



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

MISC. CIVIL APPL. NO.2 OF 2015

STEPHEN BORU ELISHA.....APPLICANT

VERSUS

HABIBA MOHAMED SAID.....1ST RESPONDENT

HAGE ABRAHAM KOME.....2ND RESPONDENT

PUBLIC TRUSTEE.....3RD RESPONDENT

RULING

The late Abraham Koome Boru died on 24.04.2012. the respondent filed succession cause number 543 of 2014 before the Marsabit Kadhi's Court and was issued with a grant of letter of administration intestate. The applicant herein filed Civil Appeal number 70 of 2015 before the Nairobi High Court, Family Division. The Appeal was transferred to Marsabit High Court and became Civil Appeal number 2 of 2015. Due to lack of action from the appellant and his counsel, this court dismissed the appeal on its own motion on 23.3.2018.

The appellant filed an application on 12th March 2019 seeking to have the appeal reinstated. He also seeks to amend his record of appeal seeks to amend his record of appeal as well as orders of stay of execution pending the hearing and determination of the appeal. The application is supported by his own affidavit sworn on 12th March, 2019. The first respondent filed a replying affidavit sworn on 18th March, 2019.

The applicant contends that he had retained the services of Mr. Biwott Korir Advocate. The advocate only filed a notice of appointment of Advocate but did not proceed diligently with the appeal. He attended Court twice but did not understand what was happening as he did not know the court procedures.

On her part, the first respondent avers that the appeal is res-judicata. Litigation must come to an end as the matter has already been concluded. The applicant had ample time to mention the case but failed to do so. The application has been filed very late and is a waste of Court's time. No reason has been given for the delay. The respondent also filed a notice of preliminary objection. It is stated that the matter was dismissed for want of prosecution and the only recourse for the appellant is to appeal or apply for review of the judgement and orders. The application is an after thought and has been filed late. The court lacks jurisdiction to entertain the application. The applicant is guilty of non-disclosure of material facts. The appeal in itself is frivolous, vexatious and filed with the intention of causing annoyance and wasting the court's time.

The record shows that the appeal was listed for mention on 11.10.2017. The appellant was present together with his advocate, Mr. Biwott. The respondents and their advocates were absent. This court directed the appellant to file the record of appeal within fourteen (14) days. The matter came up for mention on 6.11.2017. The appellant and his advocate were present. The record of appeal had not been filed. The appeal was listed for mention on 23.11.2017. Both parties and their advocates did not turn up. It was once again listed for mention on 18.12.2017. Mr. Biwott appeared for the appellant while Mr. Ondieki came on record for the responders in place of the firm of Mukira Mbaya. The matter was listed for hearing on 22.1.2018. The parties were absent. Mr. Biwott appeared for the appellant and this is what he told the Court.

“my client is adamant. He says he has finalized the matter.”

The appeal was listed for Notice to show cause why it should not be dismissed on 23.3.2018. The appellant and his advocate were absent. Equally, the respondents and their advocates did not turn up. The court dismissed the appeal for want of prosecution.

Since 23rd March, 2018 nothing took place until 12th March 2019 when the current application was filed. The notice to show cause was issued under Order 17 rule (2) of the Civil Procedure rules which states as follows:-

2(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

Order 42 rule 20 of the Civil Procedure Rules empowers the court to dismiss an appeal due to default on the part of the appellant. The default includes non appearance and failure to file a declaration under rule 16 of order 42 that the appellant does not intend to appear during the hearing of the appeal together with written submissions in support of the appeal. Order 42 rule (21) allows the Re-admission of an appeal that had been dismissed for non appearance under rule 20.

The applicant contends that he did not understand the court process. Indeed he appeared twice in court with his counsel. His counsel told the court that the appellant had settled the matter. It is not clear how the matter could have been settled. It is not clear to the court whether Mr. Biwott informed his client that the appeal was likely to be dismissed. The notice to show cause seems to have been served on Mr. Biwott. I do agree that the applicant took too long to lodge the current application. However, the law allows the court to reinstate or re-admit an appeal that has been dismissed for want of prosecution. The court does not become *factus officio* after dismissing a suit or appeal for want of prosecution. It is explained to the satisfaction of the Court why the appeal could not be prosecuted, then the Court can reinstate the appeal. The contentions by the respondents that the Court lacks jurisdiction is misplaced.

The respondents also contend that the matter is res-judicata. This is a mis-interpretation of the doctrine of res-judicata. Section 7 of the Civil Procedure Act states as follows:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

There is only one appeal. The appeal was not fully heard and determined. Termination of the appeal for want of prosecution cannot raise an issue of res-judicata or estoppel. The court has powers to re-admit the appeal and have it determined on merit.

The dispute herein involves inheritance. The matter was determined before the Kadhi's court. The proceedings of the Kadhi's court show that the appellant did not participate in the case. He contends that the deceased was his father and that the deceased was a Christian and not a Muslim. He preferred an appeal instead of seeking revocation of the grant by the Kadhi for misrepresentations (if any).

I am satisfied that there is need to have the dispute dealt with sustainably as opposed to technical dismissal of the appeal. The overriding objective is to have disputes determined by according each party the opportunity to be heard. The appellant was not heard before the Kadhi's Court. It would be unfair for his court to shut its door and ignore his protestations. There is no evidence that he was aware that his appeal was going to be dismissed. It is only fair that the appellant be accorded an opportunity to ventilate his appeal.

The record shows that a record of appeal was filed on 12th March 2019. The appellant is at liberty either to adopt that record or to amend it as prayed in his application herein. The dispute involves inheritance and it is the interest of the court to know whether the appellant is the deceased's beneficiary.

In the end, the application dated 12th March, 2019 is allowed in the following terms.

1. The order of the Court issued on 23.3.2018 dismissing the appeal for want of prosecution is hereby set aside.
2. The appeal herein is re-admitted for hearing and determination.
3. The appellant is granted leave to amend his memorandum of appeal and the record of appeal.
4. The amended memorandum or record of appeal to be filed within seven (7) days hereof.
5. The rest of the prayers are not granted.
6. Parties shall meet their own costs of the application.

Dated and Delivered at Marsabit this 2nd April, 2019

S. CHITEMBWE

JUDGE