Case Number:	Civil Appeal 49 of 2013
Date Delivered:	23 Jun 2014
Case Class:	Civil
Court:	Court of Appeal at Nyeri
Case Action:	Judgment
Judge:	Alnashir Ramazanali Magan Visram, Martha Karambu Koome, James Otieno Odek
Citation:	Cecilia Wanja Waweru v Jackson Wainaina Muiruri & another [2014] eKLR
Advocates:	Mr Wanadaka for the Appellant Mr Njoroge for the Respondents
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nyeri
Docket Number:	-
History Docket Number:	H.C.C.A No. 56 of 1999
Case Outcome:	Appeal dismissed
History County:	Nyeri
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A)

CIVIL APPEAL NO. 49 OF 2013

BETWEEN

CECILIA WANJA WAWERU …….. APPELLANT

AND

JACKSON WAINAINA MUIRURI …… 1ST RESPONDENT

LUCY NDUTA RIUNGE …….. 2ND RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Nyeri (Ombwayo, J.) dated 30th October, 2013

in

H.C.C.A No. 56 of 1999)

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JUDGMENT OF THE COURT

1. On 18th June, 1999 the appellant filed an appeal in the High Court against the judgment of the Resident Magistrate's Court at Muranga in Succession Cause No. 160 of 1999. However, on 13th February 2009 the appeal was dismissed for want of prosecution. Thereafter, on 13th May, 2013 the appellant filed an application in the High Court seeking reinstatement of the appeal. The grounds in support of the application were that, the appellant instructed the firm of Wandaka Gathaara & Co. Advocates to file an appeal against the decision of the subordinate court; the appeal was filed on 18th June, 1999; the appellant's advocate was never served with the notice of the court's intention to dismiss the appeal. The appellant's advocate only discovered that the appeal was dismissed on 2nd April 2013 upon perusing the court file. The appellant maintained that she has always been ready and willing to prosecute the said appeal.

2. In opposing the application, the respondents filed replying affidavits. They deposed that no cogent explanation had been given as to why it took so long for the appellant to learn about the dismissal. The appellant also failed to explain the delay in filing the application for reinstatement. The respondents maintained that in the event the application was allowed they would suffer prejudice since the judgment of the subordinate court had already been executed.

3. After considering the application on merits, the learned Judge (Ombwayo, J.) vide a ruling dated 30th October, 2013 declined to reinstate the appeal. It is that decision that has provoked this appeal based on the following grounds:-

- ***The learned Judge erred in law and in fact in finding that the application had not been filed within reasonable time.***

- ***The learned Judge misconstrued the law by holding that the application for reinstatement of the appeal was to be filed within 30 days.***

- ***The decision rendered by the learned Judge was entirely based on technicalities and was therefore wrong in principle and unjust.***

- ***The learned Judge erred in failing to consider the appellant's argument that she was ready and willing to have the appeal heard.***

4. Mr. Wanadaka, learned counsel for the appellant, submitted that the learned Judge did not exercise his discretion properly by dismissing the application seeking reinstatement of the appeal. According to him, the only issue was the delay in filing the application. He argued that there was no rule of law that required the appellant to file the application within 30 days of the dismissal of the appeal. Mr. Wandaka submitted that the application was filed without inordinate delay. He argued that the appellant was denied an opportunity to be heard and a fair trial contrary to her fundamental rights under the Constitution. He urged us to allow the appeal.

5. Mr. Njoroge, learned counsel for the respondents, submitted that the appeal in the High Court was admitted 14 years ago and dismissed 10 years later. He argued that the appellant was in a deep slumber; and filed the application for reinstatement four years after dismissal of the appeal. According to him, the delay was inexcusable and urged us to dismiss the appeal.

6. We have considered the grounds of appeal, the record, submissions by counsel and the law. The issue that is before us is whether the learned Judge (Ombwayo, J.) erred in declining to reinstate the appellant's appeal. We take note that the learned Judge in declining to reinstate the appeal exercised his discretionary jurisdiction. Therefore, before we can interfere with the learned Judge's discretion we must be satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or, that he misapprehended the law or failed to take into account some relevant matter. In ***Mbogo & Another- vs- Shah (1968) E.A. 93*** at page 95, Sir Charles Newbold P. held,

"……a Court of Appeal should not interfere with the exercise of the discretion of a single judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjuctice…."

7. The appellant's appeal in the High Court was dismissed for want of prosecution under ***Order XLI Rule 31(2)*** of the former Civil Procedure Rules (***Order 42 Rule 35(2)*** of the current ***Civil Procedure Rules).*** The learned Judge held that the appellant had offered a reasonable explanation for the delay of filing the application for reinstatement up to 2nd April, 2013 when she learnt about the dismissal. However, he found that from 2nd April, 2013 up to 13th May, 2013 when the application was filed there was a delay of 40 days which was inordinate; no explanation was given for the said delay. There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case. We are of the considered view that the learned Judge in

considering the application, should have looked at the appellant's conduct from the time the appeal was filed up to the date the application for reinstatement was filed.

8. This Court in ***Richard Nchapi Leiyagu -vs- IEBC & 2 others- Civil Appeal No. 18 of 2013,*** while considering circumstances under which an *exparte* order may be set aside expressed itself as follows:-

"We agree with the noble principles which go further to establish that the court's discretion to set aside an exparte 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."

9. We have to ask ourselves whether the failure by the appellant to prosecute the appeal in the High Court and/or the delay in filing the application for reinstatement constituted an excusable mistake or was it meant to deliberately delay the cause of justice. The appeal in the High Court was filed on 18th June, 1999 and dismissed for want of prosecution on 13th February, 2009, 10 years after. We note that no explanation was adduced by the appellant as to the steps, if any, she took to prosecute the appeal within the said period. The application seeking reinstatement of the appeal was filed on 13th May, 2013, four years after the dismissal. The reason advanced by the appellant for the delay in filing the application was that her advocates were never served with the notice of the court's intention to dismiss the appeal. The appellant only discovered the dismissal on 2nd April, 2013. Be as it may, why didn't the appellant peruse the court record earlier or follow up on the appeal" Why didn't she set the appeal down for hearing for almost 14 years" The reasonable explanation would be that the appellant had been indolent and had slept on her rights. She was only awakened from her slumber by the dismissal of the appeal.

10. On the issue of the right to be heard, this Court in ***Richard Nchapi Leiyagu -vs- IEBC & 2 others (supra)*** held:-

"The right to a hearing has always been a well protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality."

We find that reinstating the appeal in the High Court would amount to an abuse of the court process and injustice. We see no reason to interfere with the learned Judge's discretion.

11. The upshot of the foregoing is that the appeal lacks merit and is hereby dismissed with costs to the respondents.

Dated and delivered at Nyeri this 23rd day of June, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

……

JUDGE OF APPEAL

J. OTIENO-ODEK

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR