



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 7 OF 2014

PETER MUTHAMA.....1ST APPELLANT/APPLICANT

KANARIO M'IBUNGA.....2ND APPELLANT/APPLICANT

JOSPHAT MWAKI MUNENE.....3RD APPELLANT/APPLICANT

BENEDICT MUNYOKI NGULI.....4TH APPELLANT/APPLICANT

VERSUS

ERASTUS GATOBU MURIUKI.....RESPONDENT

RULING

1. This matter relates to a Notice of Motion dated 22/03/2019 brought ***under Order 42 Rule 1, 2 and 3 of the Civil Procedure Rules and Section 3, 3A and 3B of the Civil Procedure Act***. The applicants are seeking an order to have the appeal reinstated, the same having been dismissed on 4/3/2019.

2. The grounds in support of the application are set out in the supporting affidavit of B. G. Kariuki, advocate for the applicants, sworn on 22/3/2019. It is argued that this appeal was to be heard on 7/12/2018 (the date was actually 17.12.2018), when the trial judge made an order that the record of appeal and the submissions be filed within 21 days, failure to which the appeal would stand as dismissed. When the matter came up for mention on 4/3/2019 appeal was dismissed based on the order of 7/12/2018. The failure to comply with the directions of the court was not deliberate as the counsel on record was represented by another advocate who did not record the same. That should the application be allowed, the respondent will not be prejudiced in any way as the respondent will have the opportunity to present his case.

3. This application was opposed vide the replying affidavit of Charles Mutugi Kanyi, the respondent, sworn on 13/05/2019. He argued that this matter has been in court since 2014 and it has never been prosecuted. The appellants have never bothered to file their record of appeal despite the strict orders issued on 7/12/2018. Besides, no compelling reasons have been presented as to why the dismissal order should be set aside. The respondent avers that he has not been able to enjoy the fruits of the judgment despite the same being delivered more than six (6) years ago.

4. This matter was canvassed by way of written submissions. The appellant submitted that the mistakes of an advocate should not be visited upon his client. They relied on the cases of ***Edney Adaka Ismail v Equity Bank Limited [2014] eKLR*** and ***Bank of Africa Kenya Limited v Put Sarajevo General Engineering Co. Ltdn & 2 others [2018] eKLR*** to support their claim.

5. The respondent submitted that since 2014 this court has been more than patient with the appellants who have continued and blatantly failed to comply with court orders. He urges this court to be vigilant on incompetent litigants' who mock the integrity of the court expecting leniency. Moreover, no compelling reason has been provided to warrant the orders sought. In support of his case, the respondent relied on the case of ***Monica Malel & Another vs R. Eldoret Civil Application No. 246 of 2008*** and case of ***Waweru & Another vs, Karoni (2003)KLR 448***.

6. The issue for determination is: ***whether to set aside the dismissal order and reinstate the appeal.***

7. The power to set aside an order or judgment is an exercise of the court's discretionary power. The court may accept or refuse to exercise that discretion in favour of an applicant having in mind what is just and fair based on the reasons provided. This was so stated by the Court of Appeal in the case of ***Simon Thuo Mwangi v Unga Feeds Limited [2015] eKLR*** where it was observed that:

“The court is not bound to set the judgment aside. On reasons presented, it takes course to set aside or refuse to set aside. The court thus exercises a judicial discretion all the time having in mind what is just and fair in the case. The reason to set aside must therefore be based on good grounds or reasons advanced not on a whim or caprice.”

8. Further, in the case of **Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others [2013] eKLR** the Court of Appeal held that:

“We agree with those noble principles which go further to establish that the court's discretion to set aside an ex parte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.”

9. This appeal was filed in 2014 vide the memorandum of appeal dated 24/03/2014. From the proceedings, no record of appeal had been filed 3 years and 9 months later, that is by 17/12/2018 when the matter was before Judge Njoroge M. for hearing during the service week. On that day of 17.12.2018, the court directed the appellants to file and serve the record of appeal and submissions within 21 days failure to which the appeal would stand as dismissed. The appellants' counsel contends that on that day, he sent another advocate to represent him who failed to diarize the matter in the file. Since the said date up to 4/3/2019 it appears that the applicants' counsel did not make any inquiries to the counsel who represented him to find out what happened in court. Moreover, no affidavit was filed by that other counsel to ascertain the assertions of the counsel on record.

10. It is trite law that a case belongs to a litigant and not his or her advocate. It is the duty of that litigant to pursue the prosecution of his or her case. Thus, this court cannot set aside dismissal orders on the sole ground of a mistake by counsel. Having entrusted his/her prosecution to a counsel, litigants need to constantly check the progress of their matters to keep their advocates in check. See **Savings and Loans Limited v Susan Wanjiru Murityu Nairobi (Milimani) HCCS No. 397 of 2002.**

11. This matter has been in court for about six (6) years in this appeal and seventeen (17) years since its inception in 2003. Litigation must come to an end and this court will not assist parties who seek to delay justice.

12. It is also not lost to this court that the applicants have not attempted to mitigate their situation by demonstrating that they have prepared a record of appeal.

13. Accordingly, I am of the view that the application lacks merits, the same is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 19TH FEBRUARY, 2020 IN THE PRESENCE OF:-

C/A: Kananu

Ms. Soi for respondent

Ms. Mbumbaya for appellant

1st and 3rd appellants

Respondent

HON. LUCY. N. MBUGUA

ELC JUDGE