



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 161 OF 1999

KIMANZI KIENYI APPELLANT

VERSUS

SAMSON MUTUNGA MUTHELA RESPONDENT

(Being an appeal from the Judgment of the Resident Magistrate's Court at Kitui of Hon K.O. Ogola in Resident Magistrate Civil Case No. 47 of 1999 dated 19th October 1999)

(Before B. Thurania Jaden J)

RULING

1. The application dated 8/3/2014 seeks orders that the Appellant's appeal be re-admitted and that the costs of the application be provided for.
2. The application is supported by the affidavit sworn by the Applicant on 8/3/2014. According to the said affidavit, the Applicant was all through represented by the firm of **Mbiti & Company Advocates** up to 26/2/2014 when his current advocate, **Kinyua Musyoki** came on record. It is averred that this court granted orders for a stay of execution for the lower court costs and the appeal herein was set down for hearing several times but did not take off for one reason or the other.
3. The Applicant further deponed that his former Advocate, **Mr Jones Mwendwa Mbiti** fell sick and eventually passed on in the year 2011. That the Applicant waited for the **Law Society of Kenya** to appoint an administrator for the firm of **Mbiti & Company Advocates** but eventually the firm was closed. On 5/2/2014 the Applicant was served with a Notice to Show Cause why execution by way of committal to civil jail for failure to pay the lower court costs. The Applicant then engaged his current advocate and that is when the Applicant came to learn that his appeal was dismissed on 18/12/2008. According to the Applicant, he had not been served with the Hearing Notice for 18/12/2008 and was therefore condemned unheard. The Respondent has contended that the subject matter of the suit is land which is in his occupation/possession and use and he therefore stands to suffer irreparably.
4. The application is opposed. The Respondent filed the grounds of opposition dated 24/3/14 and a replying affidavit sworn on 24/3/14. The grounds of opposition are as follows:-
 1. **“There is inordinate delay of almost 6 years in bringing this application.**
 2. **The appeal was dismissed for non attendance of the Appellant on 18/12/2008 while the said Appellant had notice but failed to attend court.**
 3. **At the time the appeal was dismissed, the Appellant's advocates were in active practice and their offices were running as evidenced by service of process in their chambers aforesaid.**

4. **The appeal was filed on 17/11/1999 and at the time of dismissal, the Appellant had not taken any steps towards its prosecution for close to 9 years and consequently had lost interest in the same.**
5. **The Appellant knew that his advocate passed on in 2011 and since then, he did nothing to follow up his appeal.**
6. **The Appeal was dismissed in the lifetime of the Appellant's Advocates.**
7. **The Respondent has waited for over 14 years to enjoy the fruits of his successful litigation and justice of this case demands that litigation ought to come to an end."**

5. The replying affidavit depones on the issues raised in the grounds of appeal. According to the Respondent, the Applicant had not taken any steps to fix the appeal for hearing for almost 8 years. That it is then that the Respondent instructed his Advocate for fix the appeal for hearing. That a letter of invitation was sent out to the Respondent to send their representative to the court's registry to fix the appeal for directions on 16/1/2008 but there was no attendance by the Applicant's side and the appeal was fixed for directions on 29/5/2008 and the Applicant's counsel served but there was no attendance by the Applicants. That the matter proceeded for directions and the appeal was fixed for hearing on 18/12/2008. That the Applicants were served with the Hearing Notice for 18/12/2008 but failed to attend court.

6. On the issue of the Applicant's former Advocate's sickness, the Respondent avers that the said Advocate's office was open and operating on 18/12/2009 and the service was accepted and in any event the Applicant was at liberty to appoint another Advocate. The Respondent has also observed that there is no indication that the Applicant's former Advocate was ill in the year 2009 when the appeal was dismissed.

7. During the hearing of the application, the learned counsels for respective parties relied on the affidavits and the grounds of opposition.

8. A perusal of the court record shows that after the delivery of the ruling on 4/5/2004 in the last interlocutory application herein, several dates were fixed for directions in the year 2005, 2006, 2007 and 2008 but no directions were given due to non attendance by the parties. Eventually the directions were given on 29/5/2008. On 29/5/2008, the Appellant/Applicant was not present. The Appellant/Applicant was invited to participate in the fixing of the date for directions as per the affidavit sworn on 20/2/2008 by the process server **Petronillar K. Mutie** but the Applicant did not attend court. The date for the hearing of the appeal was fixed for 18/12/2008. Once again the Appellant/Applicant was served as per the affidavit sworn on 4/6/2008 by the same process server **Petronillar K. Mutie** did not attend court. The court then proceeded to dismiss the appeal for non attendance by the Appellant/Applicant. It seems thereafter the Appellant/applicant went to sleep until the 5/2/2014 when he was served with the Notice to Show Cause.

9. The reason given by the Applicant why he went on a slumber for about six years is that his former Advocate started ailing and eventually passed away on 16/7/2011. There is however no reason given why the Appellant could not engage the services of another Advocate. The Applicant only woke up from his slumber after he was served with the Notice to Show Cause, about three years after the death of his former Advocate. According to the Applicant, it was then that the Applicant learnt about the dismissal of the appeal.

10. The practice where parties file appeal then go to sleep must be condemned in the strongest possible terms. Although the Applicant has deponed that the subject matter of the appeal is land which he occupies, he can only blame himself for not having prosecuted the appeal diligently. However, this court is inclined to allow the application so that the appeal can be heard on merits. This court will however impose conditions, the ruling herein dated 12/7/200 not withstanding.

11. Consequently, I allow the application with costs on the following conditions:

- a. **The Applicant do deposit in court or in an interest earning account of both counsels the sum of Kshs.69,128/= reflected in the Notice to Show Cause dated 28/1/2014.**

b. **The said payment to be effected within 45 days from date hereof.**

c. **In default the application herein to sand dismissed.**

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Kitui this **12th** day of **June** 2014.

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B. THURANIRA JADEN

JUDGE