



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NYAHURURU  
CIVIL APPEAL NO. 98 OF 2017

JOHN MUCHIRI NDERITU.....1<sup>ST</sup> APPELLANT/APPLICANT

HILLARY MAINA KARIUKI.....2<sup>ND</sup> APPELLANT/APPLICANT

-VERSUS-

MARY WANJIU GITU.....RESPONDENT

RULING

1. The Applicants seeks stay of decree in **SPMCC 33/2014 Nyahururu** issued on 27/09/2016 and dismissal order of the Appeal lodged on 28/10/2016 be set aside plus costs inter alia.
2. The same is supported by the grounds (a) – (j) on the face of the application and supporting affidavit of Denning Muriithi Ndeke sworn on 17/04/2021.
3. The Respondent opposed the same.
4. Thus court directed parties to canvass application via written submissions.

**APPLICANTS/APPELLANTS' SUBMISSIONS:**

5. The Appellants in their submissions attributed delay in filing record of appeal timely as a result of the court registry having not prepared typed proceedings in time.
6. They submit that, via annexed letters they show their pursuit of the typed proceedings , however as a result in delay in typing, of the proceedings by the registry, preparation of the record of appeal was impossible.
7. Thus it was not their fault in not filing the record of appeal in time thus delay excusable. In any event, the Appellants have managed to prepare and now file the record of appeal, it is only fair therefore that the said appeal be heard on merit.
8. This being a mistake of the advocate, the same cannot be visited upon the Appellants herein. They rely on the case of ***Phillip Chemwolo & Another v Augustine Kubede [1982-88] KLR 103 at 1040*** as cited in the case of ***Bank of Africa Kenya Limited v Put Sarajevo General Engineering Co. Ltd & 2 Others [2018] eKLR***.
9. Also cite the case of ***Andrian Kamotho Njenga v Cabinet Secretary, Ministry of Information, Communication & Technology & 8 Others [2017] eKLR***.

10. They submit Respondent will not stand to suffer any prejudice as decretal sums is deposited in court and will compensate her if appeal in the unlikely event does not succeed.

**RESPONDENT'S SUBMISSIONS:**

11. It is submitted that, there is nothing on record to show that the Applicants moved the court to have the time for compiling the record of appeal extended.
12. It is trite law that court orders must be complied with and the Applicants herein having failed to comply with the court orders do not

deserve Court's indulgence.

13. It is submitted that, the conditions for one to meet in order for a court of law to reinstate an appeal are set by courts. See the case of **Charles Munyao Kithome & Another v Daniel Musila Mutiso [2008] eKLR.**

14. It is the Respondent's submission that this matter stood dismissed after the Applicants failed to compile and file the record of appeal within the time line given.

15. Since the Applicants herein were granted 90 days to compile and serve the record of appeal, they failed to move the court until the Respondents herein filed an application before the trial court to have the money deposited as security released. The Applicants then filed the present application.

16. The appeal herein has been pending for a period of 4 years and the Appellant has demonstrably lost any interest in having suit determined.

#### **ISSUES, ANALYSIS AND DETERMINATION:**

17. After going through the parties' affidavits and submissions filed plus the court record I find the issues are whether the application is meritorious and what is the order as to costs.

18. The instant appeal was filed on 21/12/016. On 20/6/019 the matter was placed before Wendoh J and an order was made to the effect that, ***the appellant was given 90 days within which to prepare and file record of appeal in default the appeal to stand automatically dismissed.***

19. The span of 90 days to compile and serve the record of appeal lapsed without applicant compliance nor did they move the court until the Respondents herein filed an application before the trial court to have the money deposited as security released. The Applicants then filed the present application.

20. It is clear that there has been delay on the part of the Applicants in bringing this application. In the application herein, the Applicants have not given this court any reasons that may have led to the failure to lodge the record of appeal within the requisite time

21. The Court has scrutinized the annexures in the Applicant's supporting affidavit. The Applicants requested for proceedings vide the letter filed on 02/08/2017. The Applicants' letter dated 28/07/2017 and filed on 02/08/2017 entirely refers to a different matter and thus cannot not be relied on by this Court. It was not until 09/03/2021 that the Applicants forwarded a copy of a certified decree vide the email communication filed on 10/04/2021.

22. There is nothing on record to show that the letter dated 17/06/2019 was filed. From the annexures to the Applicants' application it is clear that the Applicants waited for three years to move the court appropriately.

23. The court agrees with the Respondents' submissions that, the applicants' actions in the suit herein are muddled with a lack of urgency in prosecuting the suit.

24. The Appellants only lodged the instant application to reinstate the appeal on 27/04/2021, one year 10 months after the suit had been dismissed which was after the Respondent moved the trial court to have the money deposited as security released.

25. It is clear that the Applicants slept on their rights and only moved the court once the Respondents moved the trial court. These circumstances show the unapologetic indolence of the Applicants.

26. The Applicants are guilty of lethargy and inertia. Thus the application before this court is an afterthought and a delaying tactics.

27. Sufficient reasons for the purposes of not dismissing a suit for want of prosecution was elaborated in the case of Honorable Attorney General v the Law Society of Kenya & Another Civil Application No. 133 of 2011.

28. The application herein is intended to delay or deny the Respondent from enjoying the fruits of the judgment delivered in 2016.

29. It is now a well settle principle of law that the Court ought to do justice to all parties in a suit, including the Defendant. The rules of natural justice require as much, see Article 159 (2) (b) provides that justice shall not be delayed. Further, Sections 1A, 1B and 3A of the Civil Procedure Act obligate this Court to act in an expeditious manner in disposing off matters.

30. The appeal herein has been pending for a period of 4 years and the Appellant has demonstrably lost any interest in having appeal determined. The suit was dismissed for want of prosecution and for non-compliance with the court's orders.

31. Thus the court finds that, the application is unmeritorious, an afterthought and is otherwise an abuse of the court process since it is evident that the Appellants/Applicants only want to frustrate the Respondent and prevent him for enjoying the fruits of his judgment.

32. Thus the court makes the following orders;

#### **i. The application is dismissed with costs to the respondent.**

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 7<sup>TH</sup> DAY OF OCTOBER, 2021

.....

**CHARLES KARIUKI**

**JUDGE**