



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC APPEAL NO. 38 OF 2014

JOSEPH GICHUHI KARIUKI

NJUGUNA MUGO

BENSON MWANGI MUGO

DANIEL THUO WANJOHI (suing as the officials of

AIC Kikuyu District Church Council).....APPELLANTS

VERSUS

ROBERT KIMANI.....RESPONDENT

RULING

On 29th November 2017, the court issued orders directing the appellants to file their submissions on the appeal herein within 14 days failure to which the appeal would stand dismissed with costs to the respondent. This unless order was made after the appellants had failed on two previous occasions to comply with the order of the court on the filing of submissions. As was expected in view of the previous conduct, the appellants filed their submissions on 17th January, 2018, more than 30 days from 29th November, 2017 when the order was given and outside the 14 days time limit within which the submissions were ordered to be filed. The default by the appellants to file their submissions in time led to their appeal being struck out.

What is now before the court is the appellants' Notice of Motion dated 19th June, 2018 seeking reinstatement of the appeal and extension of time within which to file submissions. The application is supported by an affidavit sworn by Aggrey Odiwuor Kenyatta, the appellants' advocate on record. He has stated that the advocate who held his brief on 29th November, 2017 only informed him that the appellants were ordered to file their submissions within 14 days. He has stated that he was not informed that the appeal would stand dismissed in case there was non-compliance. He has stated that he complied with the directions by the court, albeit out of time by filing the appellants' submissions on 17th January, 2018. He has attributed the delay in filing the submissions to administrative lapses on his part and urged the court not to visit the consequences thereof upon the appellants. He has stated that any prejudice suffered by the respondent can be adequately compensated by an award of costs.

The respondent opposed the application through a replying affidavit sworn on 1st August, 2018 in which he has stated that the appellants had failed to comply with court orders issued previously on 31st May, 2016 and 27th October, 2016 directing them to file their submissions within 30 days and 14 days respectively. He has stated that on 17th November 2016, his advocate wrote to the appellants' advocates requesting them to file and serve their submissions and to comply with the orders of 27th October, 2016 noting that the 14 days period had already lapsed. The respondent has stated that on 29th November 2017, the court issued further orders directing the appellants to file their submissions within 14 days failure to which the appeal would stand dismissed. He has averred that despite the additional period that was granted to the appellants, the appellants did not file their submissions and even after filing the same out of time, the same was served 3 weeks later.

The respondent has averred that from the supporting affidavit, the appellants' advocate has indicated that he could only have acted on the orders of the court if he had been notified of the default clause. He has contended that the appellants' conduct explains why this appeal which was admitted on 31st May, 2016 has taken long to be heard while the appellants have continued to enjoy interim orders. He has urged the court to dismiss the application with costs.

During hearing of the application, the parties relied entirely on their affidavits in support of and in opposition to the application. I have considered the appellants' application together with the affidavit filed in support thereof. I have also considered the replying affidavit by the respondent. The only issue which arises for determination in the present application is whether there is a basis for the court to exercise its

discretionary power to reinstate this appeal for hearing on merit. Section 3A of the Civil Procedure Act gives the court inherent power to make such orders as may be necessary for the ends of justice to be met. The court's discretionary power should however be exercised judiciously, with the overriding objective of ensuring that justice is done to all the parties.

From the court record, it is clear that the appellants have on several occasions failed to comply with court orders requiring them to file submissions. The only reason given by the appellants for their continued non-compliance is administrative lapses on the part of their advocate which have not been substantiated. The reasons advanced are in my view not sufficient to enable this court to exercise its discretion in favour of the appellants. The law is settled that equity aids the vigilant. There is no doubt from the circumstances that led to the dismissal of the appeal herein that the appellants have been indolent in the conduct of the appeal. I am however of the view that failure to reinstate the appeal would deny the appellants a right to be heard in their appeal which is arguable for a mistake of their advocate that can be remedied in costs.

In the Court of Appeal Case of, Richard Nchapi Leiyangu v IEBC & 2 others, Civil Appeal No. 18 of 2013, the court stated that:

“The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent power to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day, there should be proportionality”.

In Phillip Chemwolo & Another v Augustine Kubede [1982-88] KAR 103 at 1040, Apaloo J (as he then was) stated as follows:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

Due to the foregoing, I would in the interests of justice allow the appellants' application but condemn them to pay thrown away costs. The Notice of Motion dated 19th June, 2018 is accordingly allowed in terms of prayers 3, 4 and 5 thereof. The applicants shall pay to the respondent thrown away costs assessed at Kshs. 15,000/- within 14 days from the date hereof in default of which the appeal shall once again stand dismissed without any further reference to the court.

Delivered and Dated at Nairobi this 20th day of June 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Ms. Kivuli h/b for Mr. Kenyatta for the Appellants

Mr. Gikonyo for the Respondents

Catherine Nyokabi-Court Assistant