



**REPUBLIC OF KENYA**

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

**ELCC APPEAL NO. 1 OF 2017**

**(Formerly KISII ELCC No. 182 of 2008)**

**THE AGA KHAN FOUNDATION..... APPELLANT**

**VERSUS**

**NURBANU MADATALI SHIVJI JAMAL..... RESPONDENT**

**RULING**

1) In a Notice of Motion application dated **12<sup>th</sup> October, 2016**, the Appellant/Applicant namely **AGA KHAN FOUNDATION** represented by L.G.Menezes and company Advocates, seeks orders as follows;

*a) .....(spent)*

*b) That the Honourable court be pleased to set aside it's order made 20<sup>th</sup> July, 2016 dismissing this appeal for want of prosecution and reinstatement of the appeal for hearing.*

*c) That the costs of this application to abide the outcome of the appeal.*

2) The application is based on grounds 1 to 6 on the face of it. A supporting affidavit of paragraphs 1 to 22 sworn by Mitchel J.B.Menezes counsel for the Appellant/Applicant together with annexed documents or copies of various correspondence marked MJBm 1 to 8 are in support of the application. The Six grounds are :

**a. THAT the appellants' appeal was on 20.07.15 dismissed for want of prosecution.**

**b. THAT the Appellants' Advocate were not served with the Notice of Dismissal.**

**c. THAT justice demands that the Appeal be heard on the merits.**

**d. THAT the Appellants have a right to a fair hearing under the Constitution of Kenya, 2010.**

**e. THAT the court had discretion to grant the orders sought.**

**f. THAT it is the interest of justice for the orders sought to be granted.**

3) A replying affidavit of 14 paragraphs sworn on 12<sup>th</sup> October, 2016 by G S Okoth counsel for the Defendant/Respondent **NURBANU MADATALI SHIVJI** is to the effect that the appeal was dismissed due to inordinate delay and it should not be reinstated for hearing. The Defendant/Respondent requests that in lieu thereof the original suit should be fixed for hearing and disposal. He annexed to the affidavit, documents marked GSO 1A, 1B, 2,3A, 3B, 3C,3D,4A and 4B.

4) On 28<sup>th</sup> November, 2016, John Mutungi, J sitting at Environment and Land court, Kisii directed that the application be argued by way of written submissions. Accordingly the parties filed and exchanged their submissions in this application.

5) The Appellant/applicant's counsel filed written submissions dated 17<sup>th</sup> January, 2017 on 2<sup>nd</sup> February, 2017. The submissions are on the background and analysis of facts and law, **Order 42 rule 35 (2) Civil Procedure Rules, 2010** and **Article 50 (1) Constitution, 2010**. The counsel cited the case of **Richard Nchapai Leiyangu –vs-IEBC and 2 others** Civil Appeal No. 18 of 2013 on the right to a fair hearing which is well protected in our Constitution and is also the cornerstone of the Rule of Law ( reported in the case **Philip Mururi Ndaruga-vs-**

**Gatemu Housing Society Limited (2015) eKLR).** He urged this court to allow the application with costs to enable him prosecute the appeal which has high chances of success.

6) The Respondent's counsel filed written submissions dated 27<sup>th</sup> Jan, 2017. He cited **Article 50 Constitution of Kenya, 2010, sections 1A 1B 3A and 63 (e) Civil Procedure Act (Cap 21) and Orders 51 rule 42 rule 35 (2) Civil Procedure Rules, 2010.** He stated that whereas there was no available evidence that the notice of appeal was served, delay of eight (8) months is inordinate that justified dismissal of the suit and let the main suit proceed. He further submitted that Order 51 rule 15 (supra) gives the court discretion to set aside an ex-parte order. He urged this court to dismiss the application with costs.

7) I have studied the entire application, replying affidavit by the Respondent and submissions by counsel for respective parties. To that end, are there valid grounds to grant orders (b) and (c) sought in this application?

8) The appeal was dismissed pursuant to Order 42 rule 35 (2) (supra) by Chacha Mwita , J sitting at Environment and Land court, Kisii on 20<sup>th</sup> July, 2015. In dismissing the appeal, the court made the following order;

***“Notice having been given to SHOW CAUSE why this suit should not be dismissed, and there are no satisfactory response, the suit is hereby dismissed under Order 42 Rule 35 (2) of the Civil Procedure Rules.”***

9) Order 42 rule 35 (2) (Ibid) under which the appeal was dismissed provides as follows;

***“If within one year after the service of the memorandum of appeal, the appeal shall not be have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal”*** (Emphasis laid)

10) I have gone through the court record. There is no available evidence or at all to show that notice to attend court was issued and served on the parties prior to the dismissal of the appeal. It is also not disputed by the Respondent. In **Philip Mururi Ndaruga case** (supra), Mativo, J, noted, inter alia;

***“...In other words he never got the opportunity to show cause why the appeal ought not to have been dismissed.....***

***I note from the court file.....To allow the orders dismissing his appeal on the basis of such improper service would in my view be wrong and would amount to miscarriage of justice.”*** (Emphasis added)

In the circumstances of this case, I fully associate myself with the finding of the court in the above case in relation to the present application. I am aware of the immense powers of the court under Article 165 and Section 3 A (Supra) and other provisions of the law relied upon by the parties to this application.

11) **In Article 159 (2) (b) and (d) of the Constitution of Kenya, 2010,** justice shall not be delayed and shall be administered without undue regard to procedural technicalities In the instant case, failure to serve a notice to attend court to enable the Appellant to prosecute the appeal, was so fundamental and strikes at the root of Constitutional right to fair hearing provided under **Article 50 (1)** (Supra) . In **Mwangi wa Iria-vs-The Attorney General & 2 others (2015) eKLR** it was recognized that the phrase ‘the Constitution is supreme’ is not a slogan but is pegged on the realities of the Constitution itself as was wished by the citizens of the nation. Furthermore, in Common law, the principles of natural justice should be upheld; **R-vs NEMA and Anor (2006) eKLR**

12) In sum, I find that the Applicant/Appellant's appeal was dismissed for want of prosecution on 20<sup>th</sup> July 2015 without service of notice of dismissal. The Applicant has a Constitutional right to a fair hearing. This is an appropriate case in which I have to exercise my discretion in favour of the Applicant/Appellant in the interest of justice.

13) A fortiori, I set aside an order of this court made on 20<sup>th</sup> July, 2015 dismissing this appeal for want of prosecution. I order for the reinstatement of the appeal for hearing and determination on it's merits.

14) On costs, the general rule is that costs follow the event and in the discretion of the court as in the proviso to **Section 27 (1) of the Civil Procedure Act (Cap 21 Laws of Kenya)**. In the case of **Rai-vs-Rai (2014) KLR-SCK** petition 4 Of 2012, it was observed that costs follow the event is a well-recognized principle not used to penalize the losing party rather it was for compensating the successful party for trouble taken in prosecuting or defending the suit. Since it is my finding that the notice to the parties to attend court was not served , I find it unfair to condemn the Applicant/Appellant to pay costs; See **Mururi Ndaruga case** (supra). Accordingly I order each party to bear own costs of this application.

**GEORGE M. A. ONGONDO**

**JUDGE**

**DELIVERED, SIGNED and DATED in open court at MIGORI this 8<sup>th</sup> day of March, 2017.**

In the presence of : Tom M Otieno, court assistant

In the absence of: Both parties and counsel, who are aware of this date