



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: KARANJA, KOOME & OTIENO-ODEK, J.J.A)

CIVIL APPEAL NO. 64 OF 2016

BETWEEN

TANA TEACHERS' COOPERATIVE AND

CREDIT SOCIETY LIMITED...APPELLANT

VERSUS

ANDRIANO MUCHIRI.....RESPONDENT

(Being an appeal from the Ruling and Order of the Environment and Land Court

at Mombasa (Hon. Omollo, J.) delivered on 30th June, 2016

E & LCA No. 197 of 2011)

JUDGMENT OF THE COURT

1. The appellant herein had lodged an appeal before the Environment and Land Court (**ELC**) challenging a decision rendered by the Mombasa Chief Magistrate's court. On learning of that impending appeal, the respondent took out a notice of motion, in which he contended that the said appeal was incompetent and ought to be struck out on grounds that a certified copy of the decree had not been extracted and the memorandum of appeal was not served upon him.

2. In a ruling delivered on 18th September, 2015, the court found the application devoid of merit and dismissed it. The appellant was thus extended a lifeline, albeit on condition that it shall take steps to have the appeal fixed for directions within 45 days of that ruling. However, the aforesaid lifeline and attendant condition notwithstanding, the appellant still took no steps to have the matter listed for directions. This prompted the respondent to move court once more through an application dated 16th November, 2015 primarily seeking that;

“The appeal preferred from the decision of the Chief Magistrate's court is dismissed for failure to comply with an express order requiring the appellant to seek directions on hearing of the appeal within 45 days from 18.09.2015.”

3. The Judge heard the respective submissions of the parties and in a ruling delivered on 16th November, 2015, the court (Omollo J.) found the appellant to have been indolent and on this ground, allowed the respondent's application and dismissed the appeal for want of prosecution and also for failure to comply with the orders of the court issued on 18th September 2015.

4. That ruling has spurred this appeal, wherein it is contended that the learned Judge erred by; dismissing the appellant's appeal on the basis of a technicality; reaching a conclusion on the matter whilst ignoring the appellant's pending application dated 24th February, 2016; failure to appreciate that the appellant had the right to orally apply for enlargement of time; relying on the principle of inordinate delay to dismiss the appeal yet there was abundant evidence showing that the matter had been before court severally; failure to appreciate that the appeal is protected and sustained by **Sections 3 and 3A Civil Procedure Act**; failure to appreciate and apply the guidelines and rules on handling of land matters as per **Section 19(2) Environment and land court Act** and; holding that the respondent was suffering, yet no substantive evidence had been produced in support of this assertion.

5. The appeal was ventilated through written submissions. On his part, learned counsel for the appellant **Mr. Gekonde**, conceded that the appellant had indeed failed to file an application for directions within 45 days as ordered by the court; but hastened to add that the omission

was the mistake of counsel and should not be visited on the client. It was also submitted that the court never gave any penalties that would accrue in the event the appellant failed to have the matter fixed or directions as ordered by the court. Aside from that, he contended that the appellant had made efforts to have the matter fixed for directions vide an application dated 24th February, 2016, but the respondent always frustrated those efforts by filing numerous applications thus clogging the court process.

Citing the decision in **Misc. Civil Application No 270 of 2001; Lt. Cornel Joseph Muteli Igweta v. Mukila M'Ethare & Another**; counsel stated that courts should avoid denial of justice to a litigant on the basis of procedural technicalities. Further, that the pursuit of justice by an honest litigant should never be defeated on the basis of any missteps he may make in litigation. In this regard, he said, the trial court was well aware that the appellant had the right to orally apply for enlargement of time under **Section 95 Civil Procedure Act**, yet the court still denied him that right. Counsel emphasized that the provisions of **Section 19 Environment and Land Court Act** specifically discourage undue regard to procedural technicalities and instead requires that the court be guided by principles of natural justice. On that note, this court was urged to allow the appeal.

6. Opposing the appeal, learned counsel for the respondent **Mr. Kimani** reiterated that the appellant's indolence was inexcusable. He urged this Court to adopt the principle laid out in the case of **Ketterman & Others v. Hansel Properties [1988] 1 All ER 38** for the contention that courts no longer encourage litigants to adopt a leisurely approach to litigation. With regard to the appellant's application for directions, counsel pointed out that the said application was filed long after the 45 day window directed by court on 18th September, 2015 had lapsed; and also after the respondent had filed his application for dismissal for noncompliance. If anything, counsel said, this belated application for directions was rightly ignored by court. In his view, the said application was *sub judice* and only aimed at scuttling the respondent's application for dismissal of the appeal.

7. It was further submitted that from a legal standpoint, the appellant's right to move court for directions and/or for enlargement of time were extinguished the moment the respondent moved court for dismissal of the appeal for noncompliance with court directions. On the whole, that it was apparent that the appellant was most indolent in the matter and the contention that the court should have granted her enlargement of time is wholly misplaced. In addition, that the appellant never proffered an explanation as to why she had failed to have the matter listed for directions. Equally important, that she had not moved the first appellate court seeking enlargement of time within which to comply with its directions and consequently, she was disentitled to any further indulgence by court. Counsel concluded by stating that the provisions of **Sections 3 and 3A Civil Procedure Act** as well as **Section 19 Environment and Land Court Act** were inapplicable to this case, as the finding by the trial court did not offend any of these provisions. Rather, the finding that the respondent stood to be prejudiced was within reason and was based on the averments contained in the respondent's affidavit. All in all, neither the court nor the respondent is obliged to wait on an indolent litigant. He urged this court to so find and to dismiss the appeal with costs.

