



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

ELCA CASE NO. 54 OF 2013

BEATRICE WAMBUI GIKUNJU1ST APPELLANT

ROSE WAMBUI GIKUNJU 2ND APPELLANT

VERSUS

SAMSON MBUI OBADIAH KOIGI1ST RESPONDENT

ALBERT GIKUNJU NJERU2ND RESPONDENT

RULING

On 12th March 2015, this Court dismissed the appellants/applicants' appeal for want of prosecution.

The record shows that the appeal had been admitted for hearing by **Warsame J.** (as he then was) on 7th March 2011 at the High Court of Kenya Embu where it had been originally filed as High Court Appeal No. 35 of 2010 before it was transferred to this Court following the establishment of the Environment and Land Court at Kerugoya.

It is also clear from the record that on the same day that **Warsame J.** (as he then was) made an order admitting this appeal, the Deputy Registrar Embu vide a letter dated 7th March 2011 reference E/HCA/35/2010 wrote to the firm of Maina Kagio Advocates advising them that the appeal had been admitted and directing them to prepare the record of Appeal and file the same within 21 days from the date of that letter. The said letter was also copied to the firm of Igati Mwai Advocates for the 1st respondent and also **ALBERT GIKUNJU NJERU** the 2nd respondent. On 6th August 2012, the firm of Maina Kagio Advocates filed a notice to withdraw from acting for the appellants and advised that they be served in person.

Arising from my ruling dated 12th March 2015, the appellants filed a Notice of Motion dated 23rd October 2015 seeking the following substantive orders:-

1. ***That this Court do set aside the dismissal order of 12th March 2015 and the appeal be reinstated to hearing.***
2. ***Costs be in the cause.***

The application which is brought under the provisions of **Section 3A of the Civil Procedure Code** and **Article 159 of the Constitution** is supported by the affidavit of **ROSE WAMBUI GIKUNJU** the 2nd appellant/applicant herein and on the grounds set out therein.

The respondents have resisted the application and both have filed replying affidavits in opposition thereto.

From the Notice of Motion and the supporting affidavit of the 2nd appellant/applicant, she appears to raise issues that touch on the merit of their case. What is relevant for the purpose of this application is that the appellants/applicants claim that they were not informed by the registry to enable them prepare the record of appeal and that they were acting in person but have now engaged an advocate (see grounds (b) and (c)). They also claim that their appeal raises serious issues for determination as they are at risk of being evicted from their matrimonial home.

In his replying affidavit, the 1st respondent **SAMSON MBUI OBADIAH** has deponed, inter alia, that the application is frivolous, vexatious and an abuse of the Court process as the appeal was filed by the appellants/applicants' advocate who later withdrew and the appellants/applicants started acting in person until the appeal was dismissed. That the appellants/applicants only "**woke**" up from their sleep when the respondents moved to evict them.

In his replying affidavit, the 2nd respondent **ALBERT GIKUNJU NJERU** similarly urged the Court to dismiss the application as lacking in merit and only meant to frustrate the 1st respondent.

Submissions have been filed both by the firm of Maina Kagio Advocates (who came back on record on 12th October 2015) on behalf of the appellants/applicants and the firm of Igati Mwai Advocate on behalf of the 1st respondent. The 2nd respondent filed his own submissions.

I have considered the application, the rival affidavits and the submissions by counsel and the 2nd respondent. I have also looked at the record herein part of which I have already referred to at the start of this ruling.

Basically, the gist of this application is that the appellants/applicants were not informed that their appeal had been admitted for hearing to enable them prepare and serve the record of appeal and also that at the time the appeal was dismissed, they were acting in person. In his submissions on their behalf, their counsel Mr. Kagio has stated that though the appeal was admitted by **Warsame J.** (as he then was) on 7th March 2011, this appeal was later transferred to this Court and, to use counsel's own words "**the appeal seems to have been admitted again on 16th July 2014**" but since counsel had by then ceased acting for the appellants/applicants, there was a failure to comply with the provisions of **Order 42 Rule 12 of the Civil Procedure Rules** as counsel was not notified and neither were the appellants who were acting in person.

Counsel also takes issue with the application by the respondents dated 30th August 2012 that led to my ruling sought to be set aside and argues that it was brought pursuant to the provisions of **Section 79 B of the Civil Procedure Act** and **Order 42 Rule II of the Civil Procedure Act** which were inapplicable in the circumstances.

In response, counsel for the 1st respondent has submitted that the advocate for the appellants/applicants was duly notified that the appeal had been admitted and the application for the dismissal of the appeal was duly served on the appellants/applicants who by then were acting in person.

