



**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)**

**CIVIL APPEAL NO. 58 OF 2015**

**FERRUZ OMAR MAHENDAN**

**MALKIA OMAR MAHENDAN**

**ANZUN OMAR MAHENDAN**

**NURU OMAR MAHENDAN**

**MARIAM OMAR MAHENDAN.....APPELLANTS**

**VERSUS**

**AHMED MOHAMED HONEY.....RESPONDENT**

*(Appeal against the ruling and order of the High Court of Kenya at Malindi*

*(Meoli, J.) dated 20<sup>th</sup> June, 2014*

*In*

*(Civil Appeal No. 15 of 2011.)*

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**JUDGMENT OF THE COURT.**

A brief background to the circumstances leading to this appeal is apposite. The dispute revolves around the estate of the late Batuli Omar Mahendan who died sometimes in the year 2006. The respondent is the widower of the deceased whereas the appellants are the sisters and brother to the deceased. Following the death of the deceased, the respondent lodged a petition in the Kadhi's Court at Malindi. According to the petition, the respondent was the sole survivor entitled to inherit the estate of the deceased comprising 4 houses, a hotel and a parcel of land all situate in Malindi.

The appellants disputed that contention. In answer to the petition and cross-petition, the appellants claimed that the assets mentioned in the petition belonged to their deceased parents and that upon their demise the same devolved to them as their children including the deceased. They further claimed that the respondent had immediately after the death of the deceased relinquished his interest in her estate on the ground that he had no children to inherit his estate if he was to pass on.

The cause was subsequently heard and in a judgment delivered on 26<sup>th</sup> February, 2010, the Kadhi found in favour of the respondent to the extent that he was entitled to inherit the share of his deceased's wife in the ratio of 7/14 of 1/8 of the entire estate of her deceased parents.

Aggrieved by the decision, the appellant's lodged an appeal at the High Court at Malindi on 31<sup>st</sup> February, 2011. Contemporaneous with the filing of the appeal, the appellants took out a motion on notice seeking stay of execution of the Kadhi's judgment pending the hearing and determination of the appeal. After hearing the application interpartes, **Meoli, J.**, allowed it on condition that the appellants deposited a sum of Kshs.2,000,000/- as security in an interest earning account within 10 days and that the appeal be set down for hearing within 6 months. None of the above conditions were, however, met by the appellants. The appellants instead filed yet another application to review the order regarding the conditional deposit of Kshs.2,000,000/-. The application was successful and Meoli, J. reduced the sum to Kshs.1,000,000/=. Again, this subsequent order was not complied with by the appellants. This forced the respondent to file an application dated 28<sup>th</sup> June, 2012, seeking orders of injunction as well as dismissal of the appeal on grounds that the appellants had failed to comply with the orders of the court and had also not taken any steps to prosecute the appeal.

In its ruling delivered on 25<sup>th</sup> October, 2013, the High Court held *inter alia*:

**"...the consequence of failure (by the appellants), to deposit such security is that the order for stay of execution lapses automatically once the period has expired. In this case, the period expired ten days after the order of 28<sup>th</sup> February, 2012... In the circumstances, the respondent is at liberty to execute the judgment of the Kadhi's Court. His prayer for an injunction against the appellants is superfluous..... Finally, I have to state that the appellants have not explained their failure to take the necessary steps to prosecute this appeal. Mere unsupported allegations that the court has not supplied proceedings are only excuses. It is now over two years since the appellants filed their memorandum of appeal..."**

However, the High Court rather than dismissing the appeal granted the appellants a 30 days respite within which to file and prosecute the appeal failing which the respondent was at liberty to renew the application. Again, there was non-compliance by the appellants. It was then that the respondent took out the application dated 27<sup>th</sup> February, 2014 specifically seeking that the High Court dismisses the appeal for want of prosecution, on the grounds that the appeal lodged by the appellants way back in 2011, had not been set down for hearing; the appellants had failed to comply with the directions of the court, had failed to comply with the mandatory provisions of **Order 42** of the **Civil Procedure Rules**; the court had by its ruling on 25<sup>th</sup> October, 2013, allowed the respondent to apply for the dismissal of the appeal for want of prosecution; the respondent was suffering detriment as he had been denied the fruits of his victory; was also an old man who required the intervention of the court so that he could enjoy his victory before he passed on; and finally that the new **Civil Procedure Act** and **Rules** made it incumbent upon the court and all litigants to co-operate to ensure just and expeditious resolution of civil disputes.

In opposing the application, the appellants claimed that they were not to blame for the delay in setting down the appeal for hearing; that in fact it was the court to blame for not availing the typed proceedings in time or at all; and that they had done all they could to get the proceedings to no avail. They adverted to several visits to the office of the Deputy Registrar in this regard.

After hearing the application interpartes, in a ruling delivered on 20<sup>th</sup> June, 2014, the High Court allowed the application holding that:

**"9. The record of this matter is replete with evidence of tardiness on the part of the appellants. It would seem that they would prefer to prosecute the appeal at their leisure, court orders notwithstanding there has been inordinate delay. Their counsel now submits that the appeal has never been admitted yet he is aware that no proceedings, not even the judgment of the Kadhi's Court had been placed on the record to facilitate action under Order 42 rule 11 of the Civil Procedure Rules. Neither had he moved the court as required under**

**the said order.**

**10. It is my considered view that the appellants are not keen on prosecuting their appeal and that perhaps the complaint by the respondent that it is a deliberate design to maintain the status quo that favours them, may have merit. A party whose conduct discloses an intention to obstruct or delay court proceedings and who takes court directions as to disposal in a casual manner cannot expect the court to exercise its discretion in their favour. In the circumstances of this case, I am satisfied that the respondent's application for dismissal of the appeal is merited. The same is allowed with costs".**

It is this ruling that has spurred this appeal. Nine grounds of appeal are advanced by the appellants to impugn the ruling. Generally, they complain that the High Court erred in both law and fact by failing to appreciate that the typing of the proceedings was beyond the control of the appellants; failed to direct its attention to the provisions of **Section 1A, 1B and 3A** of the **Civil Procedure Act**; failed to direct its mind to the provisions of **Article 159** of the **Constitution**; failed to appreciate the numerous applications filed by the parties that may have contributed to the delay; failed to appreciate that this was a succession cause that required more care and attention; and that the court was unfair to them.

When the appeal came before us for hearing, parties agreed to canvass it by way of written submissions. Subsequently, parties filed and exchanged written submissions that we have carefully read and considered.

It is obvious that in determining whether or not to dismiss the appeal for want of prosecution, the High Court was exercising its wide and unfettered discretion. An appellate court will rarely interfere with such exercise of discretion unless it is manifest that the lower court was clearly wrong in the exercise of the discretion. See **Mbogo v Shah, (1968) E.A. 93**. We have not been shown anything untoward in the High Court's exercise of discretion. It was further held in the above authority that the exercise of such discretion is not designed to assist a person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice. The conduct of the appellants in these proceedings right from the Kadhi's Court to date can only be said to be a study on how to obstruct and divert the flow of the streams of justice. The record is replete with acts of indolence and brazen disobedience and disregard of court orders by the appellants. We do not see how such conduct would prick the court's discretionary conscience. As correctly put and observed by the High Court, a party whose conduct discloses an intention to obstruct or delay court proceedings and who takes court directions as to disposal of an appeal in a casual manner cannot expect the court to exercise its discretion in his favour. These statements clearly captures the conduct of the appellant's and in our view, the High Court was right in not exercising its unfettered discretion in their favour. They cannot now be heard to claim that they were not fairly treated by the High Court after dismissal of their appeal for want of prosecution.

Of course, in the exercise of discretion, the court looks at the conduct of the parties in the proceedings. If the conduct of a party is appalling as in this case, the court will rightly refuse to exercise its discretion in his favour. There is on record unchallenged and undisputed evidence that the appellants were determined by their utterances and conduct to lock out the respondent from the estate of their parents and thereafter, their sister's. In doing so, they have deliberately sought to subvert the court process.

**Sections 1A, 1B and 3A** of the **Civil Procedure Act** which the appellants pin their hopes on are explicitly intended to ensure that the courts are not clogged with cases that cannot be disposed of due to the indolence or deliberate actions of litigants. In other words, they explicitly compel all litigants to cooperate with the court to ensure the expeditious disposal of cases and compliance with court orders is one such tool. The appellants' delay in filing the record of appeal in time and the violation of various court orders clearly falls foul of the overriding objective and amount to the very mischief that the rules were intended to prevent. The same reasoning would apply to the invocation of **Article 159** of the **Constitution**. Much as the Article demands that the courts should look at the substantial justice rather than procedural technicality it is also tells us that justice should not be delayed.

**Order 42** of the **Civil Procedure Rules**, upon which the appellants also hinge their appeal sets out

timelines to be met in the prosecution of appeals. The appellants failed to meet any of the timelines and even the extensions granted to them by the court. The Supreme Court has time and again emphasized that litigants are bound by timelines and that failure to do so would attract sanctions. See **Zacharia Okoth Obado v Edward Akong'o Oyugi & 20 Others, (2014) eKLR** and **John Ochanda v Telkom Kenya Limited, (2014) eKLR**. This is a clear case where the appellants did not bother to pursue the timelines. Rather, they sat back under the pretext that they were waiting for typed proceedings. The appellants' contention that the application for dismissal of the appeal was premature or made without jurisdiction in that regard is a distortion of facts. The main consideration was whether the appellants had demonstrated sufficiently their appetite to prosecute the appeal by observance of the time lines. They were found lacking in that regard and correctly so in our view. There is no cogent evidence such as correspondence exchanged between the appellants and the Deputy Registrar, regarding the delay in availing the proceedings to buttress their contention that the filing and prosecution of the appeal was hampered by non-availability of the typed proceedings. Nor is there evidence of the alleged encounter between them and the Deputy Registrar on the issue. Any diligent litigant would have bombarded the Deputy Registrar with correspondence over the issue failing which he would have escalated the matter to another level. This not the case here.

In the end, we are satisfied just like the High Court that the appellants' conduct was undeserving of the court's mercy and was deliberately calculated to deny the respondent the fruits of his victory over them. We accordingly dismiss this appeal with costs to the respondent.

**Dated and delivered at Mombasa this 22<sup>nd</sup> day of April, 2016.**

**ASIKE MAKHANDIA**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**