



REPUBLIC OF KENYA



KENYA LAW
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Consolidated Bank of Kenya Ltd v Ndugu & 5 others (Environment and Land Appeal E053 of 2022) [2024] KEELC 451 (KLR) (31 January 2024) (Ruling)

Neutral citation: [2024] KEELC 451 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E053 OF 2022
CK NZILI, J
JANUARY 31, 2024

BETWEEN

CONSOLIDATED BANK OF KENYA LTD APPLICANT

AND

MONICA WANGARI NDUGU 1ST RESPONDENT

JOEL K. NJERU 2ND RESPONDENT

THE LAND REGISTRAR MERU CENTRAL DISTRICT 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

FINA BANK LTD 5TH RESPONDENT

GUARANTY TRUST BANK LIMITED 6TH RESPONDENT

RULING

1. The court, by an application dated 13.10.2023, is asked to set aside the order made on 28.9.2023, to strike out the appeal for non-compliance, allow the appeal record to be filed, and reinstate it for hearing on merits. The reasons are contained on the face of the application and in the supporting affidavit sworn by Mugambi Nyaga advocate on 13.10.2023.
2. The applicant avers that, whereas the appeal was admitted for hearing on 13.6.2023 and listed for directions on 21.9.2023, no notice was issued to that effect to the parties; hence, they were not aware of the date. The applicant avers that coincidentally, on 21.9.2023, his advocate on record was appearing in court in another matter and sought 14 days to comply but forgot to diarise the date.
3. The applicant prays that the mistakes of his counsel should not be visited upon him. Counsel, on his part, has attached annexure MN 1, a copy of letters requesting for proceedings MN 2, a receipt for



payment of the decree MN 3, a copy of diary for 21.9.2023 and MN 4, a copy of diary for 28.9.2023 and regrets what he terms as an oversight or an inadvertent mistake.

4. Further, the applicant prays that he be granted an opportunity to be heard for the end of justice to be met; otherwise, he shall suffer great prejudice and injustice should the appeal not be reinstated for hearing on merits. The applicant invokes sections 1A 1B of the *Civil Procedure Act* as read together with article 159 (2) of *the Constitution* on the overriding objective of rendering substantive justice.
5. The application was served to all the respondents, and an affidavit of service was filed on 24.10.2023. When the matter came up for an inter-parties hearing on 30.10.2023, the 1st and 2nd respondents did not attend court, while Miss Mbaikyatta, counsel for the 3rd and 4th respondents, indicated that they were not opposed to the application.
6. The 5th and 6th respondents relied on the grounds of opposition dated 23.10.2023, that no explanation has been given as to why the record of appeal was never filed, since 21.9.2023, after directions were issued to that effect and secondly, the delay of over two weeks after the striking out was not explained.
7. On 13.6.2023, this court admitted the appeal for hearing after the lower court file was made available. Directions were also issued that the appeal record be filed and served within 60 days, with a mention for 21.9.2023, for further directions. It appears the Deputy Registrar prepared a notice to that effect dated 22.6.2023 to the respective law firms appearing for the parties. What is not clear, however, is whether the same was served upon the parties. Nevertheless, on 21.9.2023, Mr. Nyaga advocate, for Mr. Kihara for the appellant, was present while Mr. Mwenda Mwarania, advocate for the respondent, was absent.
8. Mr. Nyaga advocate told the court that there had been no compliance with the court's directions and sought more time to comply. The court gave a limited period of 7 days to do so with a mention for 28.9.2023. A mention notice was also issued to the other parties. From the court's record, Mr. Nyaga advocate did not indicate that he was unaware of the mention date or the earlier directives.
9. Be that as it may, the court has broad powers to deal with non-compliance with its directions, especially if no appeal record is filed under order 42 rules 13 & 35 of the *Civil Procedure Rules*. Under order 42 rule 13 Civil Procedure Rules, the duty to seek directions rests with the appellant. Once this is done, the appellant has to file a record of appeal as directed by the court.
10. Counsel for the applicant only takes full responsibility regarding the delay on the second part and not the first part, yet he attended court. It does not matter that they had other matters. He has not explained what other efforts he made to comply with the court directives and if the period was short if he sought for an extension of time.
11. Counsel chose to give priority to other files and not this one. The non-attendance cannot be termed as an oversight since the directions were given in the advocate's presence. For seven or so days, he did nothing to collect the lower court proceedings and file the record of appeal. Even at the time of filing the application filing, counsel for the applicant was silent on the state of preparedness of the appeal record. Therefore, the applicant cannot turn around and blame the court and term the delay and non-compliance excusable.
12. In *Allan Otieno Ofula vs Gurdev Engineering and Construction Ltd* (2015) eKLR, Aburili J held that since the right of appeal was a constitutional right and as much as there was an unexplained delay, the court had to weigh the costs and prejudice, a respondent was to suffer if the appeal was struck out before it was heard on suits.
13. Article 159 of *the Constitution*, as read together with Sections 1A & 1B of the *Civil Procedure Act*, provides that the court must expeditiously hear and determine matters and the duty vests with parties



and their advocates to help facilitate in the expeditious, proportionate, and just determination of matters.

14. In this appeal, the delay was for less than three months. In *Mwangi S. Kaimenyi vs AG & others* Civil Misc no. 720 of 2009, the court held that where the delay is prolonged and inexcusable, such as would cause injustice to the other side, the court may dismiss the application for reinstatement. The court, however, added that delay alone should not prevent the court from doing justice to the parties, lest justice be placed too far away from the parties.
15. Looking at the circumstances of this appeal, I think the applicant deserves its day in court. The respondents have not stated what prejudice or substantial risk they will suffer, which is not compensable by way of costs, if the appeal is reinstated for hearing on merits. An appeal should not be parked at the appeals registry forever without action being taken. It should not be left to hang on the heads of the respondents indefinitely.
16. In *Abraham Mukhola Asitsa vs Silver Style Investment Co. Ltd* (2020) eKLR, the court said justice demands an appeal be resolved one way or the other to avoid populating registries with stale appeals.
17. The upshot is that I allow the application. The record of appeal shall be filed and served within 14 days from the date hereof. Costs of this application to the 5th and 6th respondents.

Orders accordingly.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 31ST DAY OF JANUARY 2024

In presence of

C.A Kananu/Mukami

Jackson in person

HON. CK NZILI

JUDGE

