



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CIVIL APPEAL NO. 18 OF 2018

GEORGE NJERU GAKINYA.....APPELLANT

-VERSUS-

DAVID KAMUNYA RUNO.....RESPONDENT

RULING

1. The matter pending before Court is the application dated 18/05/2021 filed by George Njeru Gakinya, the Appellant/Applicant herein seeking for the following orders:

i. That this honorable court be pleased to set aside/vary the orders issued on 17/12/2020 striking out the appeal on the basis that the appeal proceed for judgement on merit basis.

ii. That this honorable court be pleased to reinstate the appeal and order that the appeal proceed for judgement on merits.

iii. That the honorable court be pleased to stay execution of the judgement delivered on 17/12/2020 in terms of costs by the Respondent pending the determination of this application.

iv. That the honorable court be pleased to order that the record be regularized to include the order issued on the 22/03/2018 granting the Applicant leave to file the appeal out of time.

2. The application is grounded on the grounds asserted on the face of the application and further supported by the supporting affidavit and further affidavit both by Peter Chege dated 24/05/2020 and 02/07/2021 respectively and the Applicants' Written Submissions dated 02/07/2021.

APPLICANT'S CASE

3. On whether there was inordinate delay in filing the present application, the Applicant submitted that upon delivery of the ruling, the court file could not be traced despite several attempts to do so and that the file was later traced at the end of April and the document was filed early May hence there was no intentional delay on their part. Reliance was placed on *Ivita Vs Kyumba, Cecilia Wanja Waweru vs Jackson Wainaina Muiruri & Another (2014) eKLR, Naftali Onyango vs National Bank of Kenya, Agip (K) Limited vs Highlands Tyres Limited, Charo vs Mwashetani & 3 Others (2014 KLR-SCK).*

4. On whether the failure to attach the order for enlargement of time was inaction on the part of the Appellant, it was their submission that the court should excuse the Appellant's Advocate mistake of not attaching the order on the record of appeal and grant him an opportunity to be heard. The Appellant invoked *Section 3 and 3a And 63 (e) of The Civil Procedure Act.*

5. The Appellant urged the court to find that he was condemned unheard and that his appeal is arguable as he was holding the original title deed and that is under his name. Reliance was placed on *Joseph Wekesa Tulula vs. Hilda Wanjiru Tulula Kitale ELC Case No. 52 of 2013, Sheikh T/A Hasa Hauliers Vs Highway Carriers Ltd (1988) eKLR & Pithon Waweru Maina vs. Thuki Mugira.*

6. On whether the Appellant can seek for stay of execution of the judgement and/or orders delivered on 17/09/2020, the Appellant submitted that the execution of these orders is prejudicial as he has all along known the suit to be his. Reliance was placed on *Order 12 Rule 7 of the Civil Procedure Rules* and *Esther Wamaitha Njihia & 2 Others vs Safaricom Ltd*

7. It was their submission that sufficient cause had been shown by the Applicant to be granted the stay of orders and if the same is not granted, the Applicant will suffer irreparable loss. Reliance was placed on *Halai & Anor vs Thornton & Turpin (1963) Ltd (1990) KLR 365, Richard Nchapai Leiyangu vs IEBC & 2 Others, Civil Appeal No. 28 of 2013.*

8. On whether the Appellant has satisfied the grounds for review the Applicant placed reliance on **Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules**. It was their submission that order that was issued for allowing the Appellant to file the appeal out of time was in the knowledge of the Respondent's Advocate who equally had a duty to appraise the same and failure to attach the same is an inexcusable mistake founded on a mistake on the face of record that resulted in a new and important document being left out in the instant appeal. Therefore, it is the fact that the document was not attached in this instant appeal, which document was necessary that gives rise to new evidence.

9. Additionally, the Applicant averred that failure to attach the order that granted the Appellant leave to file out of time in the instant appeal was an error that is easily noticeable and that his Advocate in his further affidavit under paragraph 11 is remorseful for the aforesaid failure. That denying the review order will simply be curtailing the Appellant's right to justice.

10. Further, the Appellant submitted that he had met the criteria for reinstating the appeal and the court's jurisdiction be exercised judiciously and justice be done to the Appellant who is thirsty of having his case heard and determined.

11. It was their assertion that the delay of 6months does not in itself prejudice the Respondent in any way and that the Respondent just wants to shelter on the dismissal and have his illegal acts covered. That in the instant proceedings, the Applicant has not in any way abused the court process but has exercised his constitutional right to challenge the decision of a trial court before an Appellant court as per **Section 66 of the Civil Procedure Act**.

RESPONDENT'S CASE

12. The application is opposed by the Respondent through the replying affidavit deponed by Kariuki Mwangi, the Respondent's counsel on 14/06/2021.

13. The Respondent averred that the present application dated 24/05/2020 is seeking aside to set aside/vary the orders issued on 17/12/2020 and hence it has no relevance to the orders now ought to be set aside or varied since it was made before the orders.

14. The Respondent averred that the Applicant has not established any valid grounds to set aside/vary or reinstate the order made on 17/12/2020 striking out the appeal and there is no failure of justice and that this court properly pronounced itself on the basis of the material placed before it and contained in the record of appeal dated 10/04/2018.

