



Mugoya & another v Momanyi & another (Suing as the Administrators of the Estate of the Late Zablon Momanyi Omwenga (Deceased)) (Civil Appeal 99 of 2021) [2024] KEHC 1810 (KLR) (29 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1810 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 99 OF 2021
PN GICHOHI, J
FEBRUARY 29, 2024**

BETWEEN

VINCENT MAKORI MUGOYA 1ST APPELLANT

FRANCIS MUGA ADHIAMBO 2ND APPELLANT

AND

SAMSON MOGUSU 1ST RESPONDENT

GRACE KERUBO MOMANYI 2ND RESPONDENT

SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE ZABLON MOMANYI OMWENGA (DECEASED)

RULING

1. On 15/03/2022, the Appellants filed a Notice of Motion Application dated 28/02/2022 praying for orders:
 1. ... Spent;
 2. ... Spent;
 3. That this Appeal being Kisii HCCA No. 99 of 2021; Vincent Makori Mugoya & Francis Muga Adhiambo v Grace Kerubo Momanyi & Samson Mogusu (Suing as the Administrators of the estate of the late Zablon Momanyi Omwenga) be and is hereby reinstated for hearing and determination in the normal way;
 4. That this Court be pleased to extend the time afforded to the Appellants to file their record of appeal;



5. That this Court be pleased to call upon the lower court to expedite supplying the proceedings and documents required by the Appellants to compile their record of appeal;
 6. That this Court does make any such further order(s) and issue any other relief it may deem just to grant in the interest of justice;
 7. That costs of the Application be in the cause.
2. As discerned from the material placed before this Court, the background of the application herein is that being aggrieved by the trial court's judgment delivered on 28/07/2021 in Kisii CMCC No. 359 of 2019; *Grace Kerubo Momanyi & Samson Mogusu (Suing as the Administrators of the Estate of the late Zablon Momanyi Omwenga (Deceased))*, the Applicants filed a Memorandum of Appeal on 18/08/2021.
 3. However, they are yet to file a Record of Appeal and the reason advanced in this Application is that they have been unsuccessful in obtaining the proceedings from the trial court.
 4. The Court record shows that when the Appeal came up for directions on 25/11/2021, the Appellants were ordered to file the Record of Appeal within thirty (30) days from the date of that order failure to which the Appeal stood dismissed. In effect, the Appeal was dismissed thirty (30) days after the said orders.
 5. Annexed to the Supporting Affidavit sworn by their Advocate Victor Ng'angá on 28/02/2022, are letters dated 28/01/2022, 11/01/2022 and 01/12/2021 marked VT1, VT2 and VT3 respectively to support the Appellants' position that failure to file the Record of Appeal was inadvertent and through no fault of their own. That it was occasioned by the backlog encountered in the subordinate court's registry.
 6. The Appellants therefore invoked Article 48 and 159 (2) (d) of the *Constitution*, Section 1A, 1B, 3A and 95 of the *Civil Procedure Act*, Order 45, Rule 1, Order 42, Rule 6 & 21, Order 50, Rule 6 and Order 51, Rule 1 of the *Civil Procedure Rules* arguing that while execution was imminent following dismissal of the Appeal and hence, they stood to suffer irreparable loss, prejudice and harm if the orders sought were not granted.
 7. They argued that no prejudice would be occasioned to the Respondents if the orders sought were granted since adequate security was deposited in Court on 09/10/2021. In support, they annexed a copy of the bank deposit slip dated 09/10/2021 marked VT4.
 8. The Appellants therefore sought this Court's intervention in calling for the lower court file to expedite supply of the typed proceedings required to file the Record of Appeal. They added that they were desirous of prosecuting the Appeal timeously and therefore, they should thus not be driven away from the seat of justice. Lastly, they stated that the Appeal was arguable and ought to be reinstated, heard and determined on its merits.
 9. The Application is opposed. The Respondents relied on the 1st Respondent's Replying Affidavit sworn on 20/04/2022 and filed on the same date to abridge the facts of the case from inception of the Memorandum of Appeal. They observed that the letters marked VT1, VT2 and VT3 were not copied to their Counsel. As such, they questioned the veracity of the said documents.
 10. Further, they stated that the letter dated 28/02/2022 was only received in the court registry on 02/03/2022, an indication of indolence on the part of the Appellants. They further highlighted the Appellants' failure to comply with the Court by failing to file the record within thirty days at the



first and second instance, and failing to meet their costs. The Respondents therefore deponed that the Appellants were in contempt of Court hence undeserving of the orders sought herein.