8. *This being a first appeal, the duty of this court is as stated in Kenya Ports Authority versus Kustron (Kenya) Limited (2009) 2EA 212; wherein the Court of Appeal held, inter alia, that:-*

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

With that in mind, the sole issue for determination herein is whether the first appellate erred in dismissing the appellant's appeal on account of her indolence. It is without doubt that the ruling delivered on 18th September, 2016 required the appellant to take steps to have the matter listed for directions within 45 days of the ruling date. It is common ground that the appellant failed to act within the 45 days stipulated by court.

9. Regardless, the appellant contends that by dismissing her appeal, the first appellate court was basing its decision on a technicality and was deliberately oblivious to the appellant's right to seek enlargement of time as provided for under **Section 95 Civil Procedure Act**. As rightly submitted by the parties, once the 45 day window lapsed, the only option available to the inactive appellant was to seek enlargement of time. The appellant has argued that in disposing of the respondent's application, the superior court below should have contemporaneously considered the appellant's application for enlargement of time. However, from the record, this Court notes that the appellant's application was belatedly filed after the respondent had already moved the Court for dismissal in the proceedings that are the subject of this appeal. Furthermore, when the appellant's application came up for hearing on 13th April, 2016, the appellant was not keen on proceeding with its prosecution and sought an adjournment. How then can the appellant fault the court for not being mindful of the merits of that application in its subsequent sitting?

10. A court can only entertain the material presently before it. The contention that it was bound to be attentive of the other pending application is an erroneous exposition of the law. Having failed to timeously pursue enlargement of time, the sole issue for determination by the first appellate court was the respondent's application for dismissal of the appeal. In this regard, the procedure and powers of the first appellate court in this case are as laid out under **Section 19 Environment and Land Court Act**, which states as follows:

1. In any proceedings to which this Act applies, the Court shall act expeditiously, without undue regard to technicalities of procedure.
2. The Court shall be bound by the procedure laid down by the Civil Procedure Act.

Did the first appellate court give undue regard to technicalities of procedure as claimed by the appellant? The appellant has sought to attribute her inaction to mistake by counsel. In the words of Madan JA in **Belinda Murai & others v Amos Wainaina (1978) LLR 2784**,

“A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel.....The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know

better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate..." (our emphasis)

Those words reign true in the present case. Mistake of counsel or not, the appellant was indeed given an opportunity to mend her indolent ways. Sadly, all she has done is sit on her laurel only to later be seen to say that the condition imposed by court was never accompanied by a penalty. That flippant attitude is what Lord Griffith seemed to have had in mind when he stated in the case of **Ketterman & Others v Hansel Properties Ltd [1988] 1 ALL ER 38** that:-

"...Legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of lawyers to fall on their own heads rather than allowing an amendment at a very late state in the proceedings..."

As rightly submitted by **Mr. Kimani**, that leisured age when a litigant could simply attribute his shortcomings to mistake of counsel is over.

11. As earlier stated, the appellant herein blatantly failed to take steps to have the matter listed for directions; she was nonetheless extended a 45 day lifeline. Again she failed to take heed, only to later term that failure as a mere technicality attributable in any event, to her counsel, all the while contending that the Civil Procedure Rules were inapplicable to the matter and that the court was only bound by rules of natural justice and should have avoided determining the matter on the basis of undue regard to procedure.

As clearly provided under **Section 19(2)** aforesaid, the ELC was bound by the Civil Procedure rules. **Order 42 rule 13 (1)** thereof requires an appellant to cause the appeal to be listed for the giving of directions within 21 days of service of the memorandum of appeal. As stated by this court in the case of **Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others Civil Appeal No. 290 of 2012;**

"In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under Section 1A and 1B of the Civil Procedure Act (Cap 21) and Section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases."

12. Therefore, as rightly held by the ELC, the appellant was bound to observe and comply with the Civil Procedure Rules as well as the directions of the court. Consequently, the argument that the respondent's applications had served to clog or fetter the appellant's efforts to have the matter listed for directions is neither here nor there. As per the record, the only interlocutory application filed by the respondent after the directions of 18th September, 2015 is the application seeking dismissal of the appeal for noncompliance with those very directions. In other words, the said application was necessitated by the appellant's failure to take steps to have the matter listed for hearing. At the time the said applications were lodged, the 45 day window the appellant had been given by court had already lapsed.

13. On the whole therefore, the first appellate court was right in finding that the appellant had been indolent and this court has been given no reason to interfere with that finding. We are mindful of the fact that the original suit giving rise to these proceedings was filed in 1994. The respondent has yet to enjoy the fruits of her judgment 24 years down the line. Although parties are always in haste to invoke the "overriding principle" when seeking favourable exercise of discretion by the courts or covering up for some infractions they may have committed, they tend to forget that **Section 1A (3) Civil Procedure Act** as well as **section 3A Appellate Jurisdiction Act** enjoins them to assist the court in ensuring that court directions are complied with and that justice is dispensed expeditiously. A party cannot egregiously fail or refuse to comply with directions of the court claiming that the said directions were salutary and not accompanied by any sanctions and hope to seek refuge in the overriding principle. That in our view amounts to gross abuse of court process. There must be an end to litigation and it behoves this Court to tell the appellant that its journey ends at this point.

14. We have said enough to demonstrate that this appeal is for dismissal. We dismiss it with costs to the respondent.

Dated and delivered at Mombasa this 8th day of November, 2018.

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR