent submitted that the Appellants never opposed the aforesaid application and never even filed submissions or replying affidavit despite the court's directions to do so.

7. The Respondent submitted that the Appellants were served each and every time the application came to court but they did not bother to attend and the honorable presiding judge satisfied that the Applicants were duly served gave a date for ruling and a notice to that effect was duly served.

8. The Respondent stated that it is important to note that service of the application was done by email. When the court set 23rd July 2020 for mention the email sent to the Respondent was copied to the Appellant and despite that the Respondent served the Appellant. Further, when a notice for delivery of the ruling was sent to the Respondent on 8th December 2020, the Respondent immediately sent a notice to the Appellants and a demand for payment was made on 10th December 2020 following dismissal of the appeal.

9. It is her submission that the Appellants assertion that they were not served was not true as it was their email that was used and no allegation has been put forth that they served via a wrong email. It is the same email that was used to send the ruling notice and demand for payment which the Appellant confirms were received. Moreover, despite the court's ruling being delivered on the 9th December, 2020 the Applicant stayed until 9th February 2021 to file this application and 60 days in her view is inordinate delay.

10. The Respondent averred that the Appellants were not seeking to set aside this court's ruling of 9th December 2020 but is mainly seeking stay of execution of the judgement delivered on 20th December 2017 and that this appeal be reinstated for hearing and determination in the normal way yet it was determined on 9th December 2020 and that determination cannot coexist with the orders sought.

11. Further, that all the Appellants did since the inception of the appeal was to write a letter to court dated 25th March 2019, over a year after lodging the appeal with no payment of the deposit for proceedings as expected of a diligent litigant and that it is doubtful whether the letter was even delivered to court. She asserted that it must be an afterthought to hoodwink the court to give the Applicant favorable orders. The Respondent submitted that there was no evidence of payment for proceedings and that this claim by the Applicant was unsubstantiated.

12. In conclusion, the Respondent averred that the precedents relied on by the Appellants are irrelevant and do not apply to this application as

they support the view that the Appellants application should be dismissed to protect the integrity of the court process from abuse that would amount to injustice and further the Appellants are not relying on any mistake or blunder to request or reinstatement of this appeal.

ANALYSIS AND DETERMINATION

13. The issue of reinstatement of an appeal o is an exercise of discretion before the court. This discretion must be exercised fairly and judicially. It must be based on good reason(s) and not on mere allegations.

14. The principles governing reinstatement of suit are stated in the case of ***John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation) [2015] eKLR*** as follows:

> ***"The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of the Constitution. Article 50 coupled with article 159 of the Constitution on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the court. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such acts are comparable only to the proverbial ''Sword of the Damocles'' which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated."***

15. The grounds upon which the application for reinstatement of the appeal is made is that the appeal was dismissed for the reason the Appellants were not served/ nor were they aware of any application for dismissal and as such they did not respond to the said application. On the other hand, The Respondent submitted that on 9th December 2020, this honorable court delivered a ruling dismissing the appeal being Nyahururu HCCA 6 of 2018. Dismissal orders were granted pursuant to the application dated 28th February 2020 by the Respondent in which she sought dismissal for want of prosecution.

16. In the case of **Cecilia Wanja Waweru V Jackson Wainaina Muiruri & Another [2014] eKLR** the Court of Appeal in holding the view that reinstating the appeal in the High Court would amount to an abuse of the court process and injustice, stated:-

> ***"There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case. We are of the considered view that the learned judge in considering the application, should have looked at the Appellant's conduct from the time the appeal was filed up to the date the application for reinstatement was filed………***
>
> ***We have to ask ourselves whether the failure by the Appellant to prosecute the appeal in the High Court and/or the delay in filing the application for reinstatement constitute an excusable mistake or was it meant to deliberately delay the cause of justice……… Why didn't she set the appeal down for hearing for almost 14 years? The reasonable explanation would be that the Appellant had been indolent and had slept on her rights. She was only awakened from her slumber by the dismissal of the appeal."***

17. Accordingly, the Appellants in this case lodged an appeal on 26th January 2018. Two years later on 28th February 2020, the Respondent filed an application for dismissal of the appeal for want of prosecution. The application was given a hearing date of 30th April 2020 for mention with the view of taking a hearing date and/or directions and the mention notice was served upon the Appellants advocates on 13th March 2020 as evidenced by the received and stamped copy of the aforesaid notice ***(marked as exhibit JWG1)***. Further, the application dated 28th February 2020 was duly served upon the Appellants advocates via email on 7th May 2020. ***(Attached and marked exhibit JWG2 is a copy of the email letter and confirmation of delivery).*** On 23rd July 2020, the court gave directions that the application would be determined by way of written submissions. The Respondents' counsel filed an affidavit of service on 15th October 2020 which indicated that he served the said directions on the Appellant's firm on 20th August 2020 ***(attached and marked exhibit JWG7 is a copy of the affidavit sworn on 13th October 2020)***. However, when the matter came up for mention, the Appellants' advocate neither appeared nor did they file submissions. Consequently, the court ruled in favour of the Respondents' application and dismissed the appeal.

18. The evidence before this court demonstrates that the Applicants allegations that they were not served is false and a misrepresentation of the fact as they were indeed served severally but they did not respond. The Appellants were fully aware that the Respondents had filed the application before this honorable court 28th February 2020 but chose not to participate despite being served severally. The Applicants did not show sufficient cause as to why their appeal should be reinstated.

19. I am alive to the principles enshrined in ***Article 159 of the Constitution*** however, I fully agree with my sister's, Hon. Lady Justice R. Wendoh sentiments in the ruling dated 9th December 2020 that the Respondents have a judgement which was delivered in Nyahururu CMCC 204 of 2016 on 20th December 2017 and should be allowed to enjoy its fruits and litigation be brought to an end. The Appellants' behavior from the time of filing the appeal demonstrates indolence and a lack of interest in pursuing their appeal therefore sleeping on their right to appeal. As it was rightly stated In ***Simon Wachira Nyaga v Patricia Wamwirwa (2018) eKLR*** that

> ***'Equity helps the vigilant but not the indolent. The law encourages a speedy resolution for every dispute. A court of equity has always refused its aid to stale demands, where a party has slept on his right and acquiesced for a great length of time. The Appellant slept on his rights even after being offered a warning by the Court.'***

20. Having considered the application, the affidavits on record, list of authorities, submissions by counsel and the law, I am satisfied that in the circumstance of this application, there is no basis for reinstating the appeal which was dismissed on 9th February 2020. The application is totally lacking in merit and thus the court makes the orders

i. Application is hereby dismissed with costs to the Respondent.

ii. This order to apply to HCCA 06/2018

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 1ST DAY OF JULY, 2021.

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CHARLES KARIUKI

JUDGE