



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC APPEAL NO. 44 OF 2018

KARAYA WA JONAH.....APPELLANT

=VERSUS=

GACHIMO MUNGAI.....RESPONDENT

(Being an Appeal from the judgment of the Principal Magistrate Hon. Mr. M. W. Murage delivered on 9th June, 2006 in Kikuyu PMCC No. 10 of 2006)

BETWEEN

GACHIMO MUNGAI.....PLAINTIFF

=VERSUS=

KARAYA WA JONAH.....DEFENDANT

RULING

This appeal was dismissed for want of prosecution on 17th June, 2015. What is now before the court is a Notice of Motion application dated 29th August, 2018 brought by one, Mary Wairimu Karaya, a legal representative of the appellant, Karaya Wa Jonah, deceased seeking; the setting aside of the order of dismissal; the revival of the appeal; the substitution of the deceased appellant with the applicant; the substitution of the respondent, Gachimo Mungai, deceased with his legal representative, Ziphora Nyambura Gachimo and stay of execution of the judgment of the lower court made on 9th June, 2006 which is the subject of the appeal herein pending the hearing and determination of the appeal.

The application was brought on the grounds that the appellant and the respondent died on 14th July, 2008 and 31st May, 2015 respectively while this appeal was pending. The applicant averred that this appeal was dismissed for want of prosecution on 17th June, 2015 after the death of the appellant and the respondent. The applicant averred that the beneficiaries of the estate of the deceased appellant were not informed of the status of this appeal by the advocates who were acting for the appellant in the appeal. The applicant averred that the beneficiaries of the estate of the appellant became aware of the status of the appeal when the legal representative of the respondent moved to execute the judgment of the lower court and attempted to evict them from the property in dispute in the appeal.

The applicant averred that the beneficiaries of the estate of the appellant came to learn that the advocate who was acting for the appellant had been struck off the roll of advocates. The applicant averred that the appellant was not substituted in the appeal by his legal representative as a result of the negligence of the appellant's previous advocates which negligence should not be visited upon the appellant. The applicant averred that the beneficiaries of the estate of the appellant were faced with imminent eviction from the suit property which they had occupied since 1963 unless the orders sought were granted.

The application was opposed by the legal representative of the estate of the respondent, Ziphora Nyambura Gachimo ("respondent") through an affidavit sworn on 20th September, 2018. The respondent averred that the applicant's application had no merit and that the same was brought in bad faith and amounted to an abuse of the process of the court. The respondent averred that the beneficiaries of the estate of the appellant were aware of the existence of the appeal and chose not to seek legal advice on how to proceed further with the matter. The respondent urged the court to dismiss the application.

I have considered the application together with the affidavit filed in support thereof. I am of the view that this appeal was dismissed in error. First, since the appellant died on 14th July, 2009, the appeal abated on 14th July, 2010 pursuant to Order 24 Rule 3(2) and (9) of the Civil Procedure Rules. It follows therefore that there was nothing to dismiss for want of prosecution on 17th January, 2015 since the appeal was not in existence. Secondly, I have noted from the record that no notice was served upon the parties when the matter was listed for notice to

show cause on 17th January, 2015. The appeal was therefore dismissed contrary to the provisions of Order 17 Rule 2 of the Civil Procedure Rules. For the foregoing reasons, I am inclined to set aside the order of dismissal of the appeal made on 17th January, 2015.

With regard to the prayers for the revival of the appeal and the substitution of the appellant and the respondent who are deceased with their legal representatives, I am of the view that the applicant has given good and sufficient reason for her delay in filing application for the substitution sought. I am also of the view that no prejudice which cannot be compensated in costs would be occasioned to the respondent if the orders are granted.

As concerns the prayer for stay, an order of stay granted on 5th July, 2007 was in existence at the time when the appeal abated and was subsequently dismissed for want of prosecution. When the said order was granted 12 years ago, the court had appreciated the fact that the appellant had occupied the suit property for 40 years and as such was likely to suffer substantial loss if the stay was not granted. From the material before me, the situation has not changed. I am therefore persuaded that a case has been made out for the reinstatement of the said stay order pending the hearing of the appeal.

For the foregoing reasons, I hereby make the following orders;

1. The Notice of Motion application dated 29th August, 2018 is allowed in terms of prayers 2, 3 and 6 thereof.
2. The appellant shall amend the Memorandum of Appeal within 14 days to incorporate the substitution of the deceased appellant and respondent with their legal representatives.
3. The order of stay of execution granted on 5th July, 2007 pending the hearing of the appeal is reinstated.
4. The appellant shall pay to the respondent thrown away costs in the sum of Kshs. 15,000/= forthwith and in any event within 30 days from the date hereof in default of which the respondent shall be at liberty to execute for the recovery thereof.

Delivered and Dated at Nairobi this 14th day of November, 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Kori h/b for Mr. Kariuki for the Appellant

Ms. Muyai h/b for Mr. Njagi for the Respondent

Phylis-Court Assistant