



REPUBLIC OF KENYA



**Ochieng & another v Barno (Civil Appeal 60B of 2020)  
[2024] KEHC 11318 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11318 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL 60B OF 2020  
SM MOHOCHI, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**MACKEY OCHIENG ..... 1<sup>ST</sup> APPLICANT**

**MACKPHILISA COMPUTER SYTE LIMITED ..... 2<sup>ND</sup> APPLICANT**

**AND**

**SHARON JEMUTAI BARNO ..... RESPONDENT**

**RULING**

1. The Applicants/Appellant moved Court vide Notice of Motion Application dated 29<sup>th</sup> November, 2023 brought under Order 22 Rule 22, Order 45 Rule 25 and Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, 3, 3A and 63E of the Civil Procedure Act and Articles 50(1) and 159 (d) of the Constitution seeking:-
  - i. Spent
  - ii. Spent
  - iii. That this Honourable Court be pleased to review its orders made on 10<sup>th</sup> November, 2023 and time to have the appeal admitted and fixed for directions extended;
  - iv. That this Honourable Court does order that a different case number be given to this instant suit for reason of duplicity of the case numbers; and
  - v. That the costs of this Application be provided for.
2. The Application was supported by the sworn Affidavit of Bernard Ombui, Advocate. He averred that the Appellants took necessary steps to set the appeal in motion pursuant to the directions of this Court in the Ruling of 20<sup>th</sup> June, 2023. That when the matter came up for directions on 26<sup>th</sup> September, 2023 the Court file was not available and in the process of retrieving it, found out there was another case



with a similar case number, Nakuru HCCA No. 60 of 2020 David Chebet vs Kiptoo Arap Korosi & 2 Others.

3. It was the Appellants case that the duplicity posed a challenge in dealing and listing the matter for directions. That they were further shocked to find that their appeal was never admitted despite filing the Record of Appeal on 14<sup>th</sup> July, 2021. Further, that the Lower Court had not been retrieved. It was also their case further that despite raising a complaint on 22<sup>nd</sup> November 2023 to the Deputy Registrar the same was not responded to. By an order of 10<sup>th</sup> November, 2023, the Appeal was marked dismissed for non-compliance.
4. That the confusion at the registry contributed to their matter not being listed. It was averred that the Respondent is likely to proceed with execution if stay is not issued which may lead to unjustifiable loss and mistakes done by the Court Registry should not be visited upon an innocent party.
5. The Respondent opposed the Application vide Replying Affidavit sworn on 22<sup>nd</sup> December, 2023 and surprisingly filed on 21<sup>st</sup> December, 2023. She denied that the appeal was ever set for directions or that the mention date for 26<sup>th</sup> September, 2023 was issued as alleged by the registry. That there being another case with a similar case number as the present suit was not the cause of delay or confusion and if there was indeed confusion the complaint should have been done prior.
6. It was the Respondent's case that the Appellants drew the complaint letter of 22<sup>nd</sup> November 2023 after they were served with the extracted of Order of 10<sup>th</sup> November, 2023 on 17<sup>th</sup> November, 2023 therefore a clear indication of the disinterest in the appeal. that non-compliance was deliberate and inexcusable. That the alleged mistake on the part of the registry has not been demonstrated.

#### **Applicants' Submissions.**

7. Through submissions filed on 8<sup>th</sup> April, 2024 the Applicants invoked the provisions of Section 80 of the *Civil Procedure Act*, Order 45 Rule 1 of the Civil Procedure Rules and relied on the decision in *Equity Bank Limited v West Link MBO Ltd Civil Application (Appeal) No. 78 of 2011* to argue that the prayer for review is on the ground of discovery of new and important facts that were not in their knowledge at the time of prosecuting the Appeal. That mistakes of the Court registry should not be visited on an innocent litigant.

#### **Respondent's submissions**

8. The Respondent submitted that, the Application has not met the threshold to grant the orders sought. On the question on whether there was a mistake or error apparent to warrant a review, reliance was placed in *Paul Mwaniki vs NHIF Board of Management (2020) eKLR* to submit that no sufficient reasons have been advanced to warrant an order for review. If at all there was a challenge the same should have communicated earlier between June and November. That Appellants were disinterested in pursuing the appeal, there was no mistake on the part of the registry and the delay was deliberate an inexcusable.