11. While emphasising that litigation must come to an end, the Respondents deponed that Article 48 and 159 (2) (d) of the *Constitution* do not apply in the circumstances herein as the Appellants had been accorded enough opportunity to exercise their right to access justice but they have abused that right by trampling on the on the Respondents' right to have the case heard expeditiously.
12. The Respondents stated that to allow the said Application would be tantamount to denying the Respondents enjoyment of their fruits of the judgment. For those reasons, the Respondents prayed that the Application be dismissed with costs.
13. The Application was disposed of by way of written submissions. In their submissions dated 17/12/2022 filed on 24/03/2023, the Appellants rehashed their application and while citing several authorities in support, they submitted their Application is merited and ought to be allowed.
14. On their part, the Respondents submissions are dated 24/03/2023 and filed on the same date. Similarly, they reiterated the contents of their Repeating Affidavit and urged this Court to dismiss the Application with costs.

Determination

15. This Court has considered the Application, Affidavits and submissions. The issue is whether the Appellants deserve the orders sought. The Court record shows that on 21/10/2021, the Appellants sought thirty (30) days to file the Record of Appeal for reasons that the court proceedings were not ready. The Court directed that the same be filed within thirty (30) days for directions on 25/11/2021.
16. Come 25/11/2021, the Appellants were given a further thirty (30) days to file the Record of Appeal failing which the Appeal would stand dismissed. They were also ordered to pay the Court adjournment fees and the Respondent's costs before the next hearing date. The Court then directed that the matter be mentioned on 22/02/2022. In the meantime, the Deputy Registrar was directed to call for the lower court file.
17. Among other provisions of the law, the Appellants have moved this Court Counsel has also invoked Section 1A and 1B of the *Civil Procedure Act* in his argument that courts are enjoined to give effect to the overriding objective in exercise of its powers. The said sections provide: -

1A

- (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

1B.



- (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
 - (a) the just determination of the proceedings;
 - (b) the efficient disposal of the business of the Court;
 - (c) the efficient use of the available judicial and administrative resources;
 - (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
 - (e) the use of suitable technology.” [Emphasis added]

18. There is no evidence of compliance with any of the above orders and the Appellants herein have only focussed on the issue of availability of the typed proceedings. Though the issue was raised in the Respondent’s Replying Affidavit, there is no comment from the Appellants on the issue of failure to pay Court adjournment fees and costs to the Respondent as directed. This order is not at all pegged to the availability of typed proceedings or availability of the lower court file and therefore there is no compliance with the very provisions of the law that the Applicants rely on.

19. On the issue of failure to obtain the typed proceedings, the Appellants deponed:-

“The delay in filing the Record of Appeal has not been the fault of the Appellants and the same has been occasioned by the backlog encountered in the lower court ‘s typing pool.”

20. Regarding difficulty faced by a party trying to obtain the typed proceedings, Edward M. Muriithi, J in the case of *Bernard Muthee & another v Anita Kamba Mwiti* [2021] eKLR held:-

“Concerning the reasons advanced of difficulties in obtaining the record of typed proceedings from the court registry, this court recognizes that there is an avenue to file an initial record of appeal and thereafter file a supplementary record once the proceedings are obtained. This would have been the best course to take and would be more convincing bearing in mind that it was over a period of 8 months between the date when the appellants were ordered to file their record of appeal on December 5, 2019 and when the order confirming the dismissal was made on July 27, 2020. The appellants have also failed to annex evidence in form of correspondence or otherwise to confirm what efforts, if any, they made to secure the said typed proceedings. It is not enough to make mere averments devoid of supporting evidence.”

21. Whereas the Appellants in this case annexed correspondence showing the request for the proceedings, the said letters were very casual. Despite the fact that there was danger of the Appeal being dismissed for failure to file the Record of Appeal, the Appellants never bothered to annex the order by the Court so as to be accorded utmost priority and be supplied with the proceedings.

22. Litigation must surely come to an end. In the circumstances of this case, the Appellants not only failed to act with due diligence but also failed to comply with the Court orders herein.

23. Consequently, the Application dated 28/02/2022 lacks merit and is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED (VIRTUALLY) AT KISII THIS 29TH FEBRUARY, 2024.

PATRICIA GICHOHI



JUDGE

In the presence of:

N/A for Applicants

N/A for Respondent

Saewa/ Aphline, Court Assistant

