



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 3 OF 2017

JONATHAN NZIOKA NZUKI.....APPELLANT

VERSUS

MUTUNGI NZUKI.....RESPONDENT

RULING

1. In the Notice of Motion dated 19th March, 2018, the Appellant/Applicant is seeking for the following orders:

a. That the period of fourteen (14) days granted to the Appellant on 15th November, 2017 to file written submissions on the Appeal herein be enlarged, and the Appellant be allowed to file submissions within such a period as the court may appoint.

b. That this Honourable Court's order dated 7th February, 2018 striking out the Appeal herein for want of prosecution be set aside; and the Appeal be heard on merit.

c. That in the alternative to prayer no. 2 hereinabove, this Honourable Court's order dated 7th February, 2018 striking out the Appellant's Appeal for want of prosecution be reviewed and set aside.

d. That the Appellant's submissions on the Appeal as may be filed herein after 7th February, 2018 be deemed as duly filed and served.

e. That costs of this Appeal.

2. The Application is premised on the grounds that the Appellant has always been desirous of prosecuting the Appeal; that after admission of the Appeal, the Appellant filed his Record of Appeal on 16th February, 2016 and that the parties were ordered to file written submissions on the Appeal.

3. According to the grounds on the face of the Application, it was averred that due to insufficient instructions, the Appellant's advocates on record did not file submissions on behalf of the Appellant within the period limited by the court; that the court proceeded to strike out the Appeal for want of prosecution and that it is only fair that the Appeal be heard on merit.

4. According to the Appellant's/Applicant's Affidavit, vide numerous letters, his advocates called him to give them appropriate instructions to enable them conduct appropriate legal research for purpose of preparing and filing submissions; that he did not call into their offices for purposes of giving them instructions because most of the letters did not reach him and that he has always been desirous of prosecuting the Appeal.

5. In response, the Respondent deponed that the Applicant has always been aware that his advocate filed the Appeal; that the Applicant had already given his advocate on record instructions on how to proceed with the Appeal and that the said advocate failed to do so on four (4) occasions.

6. The Respondent finally deponed that it is not the Appellant who was to file the submissions, but his advocate; that the Applicant's advocate never raised the issue of having lost communication with their client and that the current Application is an abuse of the court process.

7. Both the Applicant's and the Respondent's counsel filed their written submissions and authorities which I have considered.

8. The Memorandum of Appeal in this matter was filed on 18th March, 2010. However, it was not until 16th February, 2016 that the Record of Appeal was filed by the Appellant's advocate

9. The record shows that on 25th October, 2016, the Appellant's advocate informed the court that she will proceed to argue the Appeal by way of written submissions. The court allowed her request and directed the matter to be mentioned on 8th February, 2017 for a Judgement date.

10. On 8th February, 2017, the Appellant's advocate informed the court that she had not filed her submissions because her file was brought to her attention the previous day. The Appellant's counsel sought for a further extension of time of twenty one (21) days to enable her file and serve her submissions. On the said date, the court directed as follows:

“The Appellant is granted the last opportunity to file and serve submissions within twenty one (21) days and the Respondent to file their reply submissions within forty five (45) days of service”

11. The court then fixed the matter for directions on 23rd March, 2017. On 23rd March, 2017, the Appellant's advocate informed the court that the matter “*had escaped my mind.*” Counsel requested for a further period of thirty (30) days to file and serve her written submissions.

12. For the third time, the court indulged the Appellant's counsel and directed her to file and serve submissions in respect to the Appeal within thirty (30) days. The matter was fixed for highlighting of submissions on 12th June, 2017. On the said date, the court was informed that the Appellant's advocate had not filed her submissions because she had not contacted her client.

13. The Appellant's counsel was indulged by the court for the fourth time and fixed the matter for mention on 20th June, 2017. On the said date, the court was informed that the Appellant's counsel required a further period of twenty one (21) days to file her submissions. Once again, the court granted to the Appellant a further period of twenty one (21) days to file and serve submissions. When the matter came up for mention on 20th September, 2017, the Appellant's counsel requested for another extension of twenty one (21) days to file her submissions. The matter was fixed for mention on 15th November, 2017. As if the numerous adjournments occasioned by the Appellant's counsel were not enough, the court, for the seventh time, allowed the Appellant's counsel to file and serve submissions on the Respondent within twenty one (21) days. The matter was slated for highlighting of submissions on 7th February, 2018.

14. It was therefore not a surprise when on 7th February, 2018 when the court declined to allow the Appellant's advocate more time to file submissions. Indeed, having adjourned the matter on more than seven occasions, the prayer for the extension of time to allow the Appellant to file his submissions on 7th November, 2017 and now is an abuse of the court process.

15. When the Appellant's counsel informed the court on 26th October, 2016 that the Appeal should proceed by way of written submissions, she had instructions from her client to do so. If indeed counsel did not have instructions as averred in the Application, she should have filed an Application to cease acting for the Appellant instead of adjourning the matter on more than seven occasions.

16. Considering that the Appellant's counsel was given more than seven (7) chances to file her submissions but failed to do so, and in the absence of a valid reason as to why the Appeal that was struck out for want of prosecution should be reinstated, I decline to exercise my discretion in favour of the Appellant. The Application dated 19th March, 2018 is therefore dismissed with costs. For avoidance of doubt, this Appeal stands struck out with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 5TH DAY OF APRIL, 2019.

O.A. ANGOTE

JUDGE