**Munyi v Mwangi & another (Civil Appeal 26 of 2017)**
**[2022] KECA 29 (KLR) (4 February 2022) (Judgment)**

Neutral citation: [2022] KECA 29 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NYERI**

**CIVIL APPEAL 26 OF 2017**

**RN NAMBUYE, W KARANJA & AK MURGOR, JJA**

**FEBRUARY 4, 2022**

**BETWEEN**

**SIMON GACHOKI MUNYI ..... APPELLANT**

**AND**

**ALICE NYAWIRA MWANGI ..... 1ST RESPONDENT**

**PETER MWANGI KINYUA ..... 2ND RESPONDENT**

***(Being an Appeal from the Ruling/Orders of the Environment and Land Court (Olao, J.) dated the 20th of December 2016 in Kerugoya ELC Civil Appeal No. 23 of 2013)***

## JUDGMENT

1. The appellant, Simon Gachoki Munyi claimed that between the months of February and April 2008, the 2nd respondent, Peter Mwangi Kinyua had sold and transferred land parcel No. MWERUA/GITAKU/832 (the subject land) measuring 0.40 Ha to him for a consideration of Kshs. 900,000 and that he had paid Kshs. 400,000. It was intended that the balance would be paid upon the consent from the Land Control Board being obtained. He contended that before purchasing the subject land, he conducted due diligence on the title including an Official Search at the then Kirinyaga District Lands Office based in Kerugoya Town where he confirmed that the 2nd respondent was the registered proprietor of the subject land and further that it was free from all encumbrances.

2. It was his case that when the 1st respondent, Alice Nyawira Mwangi, the 2nd respondent's alleged estranged wife learnt of the sale, she sued both the appellant and the 2nd respondent in the Kerugoya Senior Resident Magistrate's Court in Civil Suit No. 168 of 2008 wherein she prayed for several orders including, the re-transfer of the subject land from the appellant back to the 2nd respondent, herself and her children, on the premises that the land belonged to her family. She further contended that as the 2nd respondent's wife, the subject land was matrimonial property and that she had contributed towards

its purchase and development. She opposed the sale for the reason that she was not consulted and the Land Control Board consent had yet to be obtained.

3. Upon hearing the parties, the trial magistrate, granted the orders for retransfer of the subject land from the appellant back to the 2nd respondent as prayed. The appellant was dissatisfied with the decision and filed an appeal at the Embu High Court, which was later transferred to Kerugoya Law Courts being Kerugoya Environment and Land Court Civil Appeal No. 23 Of 2013, and in the meantime obtained an order for stay of execution of the decree on 4th June 2012.

4. Whilst the appeal was pending, by a Notice of Motion dated 11th December, 2013 brought under section 3A of the *Civil Procedure Act* and order 42 rule 12 and order 51 rule 1 of the *Civil Procedure Rules, 2010*, the 1st respondent sought orders for striking out the appellant's appeal for failure by the appellant to take any reasonable steps towards preparing the appeal for hearing despite its having been admitted on 27th July 2011, and the appellant having been directed to file and serve the record of appeal within 21 days.

5. The first appellate court allowed the application and in a ruling dated 20th December, 2016 struck out the appeal. The appellant was aggrieved by the ruling and brought this appeal on grounds that; the learned judge wrongfully struck out with costs the appellant's appeal which had been admitted for hearing, on account of his having failed to take any reasonable steps towards preparing the appeal for hearing; that the application was erroneously brought under section 3A of the *Civil Procedure Act*, order 42, rule 12 and order 51 rule 1 the Civil Procedure Rules and that the learned judge failed to appreciate the prosecution of his appeal could only be dealt with under order 42 rule 35 (1); that the appellant was not in any way to blame for the failure of the appeal to proceed to hearing, and in any event he was still interested in having his appeal heard; that the learned judge was wrong in failing to exercise his discretion in favour of the appellant, particularly since the subject-matter was land for which the appellant had deposited security for costs. And finally, in denying the appellant his constitutional and legal right to be heard on appeal, instead of giving undue regard to procedural technicalities.

6. In his submissions, the appellant asserted that the motion dated 11th December 2013 was brought under the wrong provisions of the law; that section 3A of the *Civil Procedure Act* which deals with the inherent powers of the court cannot be invoked where there exists specific provisions dealing with the reliefs sought; that the 1st respondent's application was specifically based on order 42 rule 12 and order 51 rule 1 of the Civil Procedure Rules, which did not in any way empower the first appellate court to grant the orders for striking out, but merely obligated the registrar to notify the appellant of the refusal of a judge to reject the appeal under section 79B of the *Civil Procedure Act* so that the appellant could then serve the Memorandum of Appeal on the respondent within the period stipulated.

7. The appellant further submitted that order 42 rule 35 provided the instances under which an admitted appeal may be dismissed before hearing, and that since directions had not been given, the appeal ought not to have been dismissed.

