



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NUMBER 14 OF 2014

1. JOSEPH KIMANI KAMURI &1ST APPELLANT/APPLICANT

2. LAWRENCE MURIITHI MAINA.....2ND APPELLANT/APPLICANT

VERSUS

JAMES KANGARA KIHARA.....RESPONDENT

*(Being an appeal from the Judgment/Decree of Hon. Anganyo,(MS) Senior Resident Magistrate
Delivered On 9th December 2013 in Nakuru CMCC. No. 1273 of 2010)*

RULING

1. This appeal was filed on the 27th January 2014 by the Memorandum of appeal dated 20th February 2014.

Upon application by the Respondent for dismissal of appeal for want of prosecution, the court disallowed the same and gave appellants 45 days to file and serve the Record of Appeal failing which the appeal would stand dismissed. That was on the 29th October 2015. The Record of Appeal was not filed on time but eight days after the 45 days extension granted by the court, after the same stood dismissed.

2. By their application dated 7th April 2016 the appellants sought that the court orders dated 29th October 2015 be set aside and the appeal be reinstated for hearing on merits. They also sought that there be a stay of execution of court orders issued on the 7th April 2016 allowing the respondents to withdrawing the decretal sums deposited in court pending hearing and determination of this application.

3. The respondent opposed the application by his replying affidavit sworn on the 3rd July 2016 on the grounds that the appeal in court is prejudicial to him as the appellants had a duty and responsibility to prosecute the appeal without delay.

4. Mr. Musili Advocate for the applicants swore the supporting affidavit to the application. In a nutshell, he disposes that the delay to file the appeal within the 45 days allowed was due to delay by the court registry to supply him with the typed proceedings despite spirited efforts to get them typed.

He depones that he paid for the proceedings on the 23rd November 2015 and were advised that they were ready for collection on the 18th December 2015 and he duly collected the same and quickly prepared the Record of Appeal and filed on the 21st December 2015. By that time, it was eight days outside time. He urges the court that the applicant is desirous of prosecuting his appeal and failure to file on time was due to frustrations by the court registry.

5. I have considered the oral arguments by counsel. I have looked at what efforts the applicants counsel did when he was allowed 45 days to file and serve the record of appeal. I have seen numerous letters addressed to the Deputy Registrar calling for the typed proceedings. The proceedings were not ready for collection until the 18th December 2015. I must comment Mr. Musili Advocate for the evident effort to comply with the court orders. When the matter came up for mention on the 29th October 2015, the proceedings had not been typed leading to the appeal being dismissed. He did not give up but continued to follow up and indeed filed the Record of Appeal on the 21st December 2015.

6. It is trite that the duty and responsibility to prosecute an appeal or any case lies with the appellants/plaintiff respectively. If there is inexcusable delay that cannot be sufficiently explained, the court ought to dismiss the appeal. See **Ivita -vs- Kyumbu (1984) e KLR.**

Article 159 of the **Constitution** enjoins the court to dispense justice without undue regard to procedural technicalities. In the same breath, a court order ought to be obeyed to uphold the dignity of the court. **Section 1A, 1B and 3A** of the **Civil Procedure Act** also enjoins the court and the parties to a suit to fast track all cases before the court to achieve efficient and affordable determination of cases and appeals.

7. The Respondents submissions that the applicants ought to have come to court for an order of extension of time to file the Record of Appeal is correct. Instead of doing so, the applicants have come to court to ask for reinstatement of the appeal by setting aside of the dismissal orders. In my opinion, the end result would be the same. The court has unfettered discretion to interrogate the reasons advanced by the applicant and if it finds them plausible, it would of necessity exercise the discretion in its favour.

8. The court is aware of the hardship and difficulties experienced in the court registry in getting proceedings typed for purposes of filing records of appeal this being due to shortage of typing staff. What I am concerned with is whether or not the applicant made reasonable efforts to follow up the typing of the proceedings and how quickly the record of appeal was filed upon collection of the proceedings.

As I have stated above, the Applicants Advocate Mr. Musili spared no effort in this task. He filed the Record of Appeal two days after collection of the proceedings. This is commendable.

9. I am satisfied that the application dated 7th April 2016 is merited. I shall set aside the order of dismissal and reinstate the appeal for hearing. The applicants are also allowed to file a supplementary Record of Appeal to attach the decree but within 7 days of this ruling. A further order is issued that the decretal sums deposited in court as security pending the hearing and determination of the appeal do remain so deposited pending the hearing and determination of the appeal.

10. However, in view of the circumstances pertaining to the application, the Applicants shall pay costs assessed at Kshs.8,000/= to the Respondent within 14 days of this ruling.

It is so ordered.

Dated, signed and delivered in open court this 15th day of September 2016

JANET MULWA

JUDGE