



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO 589 OF 2017**

**KENYA AGRICULTURAL RESEARCH INSTITUTE.....APPELLANT**

**VERSUS**

**MORRIS SHIKUVALE MURUNGA.....1<sup>ST</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Appellant's Notice of Motion application dated 4<sup>th</sup> March 2019 and filed on 7<sup>th</sup> March 2019 was brought pursuant to the provisions of Article 159 (2) (d) of the Constitution, Section 1A and 3A of the Civil Procedure Act, Order 42 Rule 21 and Order 51 Rule 21 of the Civil Procedure Rules and all enabling provisions of the law. Prayer No (1) was spent. It sought the following remaining orders:-

**1. Spent.**

**2. THAT the proceedings herein of 5<sup>th</sup> October 2018 and the consequential orders made therein be and are hereby recalled, reviewed and set aside.**

**3. THAT the Appellant's appeal be re-admitted and set down for directions and hearing on merit.**

**4. THAT costs of the application be in the cause.**

2. Its Written Submissions and List of Authorities were both dated 26<sup>th</sup> April 2019 and filed on 29<sup>th</sup> April 2019 while those of the 1<sup>st</sup> Respondent were dated 26<sup>th</sup> June 2019 and filed on 3<sup>rd</sup> July 2019.

3. The parties requested the court to deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

**THE APPELLANT'S CASE**

4. The Appellant's present application was supported by the Affidavit of its advocate, Teddy Enos Ochieng, that was sworn on 4<sup>th</sup> March 2019.

5. Through its said advocate, it contended that it filed its Record of Appeal on 27<sup>th</sup> April 2018 and that its advocates had pursued its Appeal to be listed down for directions. It pointed out that in one of the routine follow ups at the Registry, its advocates were informed that the matter was listed for directions on 5<sup>th</sup> October 2018 and the same dismissed for want of prosecution.

6. It was categorical that the Mention Notice that was issued by the Registry was never served on its said advocates and consequently, the failure by its advocates to attend court on 5<sup>th</sup> October 2018 was not due to their mistake as the Appeal was fixed for directions without their notice.

7. It averred that the rules of natural justice and overriding interests of justice required that it be given an opportunity to have its Appeal heard on merit. It stated that it was ready and willing to prosecute its appeal. It added that the directions expected on a mention date could not include a dismissal of the appeal.

8. It therefore urged this court to allow its application as prayed.

### **THE 1<sup>ST</sup> RESPONDENT'S CASE**

9. In response to the said application, the 1<sup>st</sup> Respondent filed Grounds of Opposition dated 25<sup>th</sup> April 2019 on 26<sup>th</sup> April 2019. The grounds were as follows:-

1. **The application dated 4<sup>th</sup> March (sic) was intended to delay justice.**
2. **THAT notice of date for giving directions was given by Deputy Registrar to parties (sic).**
3. **The appeal was dismissed for want of prosecution.**
4. **The appeal did not have high probability of succeeding as it was speculative.**
5. **The 1<sup>st</sup> Respondent would be prejudiced if orders sought in the application were allowed.**
6. **The 1<sup>st</sup> Respondent/ Decree – older should not be denied his fruits of judgment.**

10. His advocate, Justin Asige, also swore a Replying Affidavit on his behalf on 25<sup>th</sup> April 2019.

11. He stated that he attended court on 5<sup>th</sup> October 2018 but the Appellant's advocates did not attend court and that the Appeal was dismissed for want of prosecution. Through his advocate, the 1<sup>st</sup> Respondent was emphatic that he should not be denied the fruits of his judgment.

12. He therefore urged this court to dismiss the Appellant's application on the ground that it had not been brought in good faith.

### **LEGAL ANALYSIS**

13. The Applicant relied on the cases of **Kiai Mbaki & 2 Others vs Gichuhi Macharia & Another [2005] eKLR**, **David Oloo Onyango vs Attorney General [1987] eKLR** amongst other cases where the common holding was that a party should not be deprived of his right to be heard if the rights of the opposing party would not be prejudiced and that striking out of pleadings should be used sparingly and only in the clearest of the cases.

