



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

ELCA NO. 3 OF 2018

DUNCAN KAMAU KING'ORA.....APPLICANT

VS

NIMROD IRUNGU GATAMBIA.....1ST RESPONDENT

KAHURO LAND DISPUTE TRIBUNAL.....2ND RESPONDENT

THE PRINCIPAL MAGISTRATE

MURANG'A.....3RD RESPONDENT

THE HONOURABLE THE ATTORNEY

GENERAL.....4TH RESPONDENT

RULING

1. The Applicant /Applicant filed a Notice of Motion through certificate of urgency dated 3/9/2015 under Order 12 Rule 7, Orders 51 and Order 45 Rule 2 & 3 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, Cap 21 of the Laws of Kenya, Articles 50 and 159(2) of the Constitution of Kenya, 2010 and all other provisions of the law. The Applicant sought orders for the reinstatement of the appeal so that it may be heard on its merits.

2. The application is premised on the grounds that the suit had been fixed for the hearing of the Notice to show cause under Order 42 rule 35 on 26/6/2015. The suit was dismissed for want of prosecution and non-attendance. That the Court to allow the Appeal to be heard on its merits. That the mistake of the Advocate should not be visited on the Applicant.

3. Further the application was supported by the affidavit of one Samson W Ndegwa Advocate who deponed that he had the conduct of the appeal on behalf of the Applicant. He explained that on the 26/7/2015 when the matter was scheduled for hearing he had other matters in Nairobi and the Counsel he had instructed to hold his brief was late due to motor vehicle break down. That on arrival at the Court, he found the appeal had been dismissed. That the dismissal was due to factors outside his control. He pleaded with the Court to reinstate the appeal. In addition, he stated that he filed the appeal on 18/6/2010 and the same could not be set down for hearing as he was preparing the record of appeal and secondly, he had been unwell and under heavy medication. He annexed letters from his doctor dated 25/2/2015, 12/3/2015 and 13/4/2015.

4. In response, the Respondent filed a replying affidavit on the 26/10/2015 sworn by one Titus Timothy Muthui Kimani who stated that he is an Advocate in conduct of the matter on behalf of the Respondent. He disclosed that the Applicant has concealed HCCC No 54 of 2009 in which he is the Plaintiff. That the same suit is seeking to challenge the same impugned judgment as this Appeal. That the Applicant has not explained the delay in setting down the appeal for hearing and he is guilty of laches.

5. It is on record that the Memorandum of Appeal was filed on the 18/6/2010. The Appeal was admitted by the Court on the 7/6/2011. There appears to have been a lull in prosecuting the appeal for a period of 5 years. Notice to show cause under Order 42 Rule 35 was issued on the 5/6/2015 and the matter was mentioned on 26/6/2015. On the hearing day the Applicant was absent in Court without any reason. The Court dismissed the appeal for want of prosecution. It is that order that the application seeks to set aside and reinstate the appeal.

6. The Applicant's lawyers explained that the appeal had not been prosecuted because he had been unwell. I have perused the letters from his doctor dated the 25/2/2015, 12/3/2015 and 13/4/2015. The period of illness relates to the months of February – May 2015. It does not explain why it took 5 years for the matter to be prosecuted. The Court issued a notice to show cause on 26/6/2015 as to why the appeal should be

dismissed. On that particular day the counsel states that he had other matters to attend to in Nairobi. It would appear that the reason for his absence is attributed to his busy schedule rather than illness. The notice was duly acknowledged by the said Advocate. There is no notice in writing to the Court that he would not be able to attend Court on the scheduled date of the hearing. He explained that the lawyer he instructed to hold his brief got late due to mechanical breakdown of his motor vehicle. No affidavit has been sworn by the said lawyer who held brief to support the averment. The application to review the dismissal order was filed on 3/9/2015 about 3 months later. In the circumstances the delay is inordinate. No sufficient reasons have been given for the delay.

7. In the end I find that the application has no merit and is dismissed with costs.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 20TH DAY OF SEPTEMBER 2018

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Appellant– Absent

Mr. Peter Muthoni for the 1st Respondent

2nd, 3rd & 4th Respondents – Absent

Ms.Irene and Ms Njeri, Court Assistant