



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC CASE NO. 46 OF 2019**

**JOEL KILAMBU.....1<sup>ST</sup> APPELLANT**

**PATRICK MWITI.....2<sup>ND</sup> APPELLANT**

**JOSHUA KIMATHI.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**SHADRACK NKUBITU MUGWIKA.....RESPONDENT**

**RULING**

1. On 19/11/ 2019 this court directed the appellants to file and serve their record of appeal before 2/12/2019. Come the date of 2/12/2019 and the Appellants had neither filed nor served their record of appeal. The counsel for the appellants was also absent. The appeal was therefore dismissed.

2. The appellants have now filed an application dated 14<sup>th</sup> January 2020 urging this court to set aside the dismissal Order of 2/12/2019. The application is supported by the sworn affidavit of Joshua Kimathi (3<sup>rd</sup> appellant) who averred that the delay in filing the record of appeal is not attributable to the appellants but their former advocates. That he has dutifully attended court with the intent of prosecuting their appeal. That their appeal is meritorious with high likelihood of success. That the respondent will not be prejudiced if the appeal is reinstated and that he has since found out that indeed the record of appeal was filed on 2/12/2019.

3. The Respondent opposed the application through a replying affidavit dated 13/2/2020. He cited the indolence on the part of the appellants and quoting specific instances when their advocate failed to turn up in court i.e, on 31/10/2019 and 2.12.2019. That vide a letter dated 27/11/2019 he reminded the appellants of the need to file their record of appeal citing his advanced age but the same was blatantly ignored. That the orders of 2.12.2019 were made in the presence of the 3<sup>rd</sup> appellant, but he only moved this court after 45 days.

4. The respondent also contends that there is no proper record of appeal on record as the same was filed after 2/12/2019 without leave of the court, and not before as the order prescribed. That the dispute herein spans 9 years and the delay in the trial court was occasioned by the appellants herein. That the appeal herein has no chances of success.

5. On 26/2/2020 the court directed the parties to canvass the application through written submissions. Both parties have since filed their written submissions. They both reiterated the contents of their respective affidavits. On their part, the appellants invoked the provisions of **Article 159 of the Constitution** and the overriding objectives under the **Civil Procedure Act**. They cited the following cases;

- **Abdalla Ali Bajaber v Mangale Dzombo Ngoka & Another (2012) eKLR,**
- **Harrison wanjohi Wambugu v Fesilsta Wairimu Chege & Another (2013)eKLR,**
- **Martha Karua v Independent Electoral and Boundaries Commission and 3 Others (2018) eKLR,**
- **Abdirahman Abdi also known as Abdiraham Muhammed Abdi v Safi Petroleum Products Limited & 6 Others (2011) eKLR,**
- **Christopher Orina Kenyariri t/a Kenyariri & Associates vs. Salama Beach Hotel Limited & 3 Others (2017) eKLR.**

6. The Respondent on his part submitted that it was upon the litigants to constantly check on the progress of their case and that the appellant cannot rely on the provisions of Article 159 of the Constitution which is not a panacea for all ills. In light of the age of the respondent and the time taken in the litigation arena the respondent avers that he has established the element of prejudice.

7. The respondent relied on the following cases;

- **Neeta Gohii v Fidelity Commercial Bank Limited [2019] eKLR,**
- **Raila Odinga vs Independent Electoral and Boundaries Commission & Others [2013] eKLR,**
- **Tana Teachers Cooperative and Credit Society Limited vs. Andriano Muchiri [2018]eKLR,**
- **Philip Kiptoo Chemwolo & Mumias Sugar Co. Ltd. Vs. August Kubende (1982-1988)KAR 1036,**
- **Utalii Transport Company Ltd & 3 Others vs NIC Bank Limited and Another [2014] eKLR.**

### **Analysis and Determination**

8. The main issue for determination is whether this court should reinstate this suit which was dismissed on 2/12/2019. The decision whether a suit should be reinstated for trial is a matter of discretion and depends on the facts of the case. In **Pan African Paper Mills Limited v Silvester Nyarango Obwocha [2018] eKLR** the court cited the case of **Ivita Vs Kyumbu [1984] KLR 441**, where **Chesoni, J** as he then was stated thus:

*“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite the delay. Justice is justice to both the plaintiff and the defendant; so both parties to a suit must be considered”.*

9. The appeal was dismissed as a result of the inaction of the Appellants in filing their record of appeal on time. I first have to demystify the myth that there is a record of appeal filed in these proceedings albeit on the last date of the order. No such record of appeal can be traced in this file. The appellants have placed blame on their former advocate on record and hold on to the fact that they have been present during the trial dates of the appeal and have been eager to prosecute the appeal.

10. The appellants however bear some degree of blame. The 3<sup>rd</sup> appellant was present when the dismissal order was made, but they took a considerable time in bringing the application for reinstatement of the suit. Further, the memorandum of appeal was instituted on 4<sup>th</sup> March 2019, but it is the respondent who has been giving the appellants a reminder to prosecute the appeal.

11. In **John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation) [2015] eKLR** Justice Gikonyo held that;

*“The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of the Constitution. Article 50 coupled with article 159 of the Constitution on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the court.....”*

12. I have factored in the conduct of both parties to this appeal and the grounds raised in the memorandum of appeal. I am also guided by the various cited authorities. I find it proper to grant the appellants another chance to be heard but on strict conditions. I therefore proceed to give orders as follows;

- (i) The suit is hereby reinstated but the orders given on 18.7.2019 and discharged on 2.12.2019 shall still remain as discharged.
- (ii) The record of appeal to be filed and served within 15 days failure to which the appeal shall stand as dismissed.
- (iii) Appellants are condemned to pay the costs of this application.
- (iv) The matter is to be mentioned before the Deputy Registrar of this court on 8.10.2020 to ascertain the availability of the lower court file.

**DATED, SIGNED AND DELIVERED AT MERU THIS 16<sup>TH</sup> DAY OF SEPTEMBER, 2020**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

**ORDER**

The date of delivery of this ruling was given to the advocates for the parties through a virtual session via Microsoft teams on 23.6.2020. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

**HON. LUCY N. MBUGUA**