8. The 1st respondent on her part submitted that the appeal was admitted on 26th July 2011 and that thereafter, the appellant had not taken any steps to prosecute it; that the appellant and his counsel refused to file the record of appeal or to fix the matter for directions, despite having secured a stay of execution of the trial court's orders.

9. Having considered the record and the parties' submissions, we consider that central to the determination of this appeal are two issues firstly, whether, the first appellate court was right in striking out the appeal under section 3A of the *Civil Procedure Act*, and secondly, whether the court rightly

exercised its discretion in striking out the appellant's appeal for want of prosecution, and for declining to reinstate the appeal.

10. We begin by addressing the question of whether the learned judge rightly invoked section 3A of the *Civil Procedure Act*. In this regard the learned judge stated;

> " ...this application seeks for striking out of appeal purely on the grounds that no steps have been taken by the appellant to have it heard some two years and five months after it had been admitted. That is why reliance is being placed on Section 3A of the *Civil Procedure Act*."

The court further stated that;

> " ... we are dealing with the situation where the appellant, having obtained a stay of execution of a judgment delivered on 5th May 2011, filed an appeal on 3rd June 2011 and only filed the record of appeal on March 2014 over two and a half (½) years later. In my view, in a case such as this, where the appellant has not offered any plausible explanation for the inordinate and unreasonable delay in prosecuting his appeal a Court of law is perfectly in order to have such an appeal struck out by invoking its inherent jurisdiction under section 3A of the *Civil Procedure Act*, because such delay is clearly an abuse of the Court process."

11. What in effect the court was saying, was that despite the appellant having been ordered to file and serve the record of appeal within 21 days, he neglected to do so, and only sought to file it nearly 3 years later, without having sought, either leave to extend time for filing it, or providing any plausible explanation for the delay.

Order 42 Rule 11 of the Civil Procedure Rules specifies;

> " Upon filing of the appeal the appellant shall within thirty days, cause the matter to be listed before a judge for directions under section 79B of the Act."

Order 42 Rule 12 of the same rules states that;

> " After the refusal of a judge to reject the appeal under section 79B of the Act, the registrar shall notify the appellant who shall serve the memorandum of appeal on every respondent within seven days of receipt of the notice from the registrar."

42 Rule 13 (1) goes on to provide that;

> > " On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the appellant shall cause the appeal to be listed for the giving of directions by a judge in chambers."

12. In this case, the court admitted the appellant's appeal on 25th July 2011. The appellant was thereafter directed to file and serve the record within 21 days. Instead of complying with the court's direction the appellant neglected to do as ordered thereby deliberately stalling the appellate process, and rendering it inoperable, since the next stage of the process specified under order 42 rule 13 could not take effect.

13. In the case of *Bwana Mohamed Bwana vs Silvano Buko Bonaya & 2 others* [2015] eKLR, the Supreme Court observed that without a record of appeal , a court cannot proceed to determine an appeal.

14. Further, having failed to file the appeal within the period specified, it could not have proceeded, unless with leave of the court and in respect of which the appellant had not sought to avail himself of.

15. In the case of *Patrick Kiruja Kithinji vs Victor Mugira Marete [2015] eKLR*, this Court expressed itself on this issue as follows:

> " In our view whether or not an appeal is filed on time goes to the jurisdiction of this Court. It is trite that this Court has jurisdiction to entertain appeals filed within the requisite time and/or appeals filed out of time with leave of the Court. To hold otherwise would upset the established clear principles of institution of an appeal in this Court. Consequently, we find that an appeal filed out of time is not curable under Article 159."

16. With the period for the filing of the record having since lapsed, and with no leave having been obtained to file and serve the record out of the time specified in the ruling for stay of execution, it becomes apparent that the only recourse available to the 1st respondent at this juncture was to have it struck out.

17. In the case of *Munir Abubakar Masoud (As member of Tawheed Muslim Association) vs Ali Abdalla Salim & another [2018] eKLR* this Court observed that a record of Appeal filed out of time, and without leave of Court is incompetent and susceptible to striking out.

18. Was the court entitled to rely on the inherent powers specified under section 3A of the *Civil Procedure Act*?

19. Section 3A provides that;

> " Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

20. In the case of *Stephen Boro Gitiha vs Family Finance Building Society & 3 others [2009] eKLR* this Court emphasised that;

> "... both the *Civil Procedure Act* and the *Appellate Jurisdiction Act* were amended to incorporate sections 1A and 1B in the *Civil Procedure Act* and sections 3A and 3B in the case of the *Appellate Jurisdiction Act*. These provisions incorporate into the civil process an overriding objective which has also been defined... the courts are now on the driving seat of justice and ... have a new call to use the overriding objective to remove all the cobwebs hitherto experienced in the civil process and to weed out as far as is practicable the scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and expeditious manner".

21. And in the case of *Safaricom Limited vs Ocean View Beach Hotel Limited & 2 Others [2009] eKLR* expressed itself thus:

> " The overriding objective is so called because depending on the facts of each case, and the circumstances, it overrides provisions and rules which might hinder its operation and therefore prevent the court from acting justly now and not tomorrow."

22. In effect, with the appellant having stalled the appellate process by blatantly disregarding the orders of the court, and thereafter refusing to take any prudent steps to restart it, we find that the lower court was well within its powers to rely on the inherent powers provided under section 3A to strike out the appellant's appeal, and we so find.

23. That said, we turn to the issue of whether the court rightly exercised its discretion to strike out the appellant's appeal for want of prosecution, and in declining to reinstate the appeal. In determining this issue, it is settled that this Court will only interfere with the trial court's exercise of discretion if the appellant can demonstrate that the court misdirected itself in some matter and as a result has arrived at a wrong decision, or it is manifest that the judge was clearly wrong as a result of which an injustice occurred.

24. In the case of *Richard Ncharpi Leiyagu vs IEBC & 2 Others [2013] eKLR* it was held that:

> " We agree with the noble principles which go further to establish that the Courts' discretion to set aside Judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice."

25. And as was discerned in the case of *Mbogo & Another vs Shah [1968] EA, p.15,* that;

> " An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice."

26. In the instant case, it is not in dispute that the appellant filed an appeal on 3rd June 2011. It is not also disputed that the appeal was admitted on 26th July 2011 whereupon the court directed the appellant to file and serve the record of appeal within 21 days. It was only when the 1st respondent sought to have it struck out that the appellant was jolted into action to file the record of appeal. Of note is that it was filed, without leave of the court after nearly 3 years with no explanation having been provided prior to its filing.

27. In the case of *Peter Kipkurui Chemoiwo vs Richard Chepsergon [2021] eKLR* this Court observed that;

> " In analysing the matter, the learned Judge correctly appreciated the principles in dismissing an appeal for want of prosecution as espoused in various cases such as in *Ivita –v- Kyumba [1984] KLR 441*; that the test to be applied by the courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether the delay could be excused and justice can be done despite the delay.

28. Hence the question to be answered at this point is whether in invoking the inherent jurisdiction to strike out the appeal, the trial court rightly found the delay in filing the record to be prolonged and inordinate as to conclude that the delay was inexcusable. Such determination requires that the circumstances of each case be interrogated, and in particular, whether a cogent and coherent explanation was advanced to explain such delay. See *Cecilia Wanja Waweru vs Jackson Wainaina Muiruri & another [2014] eKLR*.

29. In endeavouring to explain the delay, the appellant averred at paragraph 5 of his replying affidavit that;

> " ... he had been informed by his advocate who was acting for him then, that the said advocate (Magee Wa Magee & Co. Advocates) did not, by accidental oversight realize that the appeal had been admitted and therefore did not file the Record of Appeal and application for directions before the application to strike out his appeal was filed."

30. In other words, the explanation he gave was that since his advocate occasioned the delay, such mistake should not be visited on him. No other reason was attributed for the delay.

31. In the case of *Habo Agencies Limited vs Wilfred Odhiambo Musingo [2015] eKLR*, this Court observed;

> " It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel".

32. Similarly, in *Bi-Mach Engineers Limited vs James Kahoro Mwangi [2011] eKLR* the Court expressed that:

> " The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. The client has a remedy against such an advocate..."

33. The above- cited authorities make it patently clear that, it was the appellant's duty to assiduously pursue the prosecution of his appeal by his counsel, and ensure that the orders and directions of the court were duly complied with. He cannot seek to lay blame at his advocate's doorstep, when nothing on the record disclosed that his advocate was entirely liable for such delay. In this case, it is instructive to note that his advocate did not swear any affidavit accepting responsibility for the "accidental oversight', and, the appellant has not provided any material to show that despite continuous prompting his advocate to take action, his advocate had ignored him. The learned judge took cognisance of the delay and concluded that it was not only inordinate, but also that it was not explained at all.

34. As a consequence, we too are satisfied that there was no material upon which the learned judge could exercise his discretion to salvage the appellant's then stalled appellate process, and on this basis, we find that the judge rightly declined to reinstate the appellant's appeal. As such, we have no basis on which to interfere with the learned judge's exercise of discretion.

35. The appeal is without merit and is accordingly dismissed with costs to the 1st respondent.

36. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022.**

**R.N. NAMBUYE**

**.....**

**JUDGE OF APPEAL**

**W. KARANJA**

**.....**

**JUDGE OF APPEAL**

**A.K. MURGOR**

**.....**

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

**DEPUTY REGISTRAR**