Although the record shows that when this appeal was transferred to this Court, the Deputy Registrar wrote another letter to the firm of Maina Kagio Advocates dated 16th July 2014 advising them that the appeal had been admitted, that was really not necessary for two reasons:-

1. ***The appeal had already been admitted on 7th March 2011 and both Mr. Maina Kagio advocate for the appellants, Mr. Igati Mwai advocate for the 1st respondent and the 2nd respondent in person notified vide letter ref E/HCA/35/2010 dated 7th March 2011.***

That letter specifically directed the appellants/applicants then represented by Mr. Maina Kagio

advocate to do the following:-

“TAKE NOTICE that your appeal has been admitted for hearing before this Court.

You are directed to prepare the record of appeal and file the same within 21 days from the date of this letter”.

- 2. There is no record that this appeal was ever subsequently re-admitted for hearing either at Embu High Court or Kerugoya Environment and Land Court after 7th March 2011 and if there was any such re-admission, which is not on record, the same was superfluous and of no effect because an appeal cannot be admitted twice.***

It is not in dispute that by 7th March 2011 when the appeal was admitted to hearing, Mr. Maina Kagio advocate was still on record for the appellants. The notice informing counsel of the admission of the appeal was sent to the counsel on record and it has not been suggested that the said notice was not received by counsel. Since that notice was received, the only issue the appellants/applicants should be addressing me on is why they did not file their record of appeal as directed. It would appear that at that point, the appellants were un-able to pay their counsel for his service and so he withdrew from acting for them. This is captured in paragraph 12 of the supporting affidavit of ROSE WAMBUI GIKUNJU in which she has deponed as follows:-

“That due to lack of finances, we were un-able to pay the advocate who filed the appeal on our behalf and on 3rd August 2012, he withdrew from acting”

Since they were aware about the withdrawal of their advocate, the appellants/applicants ought to have been vigilant and either engage another advocate or prosecute their appeal in person. Equity aids the vigilant and not the indolent. They did not do so. They went to sleep and only moved the Court when they were served with an application dated 18th June 2015 seeking their eviction from the land subject of this case. And even then, it took them another four months to file this application in October 2015.

It is also clear from the record herein that the application dated 30th August 2012 seeking the dismissal of the appeal herein was duly served on the appellants/applicants. That has not been denied. The said application was not opposed and I allowed it by my ruling sought to be set aside. There is no explanation why the appellant/applicants did not oppose that application nor attend Court when it was listed for hearing on 9th March 2015. That application clearly stated that it was seeking orders to dismiss the appeal for want of prosecution. Counsel for the appellants/applicants has submitted that infact that application was brought under the wrong provisions of the law. The more reasons why the appellants/applicants should have opposed it. It is rather late in the day to raise that issue as in any event **Order 51 Rule 10 (2) of the Civil Procedure Rules** provides as follows:-

“No application shall be defeated on a technicality or for want of form that does not affect the substance of the application”

The application itself was clear that it would be seeking the dismissal of the appeal and since the appellants/applicants had been duly served and not attended Court nor filed any response thereto, the Court was obliged to grant the orders sought therein.

No doubt this Court has the jurisdiction to set aside any order obtained in the absence of the other party. The main concern of the Court is to do justice to the parties. In doing so however, this Court’s discretion is only to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a party who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice – **SHAH VS MBOGO (1967) E.A 116.** Similarly, the power to reinstate a dismissed appeal is discretionary. However, each case must be considered on its particular circumstances and the onus is on the applicant to show sufficient cause why the Court’s discretion should be invoked in his favour. Clearly, in the circumstances of this case, there is no basis

upon which such discretion can be exercised in the appellants/applicants favour. Their advocate then on record was notified of the admission of the appeal. He has not explained why he took no action as far back as March 2011 before he withdrew from acting in August 2012 and served the appellants/applicants who took no action in the matter. The appellants were subsequently served with an application seeking the dismissal of their appeal. They did not oppose it nor attend the Court when the application came up for hearing. They were only jolted into action in June 2015 when an application was made to evict them from the suit land and even that action came in October 2015 (some four months later) when they filed this application. Apart from there being no reasonable explanation for their failure to act, there is also undue delay which remains un-explained. In furtherance of the overriding objectives of the **Civil Procedure Rules**, parties are duty bound to comply with the directions of the Court and thereby assist the Court achieve those objectives. The appellants/applicants in this case are clearly not deserving of the exercise of the Court's discretion to set aside the orders dated 12th March 2015 or to reinstate the appeal herein.

In the circumstances, the appellants/applicants' Notice of Motion dated 23rd October 2015 is dismissed with costs.

B.N. OLAO

JUDGE

8TH APRIL, 2016

Ruling delivered in open Court this 8th April, 2016

Mr. Maina Kagio for Appellants/Applicants absent but parties both present in person

Mr. Igati Mwai for the Respondents absent but both parties present in person.

B.N. OLAO

JUDGE

8TH APRIL, 2016