



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL APPEAL NO. 554 OF 2007

SYMON MANYARA.....1ST APPLICANT
SUSAN WANGECHI MANYARA2ND APPLICANT

VERSUS

PAULINE WAIRIMU MAHUGU.....RESPONDENT

T/A MIANDA INVESTMENTS

RULING

1. The application dated 11th April, 2016 seeks orders that this Honourable court be pleased to set aside its orders of dismissal made on the 17th of June 2015 and reinstate this suit to be heard and determined on merit.
2. It is stated in the affidavit in support that the Respondents advocate had moved offices and could not be traced for purpose of fixing dates in this appeal. That the Applicants' advocate later met the Respondent's advocate in court and gave the Applicants' counsel the information that the Respondent's Advocates firm had relocated to Gilfilan House along Kenyatta Avenue. That subsequently the Respondent's advocates were invited to fix a date for directions on 17th March, 2015. That the date for directions was mis-diarized by their clerk and reflected as 19th August, 2015. That on 19th August, 2015 and other subsequent dates the file could not be traced in the registry. The Applicants' advocate wrote to the Deputy Registrar on 1st April, 2016 requesting for assistance in tracing the file. It turned out that the appeal was dismissed on 17th June, 2015 for want of prosecution. The Applicants' contention is that they have been diligent in prosecuting the appeal save for the mix up of the date for directions which is blamed on the court clerk from the Applicants' advocates firm.
3. The application is opposed. The Respondent filed the grounds of opposition dated 10th June, 2016. The grounds of opposition are as follows:
 - “1. That the application is frivolous, vexatious, incompetent and abuse of the process of the court and ought to be struck out and dismissed with costs.**
 - 2. That there has been inordinate delay in prosecuting the appeal and the application.”**
4. The application was argued by way of written submissions which I have duly considered.

5. The appeal was dismissed under the provisions of Order 42 rule 35 (2) Civil Procedure Rules which provides as follows:

“If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.”

6. The appeal herein was dismissed on 17th June, 2015. The memorandum of appeal was filed on 25th June, 2007. The record of the Lower court was forwarded to the High Court vide letter dated 15th September, 2010. The record of appeal was filed on 30th September 2011. The appeal was admitted to hearing on 11th July, 2012. The Deputy Registrar notified the parties to come to court for directions on two occasions. However there was no attendance by any of the parties. I have also not seen any entry in the court record reflecting the fixing of the date for directions on 17th March, 2015. The explanation that the matter was mis-diarized is therefore not supported by the court record. However, there is no copy of the Notice to Show Cause on record as evidence of service for the parties to attend court on the date the appeal was dismissed.

7. On the argument that the Respondent’s advocates relocated their offices, it is noted that the Respondent’s advocates postal address remained the same. The mention notice could therefore have been sent to the said address. The Applicants have also not shown what steps they took to locate the Respondent’s Advocates offices. The Applicants’ advocate met the Respondent’s advocate by chance in court.

8. This courts view is that the Applicants are guilty of inordinate delay in the matter. No satisfactory explanation has been given for this delay. However, as observed above, there is no evidence on record to show that the parties herein were served with the Notice to show Cause. I am also convinced that despite the delay, justice can still be done between the parties by fixing the appeal for hearing on priority basis. (see for example **Salkas Contractors Ltd v Kenya Petroleum Refineries Ltd [2004] eKLR**).

9. With the foregoing, I allow the application. The applicant to bear the costs of the application.

Dated, signed and delivered at Nairobi this 6th day of October,2016

B.THURANIRA JADEN

JUDGE