



**Gachanja & another v Waruiru (Civil Appeal 151 of 2023)
[2024] KEHC 8990 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8990 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 151 OF 2023
FN MUCHEMI, J
JULY 25, 2024**

BETWEEN

PETER KABUNIA GACHANJA 1ST APPLICANT

STEPHEN GACHANJA KABUNIA 2ND APPLICANT

AND

CAROLINE LUCY WARUIRU RESPONDENT

RULING

1. The application for dated 31st January 2024 seeks for orders readmit the instant appeal for hearing.
2. The respondent filed a Replying Affidavit dated 18th March 2024 in opposition to the application.

The Applicants' Case

3. The applicants state that they lodged an appeal in Kiambu HCCA High Court No. E067 of 2022 for they were aggrieved by the judgment in Thika CMCC No. 1034 of 2016 delivered on 31st March 2022. The applicants thereafter deposited Kshs. 1,329,038/- as security pending the hearing and determination of the appeal. The applicants further state that they applied and paid for certified copies of the proceedings and judgment for purposes of preparing the Record of Appeal. However the registry at Thika has failed and/or refused to supply them with the said certified copies of proceedings, judgment and decree.
4. The applicants state that the court on 25th January 2024 dismissed the appeal for want of prosecution. The applicants argue that the failure by the registry should not be visited upon them as they have been desirous to prosecute the appeal.
5. The applicants further argue that unless the appeal is reinstated, they stand to suffer irreparable loss and damage and their appeal shall be rendered nugatory.



6. The applicants argue that no prejudice will be occasioned to the respondent or any damage that cannot be compensated by way of costs.

The Respondent's Case

7. The respondent states that the application is res judicata as the issues raised herein have been raised in previous applications dated 25th January 2024, 23rd November 2023, 24th July 2023 and 31st May 2023. The respondent further states that the instant application is a back door review of the court orders issued on 23rd November 2023.
8. The respondent argues that the proceedings in the lower court were already typed and available in the court file by 23rd November 2023 when the court issued an order for dismissal of the appeal. As at 25th January 2024, the appeal had already been dismissed by the self-executing order. Further, prior to 23rd November 2023, the appeal had been mentioned more than 4 times when the appellants prayed for extension of time within which to file the record of appeal and despite the proceedings being available, the record was not filed as ordered. On 25th January 2024, the appellant made the same prayer on the basis of non-availability of the typed proceedings and the court declined and dismissed the appeal. Furthermore, the appeal has been listed for Notice to Show Cause severally when the appellants failed to attend court or to respond to the said notices to show cause.
9. The respondent argues that the appeal stood dismissed as at 23rd December 2023 as per the court's order of 23rd November 2023 and after that, no application was made by the appellants for extension of time before the court until this application was filed.
10. The respondent states that the appellants are not truthful as they were informed by the court on 23rd November 2023 and after that that the lower court file was already before the court and the proceedings were already typed and available for the appellants to pick for preparation of the record. The respondent therefore argues that the appellants' indolence should not be rewarded by issuance of orders of stay. The respondent further states that she has been punished enough as she awaited for the fruits of her judgment since 31st March 2022.
11. The respondent argues that the appellants are undeserving of the stay orders as the court ordered for the decretal sum to be deposited in court within 21 days from 11th June 2022 but the appellants made the deposit on 25th October 2022, 3 months after the stipulated time. The appellants were also ordered to file the record within 60 days from 15th June 2022 but one and a half years later, the record has not been filed. The respondent urges the court to order that the sum deposited in court be released to her.
12. Directions were issued that the application be canvassed by way of written submissions and both parties had not filed their submissions by the time of writing this ruling.

The Law

Whether the applicants are entitled to an order setting aside dismissal of the appeal for want of prosecution.

13. The law concerning dismissal of an appeal for want of prosecution is contained in Order 42 Rules 35(1) & (2) of the [Civil Procedure Rules](#) which provides as follows:-

Unless within three months after the giving of directions under Rule 13 the appeal shall be set down for hearing, the respondent shall be at liberty to either set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.



- If within one year after service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.
14. It is trite law that the court's discretion to set aside an order dismissing the appeal for want of prosecution is unfettered. In *Richard Ncharpi Leiyagu v IEBC & 2 Others* [2012]eKLR, it was held that the court's discretion to set aside an ex parte order or judgment for that matter is intended to avoid injustice, or hardship resulting from an accident, inadvertence or inexcusable mistake or error, but not to assist a person who deliberately seeks to obstruct or delay the course of justice.
 15. In an earlier case of *CMC Holdings Limited v Nzioki* (2004) eKLR 173 the court held that:-

The discretion must be exercised judiciously.....In law, the discretion that a court of law has, in deciding whether or not to set aside exparte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong in principle.....the answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so, she drove the appellant out of the judgment seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant.
 16. The record shows that, the applicants lodged the appeal in Kiambu High Court HCCA No. E067 of 2022 on 11th April 2022 vide their memorandum of appeal. On 11th May 2022, the applicants filed an application for stay of execution pending appeal and the court granted stay of execution on condition that the applicants deposit the decretal amount in court within 14 days from then. On 15th June 2022, the court gave directions on the appeal and gave the applicants 60 days to prepare, file and serve the record of appeal and scheduled the matter for compliance on 14th November 2022. On 14th November 2022, the applicants stated that they had deposited the decretal sum but they requested for 45 days to file their record of appeal as they had not obtained a copy of the typed proceedings. The court granted the application and scheduled a mention for compliance on 18th January 2023.
 17. The matter came up severally for mention on 18th January 2023, 31st May 2023, 24th July 2023, 23rd November 2023 and 25th January 2024 to confirm filing of the record of appeal but the applicants kept telling the court that they had not filed the record of appeal because they had not been supplied with a copy of the certified typed proceedings. On 24th July 2023 the applicants did not attend court and had not filed the record of appeal. The court issued a Notice to Show Cause why the appeal should not be dismissed for want of prosecution.
 18. It is on record that the applicants applied for typed proceedings on 16th November 2022 after judgment had been delivered on 31st March 2022 about four (4) months later. The applicants faulted the registry for the delay in filing the record of appeal, but failed to attach the certificate of delay from the said registry to support their allegations. The court registry at Thika wrote to the Deputy Registrar High Court in Kiambu on 11th August 2023 to forward the original trial court file and two certified copies of proceedings and judgment for the purposes of the appeal. Therefore it is evident that the applicants took no action to help in procuring the record of appeal. The courts in both Kiambu and Thika were patient enough for a period of two years to mention the matter several times awaiting the record of appeal.
 19. On further perusal of the record, although the applicants stated on 15th June 2022 that they had deposited the decretal amount in court, the information was not correct. The deposit was made four



(4) months later on 25th October 2022. It is evident that the applicants have failed to comply with court orders several times on action and within the timelines set by the courts.

20. Looking at the memorandum of appeal, it is evident that the grounds of appeal do not raise any arguable point of law and it is doubtful that the appeal has any chances of success as alleged.
21. It is therefore my considered view that the applicants have not given plausible reasons to warrant the court exercise its discretion in their favour and reinstate the appeal.
22. Having declined to reinstate the appeal, the prayer for stay of execution of the trial court's judgment automatically fails. Furthermore, the appellant was granted stay orders initially but failed to comply. As a result the said stay orders lapsed at the expiry of the period given by the court.
23. I find no merit in this application and dismiss it with costs.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 25TH DAY OF JULY 2024.

F. MUCHEMI
JUDGE

