



IN THE HIGH COURT OF KENYA

AT MURANG'A

CIVIL APPEAL NO 2 OF 2015

(From original Decree in Kigumo PMCC No 171 of 2013 – A Mwangi, SRM)

GEORGE MAINA WAITHAKA.....APPELLANT

VERSUS

1. MARGARET NJOKI KURIA

2. SAMSON KURIA WAITHAKA.....RESPONDENTS

R U L I N G

1. The appeal herein was on 30/08/2016 dismissed with costs for want of prosecution under **Order 42, Rule 35(2)** of the **Civil Procedure Rules, 2010**. The Appellant subsequently applied by **notice of motion dated 06/10/2016** for an order to review and set aside that order of dismissal. That application is the subject of this ruling. It is supported by the affidavit of Sheila Obiayo, learned counsel for the Appellant.

2. The grounds for the application appearing on the face thereof are that non-attendance in court on 30/08/2016 was “**genuine and not meant to delay the hearing or cause prejudice to the Respondent**”; that the mistake of counsel should not be visited upon the Appellant; that the Appellant is interested in his appeal; that the application has been timeously brought; that the Respondent will not suffer any prejudice by allowing the application; and that it is meet and just that the application be allowed.

3. The Respondent opposed the application by a replying affidavit filed on 24/10/2016. It is sworn by her learned counsel, Mr. Joseph Mwangi Ben. Grounds of opposition arising from that affidavit include –

(i) That the application as drawn is totally defective and an abuse of the court process.

(ii) That in any event the appeal was incompetent for being filed out of time.

(iii) That the appeal was dismissed on very good grounds.

(iv) That the application for dismissal was never opposed in any way.

(v) That it made no difference that the advocate who swore the supporting affidavit was on leave at the material time as her firm had no fewer than five (5) advocates.

4. Other grounds raised in the replying affidavit relate to alleged misconduct of the Appellant’s advocates in respect to decretal sum ordered to be deposited in a joint account by the lower court. This court declined to deal with that issue in this application as the matter of execution of the decree was not before this court but before the trial court. There is a lengthy supplementary affidavit filed by the Appellant. It responds to the issues of execution of decree before the lower court and alleged misconduct of the Appellant’s advocates.

5. Learned counsels for the parties chose to canvass the application by way of written submissions. Both parties filed their respective submissions on 28/03/2017. I have considered those submissions, along with the cases cited.

6. The application is stated to be brought under **Order 51, Rule 1** of the **Civil Procedure Rules** and also under **sections 1, 1A and 3A** of the **Civil Procedure Act, Cap 21**. The application thus seeks exercise of the court’s discretion.

7. The main issues in the present application are why no response to the application for dismissal of the appeal for want of prosecution was ever filed and why there was no attendance of the Appellant at the hearing of the application if it was intended to oppose the same.

8. The explanation given is that the advocate in the law firm acting for the Appellant was on maternity leave and subsequently on her annual leave when the application was served and subsequently heard; and that the matter was simply placed on her desk without it being entered in the diary. However, it is not explained why the matter was not given to another advocate to deal with. It has not been controverted that the firm acting for the Appellant had no fewer than five (5) advocates. So, why was the matter not placed before one of the other four if one was on maternity/annual leave? Is it to be believed that all the files that this particular advocate was dealing with were simply placed on her desk when they came up during her maternity and annual leaves, no doubt an extended period of time? This is not credible at all, and this court does not accept the explanation.

9. The decree appealed against was a money decree, and there appear to have been issues surrounding the security that the lower court ordered as a condition for stay of execution.

10. In this day and age it cannot always be a sufficient plea that it was all my advocate's fault, and I cannot suffer because of that! Well, why should the opposite party suffer because of your advocate's fault? At least you can sue your advocate for damages in professional negligence!

11. Besides, there is the issue whether the appeal as filed was competent in the first place, raised in the replying affidavit. The Appellant merely glossed over this issue in his supplementary affidavit. The appeal was against a decree passed on 05/12/2014. The memorandum of appeal was filed on 09/01/2015, outside the 30-day period prescribed by statute (see **section 79G** of the Civil Procedure Act). The Appellant has not stated in the supplementary affidavit that there was a certificate of delay issued by the lower court that would have brought the appeal within the exception set out in the said section.

12. After considering all matters placed before the court, I am not persuaded that the court's discretion should be exercised in the Appellant's favour. The notice of motion dated 06/10/2016 is hereby dismissed with costs. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 20TH DAY OF JULY 2017

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 21ST DAY OF JULY 2017