



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ELC APPEAL NO. 9 OF 2018**

**ISAAC OLANG SOLOGO.....APPELLANT**

**VERSUS**

**GLADYS NANJEKHO MAKOKHA**

***(Being the Administrator of the Estate of***

**ANTONINA MAKOKHA (Deceased).....1<sup>ST</sup> RESPONDENT**

**ELIYA MAKOKHA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. By a Notice of Motion dated 28/6/2019 and filed on 1/7/2019 brought under **Article 159 (2) (d) of the Constitution, Section 1A, 1B and 3A of the Civil Procedure Act Order 51 Rule 1 of the Civil Procedure Rules, 2010**, the appellant seek the following orders:-

**(1) That this application be certified as urgent and the same be heard *ex-parte* in the first instance.**

**(2) That the orders made by this court dismissing this appeal for want of prosecution be set aside and this appeal be reinstated for hearing and determination on the merits.**

**(3) That the order of stay which were in place immediately before the dismissal of this appeal for want of prosecution be reinstated pending the hearing and determination of this appeal.**

**(4) That leave be granted to the appellant to file the record of appeal out of time and the record of appeal filed herewith be deemed as properly filed.**

**(5) That the costs of this application be in the cause.**

2. The application is based on the grounds that the appellant was unable to file the record of appeal within the timelines ordered by this court as the typed proceedings of the subordinate court were not yet certified; that the proceedings were certified on 14/5/2019 and supplied to the appellant on 15/5/2019, long after dismissal of this appeal for want of prosecution and despite numerous follow-ups the subordinate court completed typing its proceedings after dismissal of this appeal; that the failure by the appellant to file the record of appeal within the timelines ordered by this court is thus excusable as it was not deliberate; that the appellant is desirous of having this appeal heard and determined on its merits; that the appellant is apprehensive that if this appeal and the interim orders which were in placed before dismissal of this appeal are not reinstated, the respondent may evict the appellant from the suit land to the utter prejudice of the appellant whose only home is on the suit land and that this application has been made in good faith. It has been urged that the ends of justice require that it be allowed as prayed.

3. The application is supported by the supporting affidavit of the appellant sworn on 25/6/2019.

4. The application was opposed by the respondent vide a replying affidavit sworn on 24/7/2019. He deposes that the application is incompetent and lacks merit; it is brought under the wrong provisions of the law; that the appeal was not dismissed for want of prosecution but for failure to comply; that the applicant failed to comply with the order that he files the record of appeal within the time given by the court and further not only failed to attend court on 24/4/2019 but has also failed to explain that non-attendance; that there is no certificate of delay has been issued by the lower court; that the proposed application for extension of time being the third one will prejudice the respondent if granted; that there was unexplained delay between the date of certification of the proceedings and the date of filing the instant application.

5. The appellant filed his submissions on the **6/8/2019** and the 1<sup>st</sup> respondent filed his on **14/8/2019**. I have considered the application, response and those submissions.

6. The applicant's explanation is that the delay in filing the record of appeal was occasioned by the inability to obtain the certified copies of the proceedings in the lower court. No date has been given of the communication to court seeking certified copies of the proceedings. This court is not able to tell whether any such request was ever made or when as the affidavit in support of the notice of motion is silent on that issue.

7. This is a court of justice. The applicant may have delayed the filing of the record and therefore the hearing and determination of the appeal. However I have noted that the decision of the lower court sought to be appealed against was delivered on **23/7/2018**. Furthermore **Article 159 (2) (d)** of the Constitution of Kenya 2010 provides that justice shall be administered without undue regard to technicalities.

8. The appellant having filed the memorandum of appeal on **2/10/2018** all that remained to enable the hearing was the filing of the record of appeal. I have noted that the record of appeal was filed on **1/7/2019**.

9. I have also noted that though the applicant took much time to file that record of appeal the task of providing certified copies lay with the court registry.

10. Further though the applicant has not furnished evidence to support the claim that the delay occurred due to the unavailability of the certified copies of the proceedings, they have now been provided and the appeal record is in place.

11. Much time may have been lost but the appeal record is now filed and if the directions of this court on that appeal are issued the same may be finalised without any further delay.

12. For the above reasons I allow the application dated **28/5/2019** as prayed.

**Dated, signed and delivered at Kitale on this 3<sup>rd</sup> day of December, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**3/12/2019**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for the Applicant

Mr. Chebii for Respondent

**COURT**

Ruling delivered in open court.

**MWANGI NJOROGE**

**JUDGE**

**3/12/2019.**