



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 375 OF 2011

MUKTAR DUBOW HASSAN.....APPELLANT

VERSUS

SHAMSA HAJI ISMAIL.....1ST RESPONDENT

ABDI FATAH ISMAIL.....2ND RESPONDENT

RULING

The appeal herein was filed on the 8th day of November, 2010 following the judgment delivered on the 18th October, 2010 by Hon. Ondenyo in Mandera Civil case number, 1/2010.

The appellant filed an application for stay of execution dated the 14th day of February, 2012 which was heard and determined by Hon. Justice Ang'awa (as she then was) and in her ruling dated 26th day of March, 2012, granted a stay of execution pending the hearing and determination of the appeal.

Thereafter, the appellant did not take any other action in the appeal and on the 16th June, 2016, the court on its own motion listed the same for notice to show cause as to why it should not be dismissed for want of prosecution. The record shows that on the said date, both parties did not appear and the appeal was dismissed under Order 42 Rule 35(2) of the Civil Procedure Rules.

On the 5th August, 2019, the appellant filed the present application seeking to review, vary, set aside and reinstate the order dismissing the appeal and that it be listed for hearing.

The application is premised on the grounds set out on the body of the same and it's supported by the annexed affidavit sworn by Muktar Dubow Hassan on the 5th day of August, 2019. The main ground on which the application is made is that there was no notice issued to the appellant before the appeal was dismissed. The appellant avers that no prejudice will be caused to the respondent in the event that the orders sought are granted.

The 1st respondent filed a replying affidavit on the 29th day of October, 2019 in which she has deponed that since the matter was determined by the trial court, she has never enjoyed the fruits of the judgment due to the appeal herein.

She further depones that since the appellant lodged the appeal, he has lost interest and even after the appeal was dismissed in 2016, he did not make any effort to know the status of the appeal, leave alone trying to set it down for hearing. That it was only after she extracted the orders dismissing the appeal and proceeding to evict the appellant that he decided to resuscitate the same.

She avers that there are no justifiable reasons as to why the appeal has not been prosecuted, nine years since it was filed. That the delay has caused her pain and suffering and she believes that litigation has to come to an end so that justice is not denied.

On his part, the 2nd respondent filed a replying affidavit on the 29th October, 2019 wherein he depones that since the appeal was filed, the appellant/applicant has deliberately refused, failed and neglected to prosecute the same leading to its dismissal on the 16th June, 2016.

He avers that the appellant continues to trespass on plot Number 195 Rhamu Township Mandera County (herein referred to as the suit land) by living and erecting houses on the said plot without any color of right from the owner. That it is only after he was served with an eviction notice by the 1st respondent that he moved this court with an application to reinstate the suit.

He depones that a duration of 3 years, 2 months and 20 days has lapsed since the appeal was dismissed and therefore the appellant is guilty of inordinate delay in bringing the present application. He avers that the appellant has not given sufficient reasons for the delay in prosecuting the appeal and his application is an abuse of the court process and it should be dismissed.

Parties made oral highlights in support of their respective positions which essentially mirrored the contents of their affidavits.

The court has cautiously considered the application and the material in support of the same. The appeal was dismissed under Order 42 Rule 35(2) of the Civil Procedure Act which provides;

“If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal”.

The appeal was dismissed four years after it was last in court. The appellant avers that he was not served with the notice of dismissal by the court.

With due respect to that submission by counsel for the applicant, this court takes Judicial Notice of the fact that the month of June, 2016 had been set aside by the Civil Division, Nairobi, for dismissal of old cases and the notices were widely published through the Law Society of Kenya and in the Daily Nation Newspaper. However, in the interest of justice the court will give the appellant the benefit of doubt in that regard.

As to the reason for the delay in prosecuting the appeal, the contention by the appellant that the lower court file has not been forwarded to this court may not be tenable. There is no reason given to the court why he has not filed the record of appeal and/or evidence to show that he applied for the proceedings and what he has done on his part to pursue the same. As rightly submitted by the respondents, the delay has not been sufficiently explained but as the court held in the case of *Ivita V. Kyumba (1984) KLR 441*, “*even if the delay is prolonged, justice can still be done to the parties*”.

Similarly, in line with Article 159(2) of the Constitution and with the holding in the case of *Agip (K) Limited Vs. Highlands Tires Limited (2001)KLR 630*, in which the court held;

“It is clear that the process of the judicial system requires that all parties before the court should be given an opportunity to present their cases before a decision is given”

In the end, the application dated 5th August, 2019 is granted in terms of prayer one. The orders made by this court on the 15th day of June, 2016 dismissing the appeal are set aside and the appeal is hereby reinstated for hearing.

This being an appeal arising from a land matter, the appeal be and is hereby transferred to the Environment and Land Court for hearing and final determination. The appellant to pay costs of Kshs. 10,000/= to each respondents and the same to be paid within 14 days from the date of this ruling.

As submitted by the respondents, the appellant after obtaining stay orders went to sleep as he continued to enjoy the orders to their detrimental. In the interest of justice, the stay orders issued by Ang’awa Judge on 26th day of March, 2012 are hereby discharged.

It is so ordered.

Dated, signed and delivered at NAIROBI this 7th Day of November 2019.

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L. NJUGUNA

JUDGE

In the Presence of

..... For the Appellant

..... For the Respondents