#### **Analysis and Determination**

9. Section 63 of the *Civil Procedure Act* provides for Supplemental proceedings in order to prevent the ends of justice from being defeated, I honestly believe the invocation of this provision was unnecessary.
10. Section 80 of the *Civil Procedure Act* provides for Review:  
Any person who considers himself aggrieved—



- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
  - (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.
11. Order 45, rule 1 provides for Application for review of decree or order.
  - (1) Any person considering himself aggrieved—
    - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
    - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay.
  - (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate Court the case on which he applies for the review.
12. Order 45, rule 2 provides to whom applications for review may be made.
  - (1) An application for review of a decree or order of a Court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.
  - (2) If the judge who passed the decree or made the order is no longer attached to the Court, the application may be heard by any other judge who is attached to that Court at the time the application comes for hearing.
  - (3) If the judge who passed the decree or made the order is still attached to the Court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other judge as the Chief justice may designate.
13. Order 45, rule 3 provides for when Court may grant or reject application.
  - (1) Where it appears to the Court that there is not sufficient ground for a review, it shall dismiss the application.
  - (2) Where the Court is of opinion that the application for review should be granted, it shall grant the same:

Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.



14. Order 22, rule 22 provides for when the Court may stay execution its invocation by the Applicant in the current context is irrelevant.
15. In this instance the Applicant seeks to review the Orders of this Court as contained in the Ruling dated 20<sup>th</sup> June 2023 as extracted in the Order dated 10<sup>th</sup> November, 2023. This Court never made any orders on 10<sup>th</sup> November 2023 for review but rather the respondent extracted the order and was issued the same on the 10<sup>th</sup> November 2023.
16. In an application for reinstatement of a dismissed suit or application, an applicant appeals to the discretion of the Court. The Court must caution itself not to exercise its discretion in a manner that will result in an injustice. This position is fortified in the case of Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others [2013] eKLR, where the Court of Appeal stated:

“We agree with those noble principles which go further to establish that the Court’s discretion to set aside an ex-parte judgment or order 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. We have considered the reasons that were offered by the appellant regarding their failure to attend Court on the 10th June, 2013 with anxious minds. We have asked ourselves whether failure to attend Court on 10th June, 2013, constituted an excusable mistake, an error of judgment regarding counsel’s failure to diarize the date properly or was it meant to deliberately delay the cause of justice”.
17. The Import herein is that, the Applicant was on the 20<sup>th</sup> June 2023 ordered to cause his appeal to be placed for admission within fifteen (15) Days and a default thereof would lead to an automatic dismissal of the Appeal. The “Self-trigger mechanism” is intended to harness diligence in representation and that by the 6<sup>th</sup> July 2023 the Appeal automatically stood dismissed.
18. The Ruling dated 20<sup>th</sup> June 2023 was never challenged on Appeal and no review thereof was sought by any of the parties.
19. The Automatic dismissal of the Appeal has never been challenged or contested until the instant Application was filed.
20. The Applicant had full knowledge of the Ruling of 20<sup>th</sup> June 2023 and in fact wrote to the Deputy registrar on the 21<sup>st</sup> June 2023 in compliance of the same. I however noted that in their letter there is no mention of preparation of the Record of Appeal and in fact he only sought for a mention date before the judge.
21. While the mention date was assigned by the Deputy registrar for the 26<sup>th</sup> September 2023, the Applicant claims to have been before Court and the file was never presented. This Court observes that whenever matters earmarked for mention or hearing and the file is not availed, the Court suo mutu directs that the file is traced on the same day and is placed before the judge for direction. This Court ordinarily urges counsel to be available and where at the close of business the file is yet to be located then the Court defers the mention to the next day without fail.
22. The Applicant has not demonstrated by evidence that, him or his counsel appeared before Court for the mention on the 26<sup>th</sup> September 2023 and what efforts if any that they took towards locating the file.
23. The fact that there two matters bearing the same file reference number is an issue that the Applicant asserts that he discovered while trying to retrieve his file. It thus goes that the Applicant was aware of this fact as early as the 26<sup>th</sup> September 2023 and ought to have undertaken explicit remedial measures.



This was not the case, as the Applicant only reacted once the respondent extracted the Order dated 10<sup>th</sup> November, 2023.

24. The circumstances of this case are sufficient to persuade the Court that, the Applicant not only failed to utilize the leave so granted by the Court and has not sought to review the same.
25. The Applicant's attempt to review an order extracted long after the Appeal stand dismissed is an ingenious attempt at reopening a matter that is determined and that it is untenable in law to review an extracted order to the exclusion of the ruling.
26. This Court is unimpressed that there is basis to exercise its discretion review and that the Court finds the Application dated 29<sup>th</sup> November, 2023 to be without merit and accordingly dismiss the same.
27. Costs of the Application are awarded to the Respondent.

It is So Ordered

**SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2024.**

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**MOHOCHI S.M**

**JUDGE**