14. It also placed reliance on the case of **Shah vs Mbogo & Another (1967) EA 1116** where it was held that the court's discretion is intended to be exercised to avoid hardship or injustice resulting from inadvertence or excusable mistake or error.

15. On his part, the 1<sup>st</sup> Respondent argued that Article 159 (2) (b) of the Constitution of Kenya, 2010 provides that justice shall not be delayed. He also pointed out that Under Section 79B of the Civil Procedure Act provides that upon filing an appeal, an appellant shall cause the matter to be listed for directions before a judge and that the same provision gives the judge power to summarily dismiss an appeal. He also alluded to Order 42 Rule 13 (1) of the Civil Procedure Rules which requires an appellant to list the appeal before a judge for directions.

16. This court also noted that he referred to the cases of **Waweru Peter vs Robert Njoroge Chege [2018] eKLR**, **Paxton vs Allsopp [1971] 2 ALL ER 370** as adopted in the case of **Ivita vs Kyumbu [198] KLR 441** amongst other cases where the common holding was that any litigant is expected to take all action to ensure the speedy resolution of his case and that in this case, the Appellant was employing delaying tactics in having its Appeal determined.

17. This court noted the parties' respective Written Submissions but found that it could not consider the merits or otherwise of the same because it was apparent *prima facie* from the court record that the Appellant's advocates did not appear to have been served with the Notice under Order 42 Rule 13 of the Civil Procedure Rules as per the Notice that was in the court file. It only indicated that the firm of M/S A.H. Khamati & Co Advocates was duly served with the said Notice dated 27<sup>th</sup> July 2018.

18. On 5<sup>th</sup> October 2018, this court dismissed the Appeal for want of prosecution after it observed that the firm of M/S Muriithi & Ndonge Advocates for the Appellant who had been duly served with the aforementioned Notice, were not present in court at the time the matter was called at 10.46 am. A perusal of the proceedings of the day vis-à-vis the Record of Appeal before the court was puzzling to the court because the Appellant's advocates in the Appeal herein were Millimo, Muthomi & Co Advocates and not the said firm of M/S Muriithi & Ndonge Advocates as it was indicated.

19. There was nothing in the file to show that the said firm of M/S Muriithi & Ndonge Advocates had been served as the court observed on 5<sup>th</sup> October 2018. This court was also confused because at the time of reading the order, Mr Asige for the 1<sup>st</sup> Respondent did not bring it to the attention of the court that the firm of M/S Muriithi & Ndonge Advocates were not the ones on record for the Appellant herein.

20. It could not, however, fault him because he did not appear to have participated in the lower court proceedings and may therefore not have been certain which advocates were representing the Appellant herein. In addition, the Appellant could also have changed representation at the appellate stage.

21. However, this court was concerned that it was certain that it had referred to a Notice in the court file that showed that the same had been

served upon M/S Muriithi & Ndonge Advocates but which was now no longer on the court file. So as to bring closure to the confusion it found itself in

22. This matter, it opted to take the view that there may have been misfiling which had been rectified by the time the file was placed before it for the hearing and determination of the present application.

23. Without belabouring the point, this court found that there was an error on the face of the court record and there was therefore merit in reviewing the orders it made on 5<sup>th</sup> October 2018 so that the Appellant's Appeal herein could be heard and determined on merit.

#### **DISPOSITION**

24. For the foregoing reasons, the upshot of this court's decision was that the Appellant's application that was dated 4<sup>th</sup> March 2019 and filed on 7<sup>th</sup> March 2019 was merited and the same is hereby allowed in terms of Prayer Nos (2) and (3) therein. **Costs of the application herein will be in the cause.**

25. It is so ordered.

**DATED and DELIVERED at NAIROBI this 10<sup>th</sup> day of December 2019**

**J. KAMAU**

**JUDGE**