REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL CASE NO. 110 OF 2011

JAMES NDIRANGU NG'ANG'A..... APPELLANT

VERSUS

KANUBHA MAREBHA VAGHELA.....RESPONDENT

RULING

1. The Respondent has moved the court under Order 42 Rule 14 (1) and Rule 35 (2) of the Civil Procedure Rules 2010, and other enabling provisions of The Law. The Respondent seeks to dismiss the appeal for want of prosecution. The application is supported by grounds on the face of it and on the affidavit of **Kanubha Merubha Vaghela** the Respondent.
2. Briefly the Respondent in the appeal depones, the appeal was filed on 27th October 2011 and duly served upon his advocates. That since then the Appellant has not taken any steps to prosecute his appeal. Secondly, stay pending appeal was granted in the subordinate court file Bungoma CMCC No. 602 of 2008 on 31st August 2012. The Respondent aver he is greatly prejudiced by the pendency of this appeal as he is the registered owner of L.R. Webuye block 1/793. The subject of this appeal.
3. The application is opposed by the Appellant. He has sworn a replying affidavit narrating reasons why the appeal should not be dismissed. At paragraph 9, he explains he is entitled to access to justice as enshrined in the Constitution under article 40 and 48. He has also developed the land in dispute. He depones that it is a policy of law not to penalize litigants on mistakes of their advocates. He says he had three law firms assisting him in this case hence the confusion. It is his further deposition that the present application is premised under subsidiary legislation which cannot override the provisions of substantive law.
4. He referred to case law of **Dorcas I. Wasike Vs. B.W. Khisa Eldoret Civ. Appeal No. 87 of 2004** which relates to a decision on mistake of counsel**.** The Appellant depones that he doesn't know when certified copy of proceedings were received by his advocates and that a decree was issued only in September 2012.
5. He depones further that in the lower court he was represented by the firm of Ashioya & Co. Advocates. The memorandum of appeal was filed by Bogonko, Otanga & Co. advocates while Gacheche Wa Miano was also assisting in connection to this appeal. He believes he has done everything possible to ensure the record of appeal is filed timeously but does not know why the same was not filed in time.
6. In November 2013, he instructed the firm of Kamau Kuria & Kiraitu to represent him in the present application and in the appeal. The said law firm has since filed the record of appeal on 25.11.13.
7. Both counsels for the parties presented their oral arguments on 2.12.13.
8. The Respondent raised issues which this court summaries to two issues for determination.
9. (I). Whether the firm of Kamau Kuria & Kiraitu Advocates were required to comply with provisions of Order 9 Rule 9.

(II). Whether the appeal is due for dismissal for want of prosecution.

(I) Compliance with Order 9 Rule 9 (representation):

9. The record shows the Appellant was represented by the firm of Ashioya & Co. advocates in the proceedings undertaken in the Chief Magistrate's court. The firm of Bogonko, Otanga & co. advocates took over from Ashioya and concluded the matter. They are the ones who filed the memorandum of appeal on 27.10.2011.

10. On 9th February 2012, Ashioya & Co. advocates filed an application for directions within the file which has not been prosecuted todate. On 25th November 2013, Kamau Kuria & Kiraitu advoctaes filed a notice of change of advocates to take over from Bogonko, Otanga & Co. advocates to represent the Appellant in this appeal.

11. Ms. Wamucii for the Appellant urged court that they did not need to comply with Order 9 as the memorandum of appeal was filed by an advocate who acted for the Appellant in the lower court. The question therefore arises whether the current advocates are required leave of court under Order 9 Rule 9 before they could file documents on behalf of the Appellant. Order 9 Rule 9 provides thus,

"Whether there is a change of advocate or when a party decides to act in person, having previously engaged an advocate after judgment has been passed, such change on intention to act in person shall not be effected without an order of the court.

(a). Upon an application with notice to all parties or

(b). Upon consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."

12. The present appeal was filed to challenge the judgment of the trial magistrate in Bungoma CMCC No. 602 of 2008. It implies the firm of Kamau Kuria & Kiraitu advocate are coming on after judgment has been entered. I believe the law required them to comply with order 9 Rule 9 before filing any documents. The Respondent cited the case of **Nbi. HCC Mililimani Commercial court No. 1917 of 1999** in submitting the Appellant's counsel required leave. However what was the mischief the rule intended to cure? It was to ensure advocates earn their fee after representing parties.

13. The present application was served on Bogonko Otanga & co advocates. The firm of Kamau Kuria & Kiraitu Advocates had the opportunity to obtain consent from the advocates served with the application to take over the matter from them. Filing notice of change was not the appropriate procedure provided by the law. I do find that their documents are irregularly filed and hereby strike them out forthwith.

14. **(II). Dismissal for want of prosecution:**

Is this appeal a candidate for dismissal under Oder 42 rule 35 (2) It is over a year since the memorandum of appeal was filed and served on the Respondent.

Rule 35 (2) provides***" if within one year, the appeal <u>shall not</u> have been set down for hearing, the registrar, shall on notice to the parties list the appeal before a judge in chambers for dismissal."***

15. This rule is couched in mandatory terms. The Appellant explains the reason for the delay is a result of confusion of the 3 law firms representing him. But the record shows Bogonko & Otanga advocates took over the file from Ashioya before the proceedings were concluded in the Chief Magistrate's court and later filed an appeal. There is nothing confusing about this state of affairs. If there was any confusion created, it is in the Appellant's mind and he therefore cannot rely in *holding no. 4* in **Murai vs. Wainaina [1982] KLR 38.** He has also failed to disclose what in his

view was the mistake of his counsels.

16. At paragraph 18 (b) of his affidavit he states ***"the overriding objective of the Civil Procedure Act is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes."*** In this instance, he has failed to ensure just and expeditious disposal of his own appeal, two years and no step to move the court. At paragraph 38, he depones he does not know why the record of appeal was not filed shortly as deponed in his previous affidavits. This demonstrates laxity and indolence on his part to prosecute this appeal.

17. His Counsel urged this court to consider that at one point advocates were on strike in Bungoma and this court was sitting for election petitions. As rightly pointed by the Respondent's Counsel, non of the Appellants advocates are stationed in Bungoma hence they could not participate in a strike that did not concern them. Secondly the Environment and Land Court was not sitting for election petitions and that line of submission is intended to mislead the court.

18. I will distinguish this case and my ruling in ***BGM HCCA no 26 of 2008 , Patrick Otwo Baridi Vs. Registered Trustees, Catholic*** **Diocese of Bungoma**. In that appeal, the appellant did not file the record of appeal at the time the application for dismissal for want of prosecution was being argued. However in the present circumstances, upon being served with the application for dismissal, the Appellant took steps in the appeal by filing the record. Although i have struck off the said record of appeal for being irregularly filed, i cannot assume its existence. The court will pardon the appellant on account that the record is ready and to meet the ends of justice as provided under article 159 of the Constitution. Therefore although the reasons put forward by the Appellant are not satisfactory, the appeal will not be dismissed.

19. The Appellant will however be condemned to pay the Respondent costs (waiting on the Respondent to wake him up) of the application assessed at Kshs. 15,000/= payable within 30 days from date herein – in default execution to issue. The appellant is given 30 days to take steps in prosecuting his appeal. In default, the appeal stands dismissed.

DATED, SIGNED AND READ in open court this 11th day of Feb 2014.

A. OMOLLO

JUDGE.