



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT GARISSA**

**ELC APPEAL NO. 18 OF 2012**

**SHAMSA MOHAMED HUSSEIN.....1<sup>ST</sup> APPELLANT**

**MUNICIPAL COUNCIL OF GARISSA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**SALE RAGE BULLE.....1<sup>ST</sup> RESPONDENT**

**YUSSUF DABLE BULLE.....2<sup>ND</sup> RESPONDENT**

**RULING**

The appeal arises from an order issued by this Honourable Court on 18<sup>th</sup> September, 2018 dismissing this appeal for want of prosecution with costs to the Respondent. The genesis of that order is that on 16<sup>th</sup> March, 2017, the Appellant was granted 21 days to prosecute this Appeal failing which the same was to stand dismissed for want of prosecution. On 18/9/2018, this Honourable Court confirmed the said order and dismissed the Appeal as no steps had been taken by the Appellant to prosecute the Appeal. That order provoked this application which is brought under Section 3A & 63 CPR, order 42 Rule 22, 6, 35 Order 45 Rule 1 and 2 CPR and all enabling provisions of the law. The Appellant is also seeking a stay of execution of the decree in RMCC No. 3 of 2011 (Garissa) pending the hearing and determination of this Appeal. In his supporting affidavit sworn on 14<sup>th</sup> November, 2018, the 1<sup>st</sup> Appellant/Applicant deposed that they lodged this appeal on 22<sup>nd</sup> August 2012 after the Principal Magistrate in RMCC No.3 of 2011 (Garissa) declined to set aside an Exparte Judgement and issue a stay of execution pending the hearing of this Appeal. Upon moving the Superior Court in Nairobi for stay orders, the court granted the stay orders pending Appeal. After those orders were issued, the court file went missing on 13<sup>th</sup> February 2017, his advocate was served with a Notice to Show Cause why the Appeal should not be dismissed for want of prosecution.

The 1<sup>st</sup> Appellant also stated that in the said notice he received on 13/2/2017 it was indicated that the matter was coming up for Notice to Show Cause on 21/2/2017. On the said 21/2/2017 as her advocates instructed one Nyaga Advocate to hold their brief who explained the delay in prosecuting that appeal. After considering those explanations, the court accepted the reasons and directed the matter to be mentioned again on 16/3/2017 on that date, their advocate requested one Wambugu Advocate to hold their brief. The said Wambugu confirmed that requisite documents had been filed including the record of Appeal. The court directed the Appellant to take such steps to prosecute the Appeal within 21 days from that date failing which the Appeal was to stand dismissed.

On 18/9/2018, the court on its own motion dismissed this Appeal for failing to comply with the directions of 16/3/2017. According to the Applicants, their advocate wrote to the advocates for the Respondents the same date inviting their representatives to meet theirs on 28/3/2017 for purposes of fixing a convenient hearing date. However on the said 28/3/2017, their advocate sent their representative to court but the court file was missing. The Applicants further deposed that as their lawyer was in the process of writing a complaint letter to the court about the missing court file, the Respondent went to the suit premises on 12/11/2018 and informed his workers to prepare to leave the suit property or risk being evicted as the appellate court had declared them the rightful owner of the subject property. He contacted his advocate who informed him that he was not aware of any judgement given in favour of the Respondent. His lawyer perused the court file and learnt that this appeal was indeed dismissed on 18<sup>th</sup> September, 2018 for want of prosecution. The deponent further stated that his lawyer was never served with a notice to attend court on the 18<sup>th</sup> September, when the matter was dismissed.

He stated that he has been ready and willing to prosecute this Appeal as can be demonstrated by the chronology of events set out herein above. He said that failure to set down the appeal for hearing as directed on 16<sup>th</sup> March, 2017 was not deliberate but was occasioned by the court file which went missing. He argued that the appeal herein had high chances of success and unless the orders sought are granted, the respondent may evict him and that he will suffer irreparably. The Applicant further stated that the Respondent will not suffer any prejudice as they can be compensated by costs and that they are willing to furnish security for the due performance of the decree should the court require.

In reply the Respondent filed replying affidavit opposing the said application sworn by Salah Rage Bulle on 4<sup>th</sup> December, 2018. In the said replying affidavit, the 1<sup>st</sup> Respondent stated that all the reasons given by the Appellants for failure to prosecute the appeal expeditiously are merely excuses.

He deponed that the Appellants went to slumber after they obtained a stay of execution of a decree on 3<sup>rd</sup> September, 2012. The Respondent further deponed that they were served with a Notice to Show Cause and believes that the Applicants were also served with the same Notice to Show Cause and if they chose to ignore it, they cannot blame the court for not being vigilant. He sought to have the application dismissed so that he can enjoy the fruits of their Judgement before the Lower Court in RMCC No. 3 of 2011.

I have considered the Notice of Motion dated 14<sup>th</sup> November, 2018 and the supporting affidavit sworn by Shamsa Mohammed Hassan together with the annexures thereto. I have also considered the replying affidavit sworn by Sale Rage Bulle. The record shows that when this Appeal came up for the hearing of Notice to Show Cause on 21/2/2017, Mr. Nyaga who was holding brief for Paul Mwangi had just been instructed to act for the Appellants in place of the hitherto firm of M/S Mwangi & Guandaru Advocates and that the Appellant was serious and committed to the prosecution of this appeal if given a chance. The court considered the explanation and ordered them to take pragmatic steps to prosecute the Appeal. The matter was fixed for mention on 16/3/2017. During the said mention on 16/3/2017, one Mr. Wambugu who was holding brief for Mr. Paul Mwangi confirmed that the record of Appeal had been compiled and that they were ready to take directions for the hearing of the Appeal.

The Appellant was then given 21 days within which to prosecute the appeal failing which the Appeal was to stand dismissed for want of prosecution. The Appellants explanation for the delay was accepted on conditions that the Appellant takes steps to prosecute the same within 21 days. When the Appellant failed to take steps to prosecute this Appeal within the given timelines, the court proceeded to affirm its orders dismissing this suit for want of prosecution. The presence of the Appellant on 18<sup>th</sup> September 2018 would not have changed the position since the order dismissing this suit for want of prosecution crystalized after they failed to fix this matter for hearing within 21 days from the said 16/03/2017. It did not therefore require the presence of the Appellant or his advocate to be present when the court affirmed its orders on 18/09/2018. What transpired on 18/09/2018 was not the dismissal of this appeal but the affirmation of an order of dismissal after the Appellant failed to meet the conditions set by the court after the Appellant's explanation was accepted by the court upon meeting the conditions to set down the Appeal for hearing within 21 days.

Having carefully listened to the counsels and their submissions, I exercise the courts discretion and allow the application dated 14<sup>th</sup> November, 2018 on the following terms:

- 1. The Appellant to pay the Respondent throw away costs of Kshs.10,000/= within 7 days from today.**
- 2. This court will thereafter give directions on the hearing of this Appeal.**

Read and delivered in the Open Court this 30<sup>th</sup> day of January, 2019.

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**E. C Cherono (Mr.)**

**ELC JUDGE**

**In the presence of:**

Mr. Mutembei holding brief Paul Mwangi.

Amina: Court clerk

In the absence of the Respondent/Advocate