



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELCC No. 247 OF 2017

(FORMERLY HCCA No. 78 OF 2013)

FRANCIS MURAYA THEURI..... APPELLANT

VERSUS

MONICA WANGU WAMWERE.....RESPONDENT

RULING

1. By Notice of Motion dated 11th October 2019, the appellant seeks the following orders:

1. Spent.

2. That this Honorable court be pleased to set aside orders of 18th December 2018 delivered by Hon. Justice D. Ohungo and the appeal herein be reinstated for hearing and determination.

3. That this Honorable court be pleased to reinstate the Appellant's/Applicant appeal dismissed on 18th December 2018 for hearing and determination.

4. That cost of this application be provided for.

2. The application is supported by an affidavit sworn by the applicant. He deposed that he was unable to prosecute the appeal owing to delay by the court in furnishing him with certified proceedings and that her advocates failed or neglected to prosecute the appeal. He pleaded that mistake of counsel be not visited on him and added that it is in the interest of justice that he be given another chance to prosecute the appeal.

3. The respondent opposed the application through a replying affidavit and further affidavit. She deposed that the matter is post judgment yet the applicant has failed to comply with Order 9 Rule 9 of the Civil Procedure Rules, that a period of over 11 months had passed since the appeal was dismissed for want of prosecution on 18th December 2018 thereby making the applicant guilty of laches and that litigation must come to an end.

4. Both parties also deposed to several matters in their respective affidavits which go to the merits of whether or not the appeal was ripe for dismissal for want of prosecution. I have avoided going into those matters since they were dealt with in the ruling delivered on 18th December 2018.

5. The application was canvassed through written submissions. The applicant filed his submissions on 2nd June 2020 while the respondent filed hers earlier on 5th February 2020. I have considered the application, the affidavits and the submissions.

6. The applicant seeks setting aside of the orders of this court made on 18th December 2018 pursuant to which I dismissed the appeal herein for want of prosecution. There is no suggestion that the applicant was not served with notice of hearing in respect of the proceedings that yielded the said ruling. I therefore proceed on the premise that service is not disputed.

7. In an application for setting aside where service is not denied, the court is called upon to exercise discretion pursuant to the principles paid down in **Mbogoh & Another v. Shah [1968] EA 93** which were reiterated as follows in **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR**:

... In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is

entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See Mbogo & Another v. Shah (supra), Patel v. E.A. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v. Kubende [1986] KLR 492 and CMC Holdings v. Nzioki [2004] 1 KLR 173).

8. A perusal of the ruling of 18th December 2018 shows that it arose from Chamber Summons dated 17th August 2016 through which the respondent sought dismissal of the appeal herein for want of prosecution. The record further shows that appellant opposed the Chamber Summons through a replying affidavit sworn by Raymond Kiprok Kipkemei, his then advocate. The Chamber Summons was therefore heard inter parte and determined on the merits. As I have noted previously, service is not disputed even now. The court having found, upon an inter parte hearing, that the appeal was ripe for dismissal for want of prosecution, it is not open to the parties to revisit the issue in the manner the applicant has sought to do. For that reason, the allegations of mistake of counsel do not fall for consideration at this stage. If dissatisfied with the outcome in the ruling of 18th December 2018, the applicant should have appealed against it.

9. The application dated 11th October 2019 was filed on 15th October 2019, some 10 months after the ruling of 18th December 2018. Even assuming that the option of setting aside was available, such an application ought to be filed without unreasonable delay. The applicant has not offered any explanation as to why the present application was not filed earlier. In the particular context of this matter where the applicant is facing charges of failing to prosecute his appeal, I find that a delay of 10 months is unreasonable.

10. In view of the foregoing discourse, I find no merit in Notice of Motion dated 11th October 2019. I dismiss it with costs to the respondent.

Dated, signed and delivered at Nakuru this 8th day of October 2020.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the appellant/applicant

Mr Mwangi for the respondent/respondent

Court Assistants: Beatrice Jelimo & Julius Lotkomoi