15. That the Applicant has introduced an order purportedly made on 21.3.2018 in **Nyahururu H.C Misc Civil Application No. 34 of 2017** and also alleged that his firm was served with the same yet his firm was neither served with the alleged application dated 21/12/2017 giving rise to that order, nor the order given on 21/03/2018 and he believed that the Applicant's Advocates did not file it together with the record of appeal filed on 10/04/2018 or make references to it in the submissions dated 24/10/2019 or in the supplementary petition of appeal dated 23/12/2020 or in the supplementary submissions dated 21/10/2020.

16. He deponed that the Applicant was deliberately misleading the court and that the said order was not in existence when the Applicant lodged the appeal and that if the said order was in existence, the Applicant deliberately opted to omit it from record of appeal and the court could not consider the material that had not been placed before it and failure to do so does not constitute good or sufficient cause for discretion to be exercised in his favour.

17. It was their assertion that the Applicant had not satisfied the grounds for review of the order striking out appeal in that if the order for leave to file appeal out of time had been given by the time the record of appeal was lodged, then it is not discovery of a new and important matter of evidence or evidence which after exercise of due diligence was not within his knowledge or could not be produced by him before or when judgement of 17/12/2020 was delivered.

18. That this honorable court should be reluctant to invoke its residual jurisdiction of review in this appeal especially because of the Appellant's failure to explain why the order of 21/03/2018 was not exhibited in the record of appeal if in fact it was in existence.

19. That there is inordinate delay of almost 6 months in filing the present application in that the judgement was delivered on 17/12/2020 while the present application was filed on 27/5/2021.

20. It was deponed that the costs in this appeal have not been taxed and it is therefore premature for the Applicant to apply for stay of execution. In any event the Respondent is entitled to execute for costs after taxation and there is no valid grounds for stay of execution at this stage.

21. It was the Respondent's prayer that he is entitled to have the costs of the struck out appeal taxed and recover the same from the Applicant.

ANALYSIS AND DETERMINATION

22. I have considered the application, the affidavits on record, list of authorities, submissions by counsel and the law.

23. In **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 act 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."

24. Under **Rule 102 of the Civil Procedure Rules, 2010**, an Applicant must satisfy two (2) conditions before the Court can exercise its discretion in his/her favour; the application for reinstatement should be made within thirty (30) days of the dismissal and the Applicant must show that he or she was prevented by sufficient cause from attending the hearing.

25. In the instant application, the Applicant submitted that upon delivery of the ruling, the court file could not be traced despite several attempts to do so and that the file was later traced at the end of April and the Application was filed early May hence there was no intentional delay on their part. They attached a duly stamped letter dated 04/03/2021 addressed to the Executive Officer, Nyahururu Law Court alluding to the loss of the file inhibiting their intention to file the stay of execution of orders. Having considered the Applicants submissions, I give him the benefit of doubt.

26. Secondly, on the issue of reinstatement of the appeal, the Applicant's counsel submitted that the failure to attach the order for enlargement of time dated order of 21/03/2018 was inaction on the part of the Appellant's Advocate and that the court should excuse the Appellant's Advocate mistake of not attaching the order on the record of appeal and grant him an opportunity to be heard. The mishap was clearly occasioned from the Applicant's Advocate end and the explanation brought before court was that the preparation of the record of appeal was delegated to a clerk and the drafting of submission to an associate who left out the enlargement of time order. The same is also further explained by the affidavit by Beatrice Karanja attached and marked as PC III.

27. In the case of ***Belinda Murai & Others vs Amos Wainaina, [1979] eKLR, Madan, J.A.***, (as he then was) stated:

"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 a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or 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 laws and adoption of a legal point of view which courts of appeal sometimes overrule..."

28. Also in the case of ***Philip Chemwolo & Another vs Augustine Kubende, [1986] eKLR*** where ***Apaloo, J.A.*** (as he then was) stated:

"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline".

29. There are a lot of gaps in the explanation provided by the Appellant of which he provides no answers. Most importantly, there is a stage when litigation should come to an end and the Applicant seems to want to prolong this case unnecessarily. However, the issue of reinstatement of an appeal or not is an exercise of discretion before the court. This discretion must be exercised fairly and judicially. This court is mandated with the fundamental task of ensuring that substantive justice is served to all parties and that each party gets a right to be had as enshrined in the constitution particularly in **Article 50** and **Article 159**.

30. Guided by the foregoing, I am of the view that justice would be served in reinstating the appeal despite the numerous gaps noted. Accordingly, I make the following orders;

i. I set aside the orders issued on 17/12/2020 striking out the appeal. However, the Appellant shall set down the appeal for hearing within 21 days from today, failure to which the appeal will stand automatically dismissed.

ii. Secondly, the Applicant will pay to the Respondent thrown away costs of Kshs.20, 000/= within 21 days from today's date, failure to which the appeal will stand automatically dismissed.

iii. Additionally, I also order that the record be regularized to include the order issued on the 22/03/2018 granting the Applicant leave to file the appeal out of time within 21 days from today's date.

iv. The prayer for stay execution of the judgement delivered on 17/12/2020 is dismissed as the Appellant has not demonstrated the loss he will suffer and the same is made prematurely.

v. Costs of the application to the Respondents.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 4TH DAY OF OCTOBER, 2021.

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CHARLES KARIUKI

JUDGE