



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL APPEAL NO. 5 OF 2015

JGM.....APPELLANT/APPLICANT

VERSUS

GWG.....RESPONDENT

RULING

1. The applicant JGM and the respondent GWG got married in 1981 and have grown children. They have many suits and applications between them. In the subordinate court in **Judicial Separation Cause No. 2 of 2008**, the respondent sought judicial separation, custody of the children and her maintenance and that of the children. Several orders were issued by the court on various occasions. They included orders to pay school fees, educational needs, food and medication needs for the children and a grandson. By 24th November 2008 there had accumulated substantive arrears which he was asked to pay, and also make monthly instalments.

2. The applicant appealed against these orders in the instant appeal filed on 17th December 2014. With the appeal was a motion seeking the stay of the orders of execution made by the subordinate court until the appeal is heard and determined. The applicant had filed another appeal (**Civil Appeal No. 9 of 2009**) which he wanted consolidated with the appeal and heard together.

3. The motion was heard by Justice M.W. Muigai who on 9th October 2015 granted stay of execution of the decretal amount as per the order of the subordinate court, on condition that he continues to pay school fees and medical expenses of the children. The orders were to subsist until the appeal is heard and determined.

4. Following a notice to show cause why the appeal should not be dismissed for want of prosecution, on 18th January 2018 the appeal was dismissed with costs. No cause had been shown by the appellant whose advocates were served with the notice but kept quiet. The applicant's advocates were Abuodha & Owino Advocates. In the meantime, the respondent filed Party to Party Bill of Costs of Kshs.1,824,860/38 which she sought that they be taxed.

5. The applicant filed the present application dated 1st October 2019 seeking the setting aside of the orders dismissing the appeal and seeking its reinstatement; the stay of execution and/or the taxation of the Party to Party Bill of Costs; and that, upon reinstatement, the appeal to be consolidated with **Civil Appeal No. 9 of 2009** and **Constitutional Petition No. 44 of 2010**. It is notable that on 24th November 2011 the Court ordered that **Petition No. 44 of 2010** be stayed to allow for the hearing and determination of **Civil Appeal No. 9 of 2009**. The application was brought under **sections 1A, 1B and 3A** of the **Civil Procedure Act, Orders 21 rule 12 and 51 rule 1** of the **Civil Procedure Rules** and **Article 159** of the Constitution.

6. In support of the present application, the applicant swore that the dismissal of the appeal was without his knowledge. He stated that:-

“10. THAT it is quite appalling that my said previous advocates neither took any further steps in the matter nor informed me of the notice aforesaid, with the consequence that the matter was dismissed without my knowledge.”

He stated that his appeal had high chances of success, and asked that the mistakes of his former advocates should not be visited on him. He further stated that he had been complying with the orders to pay school fees, and so on, and that the children had completed school and were now substantially on their own.

7. The respondent opposed the application, and filed a replying affidavit sworn on 14th January 2020. She stated that after the court issued stay on 9th October 2015, the applicant went to sleep. He did not file the record of appeal and never set down the appeal for hearing. Her

advocates set down the appeal for directions before the Deputy Registrar with notice to the applicant's advocates. They did not attend. The Deputy Registrar directed for a mention before the Judge with notice to the applicant's advocates. The matter was mentioned. The advocates for the applicant did not attend. This is when the notice for dismissal was issued and served. The appeal was dismissed with costs for non-attendance to show cause. She stated that the applicant was in the habit of filing many cases against her with no intention to prosecute them. If the advocates had failed the applicant, she stated, he should have complained to the relevant body for the advocate to be disciplined for professional misconduct.

8. I appreciate that the dismissal of an appeal for want of prosecution is a draconian step that denies the parties the opportunity to have the appeal heard and determined on merits. However, a party who files an appeal is expected to proceed with expedition to have it heard and determined. It is true that the applicant had lawyers whom he had instructed to process the appeal for hearing. He expected the lawyers to be diligent. At the same time, however, he was himself expected to be equally diligent by visiting the offices of the lawyers frequently to find out the status of his appeal. The applicant has not indicated in his supporting affidavit when he last checked with his lawyers regarding the status of the appeal. He did not check to find out whether the record of appeal had been filed, and whether directions had been sought. Once he filed the appeal and got stay, he went to sleep, as it were.

9. The appeal was filed on 17th December 2014. The orders of stay were obtained on 9th October 2015. The dismissal was on 18th January 2018. The present application was filed on 2nd October 2019, more than one year following the dismissal. I find that the conduct of the applicant, the delay in dealing with the appeal and the delay in bringing this application, all taken together, do not show that he had a keen interest in the appeal and its expeditious resolution. I do not, in the circumstances, accept his explanation that his lawyers were to blame for the circumstances he finds himself in.

10. In conclusion, I exercise my discretion and dismiss the application with costs.

DELIVERED electronically at NAIROBI this 15TH day of OCTOBER 2020

A.O. MUCHELULE

JUDGE