

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 335 OF 2002

JOHN GIOCHE WAITHAKA.....APPLICANT

VERSUS

ESTHER WANGUI MWANGI.....RESPONDENT

RULING

1. The application dated 14th December, 2016 principally seeks orders that:-

1. THAT this Honourable Court be pleased to review and set aside/vary its dismissal order issued against the Appellant/Applicant's Appeal on or about 24th January 2011 and re-admit the Appellant's appeal for hearing on its merits.

2. It is stated in the affidavit in support that the Applicant's Advocates became aware of the dismissal of the appeal when they were served with a Bill of Costs together with a Notice of Taxation on 8th November 2016. That a perusal of the court file revealed that the appeal was dismissed on 24th January 2011 in the absence of the Applicant's (Appellant's) side. According to the Applicant's counsel, they had not been invited to fix a convenient hearing date and therefore received the hearing notice for hearing on 24th January 2011 under protest as they did not have the year 2011 diary and the date was inconvenient due to the Christmas vacation. That it was not clear from the hearing notice whether the matter had been fixed for the hearing of the appeal or the application made by the Respondent's counsel to come on record.

3. It is further stated that there was an oversight on the Applicant's counsel's side and the date was not diarized because it fell between Christmas and new year when their offices are closed. The court was urged not to visit the mistakes of the advocate on the litigant who has been following up on the matter regularly. The Applicant further stated that the application by the Respondent's counsel to come on record was dismissed with by way of a consent and without any notice to the Applicant's advocate. It is contended that Wanjama & Co. Advocates were not on record when the said consent was recorded for the Respondent. That by the time the said consent was entered into between the firm of **NYOKABI WAIGANJO & CO. ADVOCATES** and **WANJAMA & CO. ADVOCATES**, it was the firm of **WERU & CO. ADVOCATES** who were on record for the Respondent. That the firm of **NYOKABI WAIGANJO & CO. ADVOCATES** is therefore not properly on record for the Respondent and therefore the application by the firm of **NYOKABI WAIGANJO** to come on record was still pending.

4. The application is opposed. It is stated in the replying affidavit that the Applicant's Advocates were invited for the fixing of the hearing date but failed to send a representative and the date was fixed exparte and a Hearing Notice served. That on the hearing date on 24th January 2011 there was no attendance on behalf of the Applicant and the appeal was dismissed. That the Applicant took about six years before filing the application under consideration or taking any other step and only rushed to court after the Bill of Costs was served. The Applicant took the stand that the delay is inordinate and inexcusable and urged the court to dismiss the application.

5. The application was canvassed by way of written submissions which I have duly considered.

6. The appeal herein was dismissed on 24th January 2011 for non-attendance. Prior to the said date, the last time the Applicant's counsel was in court was on 28th July 2008. Although the Applicant has criticized the manner in which the firm of **Ms Nyokabi Waiganjo** came on the record on 2nd June 2010, the orders made on the said date remain on the record and have not been reviewed or set aside. There is no evidence of any activity on the record by the Applicant from the date 28th July 2008 when the Applicant had fixed the appeal for hearing but the appeal could not be heard as **MS WERU & CO. ADVOCATES** who had filed a Notice of Appointment for the Respondent was not present. By the 24th January 2011 when the appeal was dismissed, there were no pending applications. The application dated 14th October 2009 by the firm of **NYOKABI WAIGANJO** to come on record had already been disposed of on 2nd June 2010.

7. On the hearing date having fallen on 24th January 2009 which is stated to be between Christmas and the new year, the only period time stops running under Order 50 of the Civil Procedure Act is between 21st December and 13th January. If the Applicant's Advocate's offices were closed, arrangements could have been made before hand to instruct another counsel to hold their brief. In any event, the Applicant's counsel was invited vide letter dated 3rd November 2010 to appear in the registry on 8th November 2010 to fix a convenient hearing date but failed to do so. The letter of the invitation (**annexture MNWI**) shows that it was received by the Applicant's Advocates on 4th November 2010 as per the stamp on the same. It does not come out clearly from the Applicant's Advocates whether the failure to attend court was because of the inconvenient hearing date or the failure to diarize the matter. No excerpt of the diary for the hearing date was exhibited herein

8. From the date 24th January 2011 when the appeal was dismissed, it took about five years before the application under consideration was filed on 15th December 2016. If the Applicant's Advocates were diligent, they would have visited the registry earlier to fix a hearing date for the appeal or for any applications stay deemed as still pending. It was not until the Bill of Costs was fixed for taxation on 17th November 2016 that the Applicant's Advocates woke out of their slumber and filed the application at hand. The Applicant cannot be exonerated from the blame either as this was his appeal and he ought to have followed up on the progress of the same.

9. Although the Applicant has his undoubted right of appeal, he has not demonstrated to this court that he acted diligently and is deserving of the exercise of this court's discretion in his favour. The delay in prosecuting this appeal which was filed in the year 2002 is inordinate. It is time that the litigation herein which was initiated in the year 1998 is brought to an end. Consequently, I find no merits in the application and dismiss the same with costs.

Date, signed and delivered at Nairobi this 15th day of June, 2017

B. THURANIRA JADEN

JUDGE