



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL APPEAL NUMBER 34 OF 2017

JULIUS MWINAMO NGUNU.....APPELLANT/APPLICANT

VERSUS

MARY MWANZIA.....RESPONDENT/DEFENDANT

(Formerly of HCCA.183 OF 2014 (B) Machakos High Court being an appeal from the Judgment of HON.A.S.LESOOTIA Senior Resident Magistrate in SPMCC NO.2016 OF 2012 at KITUI delivered on 30th July, 2014.)

R U L I N G

1. **Julius Mwinamo Ngunu**, the **Appellant/Applicant** herein has moved this through an undated Notice of Motion filed on 16th September, 2020 asking for the following Orders:-

i. Spent

ii. That this Hon. Court be pleased to reinstate the Appellant/Applicant's appeal dated 25th March, 2014 and/or the lower court case No.216 of 2012 and Notice to Show Cause slated for 26th March 2020 be stopped pending the hearing and determination of this application.

iii. Costs of this application.

2. The **Applicant** has invoked the Provisions of **Article 159** of the **Constitution of Kenya**, **Section 1A, 1B** and **3A of Civil Procedure Act**, **Order 12 Rule 7** and **Order 51 Rule 1** of the **Civil Procedure Rule** in seeking the above prayers and has relied on the following grounds namely:-

a. That the Applicant appealed against the Judgment of A.S.Lesootia Senior Resident Magistrate on 25th August, 2014.

b. That he later appointed the firm of D.M. Mutinda advocate who failed to prosecute his appeal.

c. That the Applicant's appeal is strong and he is eager to prosecute it.

d. That he stands to suffer loss if this application is not allowed.

3. The **Applicant** has supported the above grounds with his affidavit sworn on 7th September 2020 where he has reiterated the above grounds. He has deposed that he lodged his appeal on 25th August, 2014 because he was dissatisfied with the judgment of **Hon.A.S.Lesootia** delivered on 30th June 2014.

4. The **Applicant** further states that after instructing his advocates, **M/s D.M.Mutindia & Company Advocate**, he inadvertently thought that the said firm of advocates would proceed with his appeal and was surprised to receive dismissal orders of his appeal.

5. He avers that he risks loosing his property which was the subject of appeal and has asked this court to reinstate the same for the interest of justice.

6. The **Respondent** has opposed this appeal through grounds of opposition dated 25th September, 2020. The **Respondent** contends that this appeal is an afterthought only to deny or delay payment of costs to him after he successfully defend the action taken against him.

7. The **Respondent** through counsel submitted that the **Appellant** filed the Memorandum of Appeal on 25/8/2014 and failed to file any

record of appeal until Notice to show cause was served on him on 22nd November, 2018.

8. He avers that the **Respondent** acted in person in his appeal and there was no advocate on record adding that there is no evidence tendered to show that he did instruct the firm of **D.M.Mutinda Advocates** to act for him after filling the Memorandum of Appeal in person.

9. The **Respondent** has faulted the **Applicant** for indolence adding that this application was filed to delay or frustrate payment of costs.

10. This court has considered this application and the response made. The **Applicant** has invoked the Provisions of **Article 159** of the **Constitution of Kenya** and **Section 1A, 1B** and **3A** of **Civil Procedure Act**. He has also cited the Provisions of **Order 12 Rule 7** and **Order 51 Rule 1** of the **Civil Procedure Rule**.

11. The **Applicant** has however not laid basis or stated why this court should resort to the Provisions of **Article 159** to aid him in the prayers sought.

12. This court can perhaps only invoke the said Provisions to determine this application on merit notwithstanding that it is undated. In my view the fact that it is undated does not affect in any significant way the substance of the application.

13. This court also finds that, Provisions of **Sections 1A,1B** of the **Civil Procedure Act** cited by the Applicant are in conflict with the application because the overriding objectives of the Civil Procedure Act includes expeditious disposal of matters in court. This application certainly does not by any stretch foster that objective.

14. Secondly the Provisions of **Order 12 Rule 7** relates to the hearing of a main suit and consequences of nonattendance. Those Provision is not relevant to appeals. The Provisions that caters for appeals are domiciled in **Order 42 of Civil Procedure Rule**. The Notice to Show Cause as why appeal could not be dismissed was issued on 30th October, 2017 pursuant to **Order 42 Rule 35 (2)** of the **Civil Procedure Rule**.

15. The reasons advanced by the **Applicant** that he had instructed an advocate by the name of **D.M.Mutinda** is unfounded because there is nothing to demonstrate that fact. There is no letter or even a receipt issued to the Applicant in respect to legal fees paid that indicates that he instructed the said firm or any other firm of advocates to act for him. The **Applicant** has also not stated how an when he engaged the said firm of advocates and when he last checked on him about the progress of his appeal.

16. This court has gone through the grounds listed in this application and the affidavit in support and there absolutely no explanation given to explain the **Applicant's** inaction for about 6 years prior to making this present application. This court is persuaded by the argument advanced by the **Respondent** that the Applicant was woken up from in action only when he was confronted with demands for costs by the **Respondent** who was successful in the suit on the lower court.

17. The **Applicant** has invoked the inherent powers of this court under **Section 3A** of the **Civil Procedure Act** but I am not persuaded by the reasons advanced by the Applicant. Litigation has to come to an end and courts are always driven by the letter and spirit of **Section 1A & 1B** of the **Civil Procedure Rule**. Inherence powers of a court can only aid the vigilant and a deserving case but not the indolent parties whose only intention is to delay or frustrate the finalizing or putting to rest matters pending in court.

In the end and for the reasons advanced, this court finds no merit in the undated application filed on 16th September, 2020. The same is disallowed with costs to the **Respondent**.

Dated, Signed and Delivered at Kitui this 8th day of September, 2020.

R. K. LIMO

JUDGE