



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CIVIL APPEAL CASE NO.9 OF 2013**

**PETER MUSUNGU KENYATTA.....APPLICANT**

**VERSUS**

**JULIUS KITURI NGONDO.....RESPONDENT**

**(Being an Appeal from the Judgment and Decree of Honourable Obura(Mrs) Delivered on 29/2/2013 in Kilifi SRMCC No. 29 of 2009)**

**RULING**

1. By this Notice of Motion application dated and filed herein on 11<sup>th</sup> June 2018, the Appellant Peter Kenyatta Musungu prays that this Court be pleased to re-admit the Appeal herein that was dismissed for non-attendance and want of prosecution on 21<sup>st</sup> May 2018.
2. The Application which is supported by an affidavit sworn by the Appellant as well as another by Ms Erica Rutto Advocate is premised on the grounds inter alia:-
  - a. **That the Appeal was dismissed in the absence of Counsel for the Appellant who had by then filed submissions which were coming up for highlighting;**
  - b. **That the Appellant has all along been keen on prosecuting the Appeal and had filed his submissions on 15<sup>th</sup> November 2017 long before the Respondent filed his own;**
  - c. **That the dismissal was occasioned by an excusable mistake of the Appellant's Advocate who was detailed to hold brief and highlight the submissions;**
  - d. **That the Appellant has developed and resides on the land which is the subject of this dispute and he stands to suffer irreparable loss and damage unless the orders sought herein are granted.**
3. The Respondent is however opposed to the grant of the orders sought herein. In a Replying Affidavit sworn and filed oherein on 26<sup>th</sup> June 2018, Julius Kituri Ngondo avers that the Appellant has not been diligent in prosecuting the Appeal which was filed almost four years back. He further avers that the Appellant filed the Appeal and then went to sleep and was only woken up by a Notice to show cause why the suit should not be dismissed dated 21<sup>st</sup> March 2017.
4. The Respondent further asserts that Ms Ruto Advocate who was holding brief for the Appellant's Counsel had been in Court when the date was taken for highlighting of submissions and it was therefore unbelievable that she misdiarised the matter afterwards. The Respondent asserts that a case belongs to the litigant and not his advocate and it is the litigant who had a duty to pursue the prosecution of his case which he has failed to do.
5. The Respondent accuses the Appellant of illegally constructing a residential house on land that does not belong to him and he should not be heard to complain that he stands to suffer any irreparable loss and/or damage.
6. I have considered the application as well as the response thereto. I have equally considered the written submissions filed by the Learned Advocates for the parties as well as the authorities to which they referred me.
7. Order 42 Rule 21 of the Civil Procedure Rules provides that where an appeal is dismissed under Rule 20, the appellant may apply to the Court to which such appeal is preferred for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient

cause from appearing when the appeal was called on for hearing, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.

8. Essentially setting aside an ex-parte Judgment or order is a matter of the discretion of the Court. The manner of the exercise of that discretion was recently re-stated by the Court of Appeal in Richard *Ncharpi Leiyagu –vs- IEBC & 2 Others (2013) eKLR* where the Court observed as follows:-

**“We agree with the noble principles which go further to establish that the Court’s discretion to set aside an exparte Judgment or order for that matter, is intended to avoid injustice or hardships resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.”**

9. In the matter before me, the Appellant blames the dismissal of the Appeal herein on the fact that Ms Ruttoh Learned Counsel who held brief for his Advocates on record Messrs Akanga Alera Advocates misdiarised the date when the matter was coming up for highlighting the written submissions and hence their failure to be in Court on 21<sup>st</sup> May 2018 when the Appeal was dismissed.

10. The Respondents while acknowledging that a mistake of a Counsel ought not to be visited on the Client are however of the view that this was not such a mistake that should invite the Court’s discretion to be exercised in the Appellant’s favour. The Respondents submit that taking audit of the manner in which the Appeal has been prosecuted since 2013, the Appellant’s Advocate is guilty of indolence which this Court ought to frown at.

11. I have studied the record herein and I agree that this Appeal has not been prosecuted with the speed that would have been expected herein. I note however that on the date the Appeal was dismissed, the matter was coming up for highlighting of submissions. By that date however, the Appellant had long filed the submissions they wished to rely on.

12. I have considered the Affidavit of Ms Ruttoh Advocate in support of the application and I am prepared to accept that Counsel may have made a mistake in diarizing the date for highlighting submissions.

13. As has been stated in a number of authorities, the main concern for the Court in such circumstances is to do justice to the parties and the Court will not impose conditions on itself to fetter the wide discretion given to it under the rules.

14. In the circumstances, I will allow the application dated 11<sup>th</sup> June 2018 and re-admit the Appeal for hearing and determination.

15. The Appellant shall however pay the sum of Kshs 30,000/- to the Respondent as throw away costs. That sum should be paid within 30 days from today in default of which the Appeal shall stand dismissed as earlier ordered.

**Dated, signed and delivered at Malindi this 20<sup>th</sup> day of September, 2019.**

**J.O. OLOLA**

**JUDGE**