



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

HIGH COURT CIVIL APPEAL NO. 115 OF 2013

(FORMERLY EMBU APPEAL NO. 46 OF 2007 of Principal Magistrate's Court

at Kerugoya before S. N. Mbungi – P.M)

PHYLLIS KARIUKO NJAGI.....APPELLANT

V E R S U S

JANE WAGUAMA NJAGI.....1ST RESPONDENT

JANET WAMARWA NJAGI.....2ND RESPONDENT

RULING

1. The application pending before court is dated 15/01/2018 seeking that Court reviews and/or sets aside its ruling delivered on 07/07/2017 and subsequent order issued on 20/12/2017. The said order was for dismissing the appeal for want of prosecution.

Applicant's case

2. The application is based on the fact that failure of the advocate to attend court on 29/06/2017 was a mistake caused by his clerk and therefore the appellant should not suffer due to advocate's mistake. That his clerk received the application dated 25/05/2017 but neither informed him of the same or recorded the hearing date therefore he was not aware of the same. That the application contravenes the provision of **Order 9 of the Civil Procedure Rules** and therefore the firm of Wangechi Munene & Co. Advocates are not properly on record. That the case involves land and the 1st respondent will not be prejudiced if the appeal is reinstated and determined on merit.

Respondent's case

3. In response, the 1st respondent filed grounds of opposition on ground that the application is bad in law, misconceived and an abuse of the court process. In addition, she filed a response stating that the appellant filed the appeal on 24/01/2010 and amended the same on 15/12/2010. She filed records of appeal on 02/12/2013 and the court gave directions on 17/06/2015 for the appeal to be disposed by way of oral submissions. That there are no reasons given why the appellant never fixed the matter since 17/06/2015 and it is impossible for the court to lack hearing dated for whole of 2016 and 2017.

4. That the advocate is properly on record since she filed notice of change of advocates dated 25/05/2017 before judgment was delivered. That though the appellant is blaming his advocate in respect of the application dated 25/05/2017, he does not give reasons why the appeal has never been prosecuted since it was filed in 2010.

Issues arising;

1. Review

Grounds for applying for review

5. Review can only be allowed under certain circumstances. It is not in all cases that you are allowed to apply for review. The grounds are:

i) Discovery of new and important matter of evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the Order made

ii) *Mistake or error apparent on the face of the record*

iii) *Any other sufficient reason which may make the court to review its order.*

The grounds in which the appellant is seeking review are as follows;

a) Mistakes of an advocates

6. The appellant's seeks to review the order dismissing his appeal for want of prosecution on ground that his advocates clerk failed to alert the advocate of the application or the hearing date. That the mistake of an advocate should not be visited upon a client.

7. In my view a mistake is a mistake, and as long as sufficient explanation is given showing good faith like in this case, it should be excused and a party given an opportunity to be heard on their grievances on merit.

b) Whether the advocate for the 1st respondent is properly on record.

8. **Order 9 of the Civil Procedure Rules** deals with procedure for change of advocates. Maina Kagio & Co. Advocates was representing the appellant until 25/05/2017 when the current advocates filed notice of change.

Order 9 Rule 9 of the Civil Procedure Rules provides:

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

a) upon an application with notice to all the parties; or

b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

9. In **Livingstone Simel Sane v Shadrack F. Ogata & another [2014] eKLR**

The applicant filed an application seeking for orders to file his intended appeal out of time. However, the Respondents filed a Notice of Preliminary Objection on a point of law arguing that the application was filed in contravention of **Order 9 Rule 9 of the Civil Procedure Rules**. *L. Gacheru J*, in dismissing the application stated;

From the above provisions of law, there are two options of coming on record. Firstly one may seek leave of court by way of an application or file a consent letter. The advocate now on record for the applicant has not done any of the above. The provisions of Order 9 Rule 9 of the Civil Procedure Rules are not complied with.....

I also find that Sane &Co. Advocates or the applicant herein have not complied with Order 9 Rule 9 of the Civil Procedure Rules. That contravention is fatal to the applicant's application dated 30th September, 2013. The upshot of the foregoing is therefore that the application dated 30/9/2013 is fatally defective and not merited.

Refer to **Lalji Bhimji Sanghani Builders & Contractors V City Council Of Nairobi[2012]eKLR**

Odunga J, struck out the application since the defendant had not complied with Order 9 Rule 9 of the Civil Procedure Rules stating;

A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the rules of the procedure the Court may well be entitled to conclude that the failure to comply therewith was deliberate.

10. He quoted with approval the holding of *Sitati J*, in **Monica Mora versus Kenindia Assurance Co. Ltd. [2010] eKLR;**

...there is no doubt in my mind that the issue of representation is critical especially in case such as this one where the applicant's advocates intent to come on record after delivery of judgment. There are specific provisions governing such change of advocate. In my view the firm of M/s Kibichiy & Co. Advocates should have sought this courts leave to come on record as acting for the applicant.... The firm of M/s Kibichiy & Co. Advocates as not complied with the rules and instead, have just gone ahead and filed a Notice of Appointment without following the laid down procedures. The issue of representation is a vital component of the civil practice and the courts cannot turn a blind eye to situations where the rules are flagrantly breached....

11. **Order 9 rule 9** is couched in mandatory terms '*...such change or intention to act in person shall not be effected without an order of the court*'. The 1st respondent's advocates did not follow the procedure laid down for change of advocates and their application before court dated 25/05/2017 was incompetent and fatally defective.

2. Reinstating an appeal dismissed of suit for want of prosecution.

The Court of Appeal in holding the view that reinstating the appeal in the High Court would amount to an abuse of the court process and injustice, stated;

There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case. We are of the considered view that the learned Judge in considering the application, should have looked at the appellant's conduct from the time the appeal was filed up to the date the application for reinstatement was filed.....

We have to ask ourselves whether the failure by the appellant to prosecute the appeal in the High Court and/or the delay in filing the application for reinstatement constituted an excusable mistake or was it meant to deliberately delay the cause of justice..... Why didn't she set the appeal down for hearing for almost 14 years? The reasonable explanation would be that the appellant had been indolent and had slept on her rights. She was only awakened from her slumber by the dismissal of the appeal.

Order 42 Rule 35 of the Civil Procedure Rules:

1. Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.

12. Upon perusal of the entire record of events that had taken place and each action since the appeal was filed until its dismissal, the advocate and his client went into slumber. The appeal herein was filed in 2010, the appellant subsequently passed away and on 31/10/2013, the parties consented to her substitution with the current appellant. Thereafter, the court gave directions on 17/06/2015 that the appeal be disposed by way of oral submissions. Since then the appellant choose to sleep until the 1st respondent filed the application for dismissal which period comes close to two years. They were guilty of inaction as the delay/lapse was not adequately explained.

13. Though the explanation of failure to attend the hearing date of the application for dismissal is plausible, there was inordinate delay in prosecuting the appeal which the appellant has not explained satisfactory. Be thus as it may, as seen above the application for dismissal was fatally defective having been filed by an advocate not properly on record. In view of this I find that the application has merits.

14. I allow it and order that the ruling on 7/7/17 be set aside together with consequential orders. The appeal shall be listed for hearing as earlier ordered.

Dated at Kerugoya this 13th Day of December 2018.

L. W. GITARI

JUDGE