



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT THIKA

ELCA NO 16 OF 2021

DANIEL MAINA NJOROGE1ST APPLICANT/APELLANT

JOSEPH NJOROGE MBURU2ND APPLICANT/APELLANT

JACKSON MWAURA MBURU..... 3RD APPLICANT/APELLANT

PETER MAINA MBURU.....4TH APPLICANT/APELLANT

VS

JOHN NDUNGU MAINARESPONDENT

RULING

1. It is the Appellant's Application dated the 26/10/2021 and filed on the 28/10/2021 seeking the reinstatement of the Appeal dismissed on the 25/10/2021 for non-attendance.
2. The Application is supported by the grounds adduced thereto and the Affidavit of Andrew N Gachoka, the Learned Counsel for the Applicants. That his law firm was not served with the mention notice for the 25/10/2021 despite being on record for the Applicants. That it is the firm of **Kamuiru Muiru** that was served instead. He faulted the Respondents Advocates Application for dismissal despite not being served with the said notice and that in any event the matter was coming up for mention for directions and not hearing. He urged the Court to reinstate the Appeal so that his clients are afforded the opportunity to be heard on their Appeal.
3. The Application is opposed by the Respondent vide his Replying Affidavit dated the 19/11/2021 and filed on the 25/11/2021. That the firm of **Kamuiru Muiru Advocates** acted for the Respondent interchangeably with that of **Gachoka & Co Advocates** and that explains why the former firm of Advocates was served. That the dismissal was long overdue, regular and justified as the matter had been fixed for mentions on the 22/4/2021, 21/6/2021, 8/9/2021 and 25/10/2021 when neither the Applicants nor their Advocates were present. He urged the Court to uphold the dismissal to allow him the opportunity to enjoy the fruits of the Judgment in his favour.
4. On the 21/11/2021 the Learned Counsels for the parties argued the Application orally in open Court. Each reiterated the contents of the Supporting Affidavit/Replying Affidavit on record which submissions I have read and considered.
5. The key issue for determination is whether the Applicants are deserving of the reliefs sought.

6. According to the record, the Appeal was filed on the 23/2/2021 and several mention dates have been taken to progress the hearing of the same in vain. The lower Court file is now annexed and the record of Appeal was filed on the 17/6/2021. It is on record that the matter was listed for mention to take directions on the 25/10/2021 when on Application of the Respondents counsel the Appeal was dismissed. It is the Applicant's case that their Advocate was not served with the said notice. Secondly that the matter was coming up for directions and not hearing to warrant a dismissal.

7. **Section 3A** of the Civil Procedure Act (CPA) which provides that nothing in the 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. This section is preceded by sections 1A and 1B that are popularly known as the oxygen principles. They state;

1A. Objective of Act

(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. Duty of Court

(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

8. Reinstatement of a suit is a discretionary remedy of the Court. It can only be granted to a deserving litigant who lays a sufficient basis for it. In the case **Shah -vs- Mbogo & Another (1967) EA 116**, the Court stated that such discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to pervert, prevent and or obstruct or delay the course of justice.

9. A perusal of the Court record shows that the firm of **Gachoka & Co Advocates** has been representing the Applicants both in the trial Court and on Appeal. It is admitted that another disclosed law firm was served with the directions scheduled for the 25/10/2021.

10. Dismissal of an Appeal is governed by Order 42 rule 35 (1) and (2) of the Civil Procedure Rules. The directions must have been given under rule 13 by the Court. If the Appellant fails to set the Appeal for hearing 3 months after giving directions, the Respondent shall be at liberty either to set down the Appeal for hearing or apply for summons for its dismissal for want of prosecution. I note from the record that the dismissal was premature, this step having been missed by the respondent.

11. Secondly, the Respondent failed to serve the Applicants counsel on record thus denying the Applicants the right to be heard. Am guided by the provisions of Art 48 and 50 of the Constitution on the right to be heard , which right should not be taken lightly.

12. I find that for the reasons given above, this is a case which I shall exercise my discretion to avoid an injustice and allow the Application with no orders as to costs.

13. It is so ordered.

DELIVERED, SIGNED & DATED ON THE 21ST DAY OF APRIL 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of:

Gachoka for the Applicants

Ms. Njihia for the Respondentss

Court Assistant: Phyllis



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