



**Chebocho & 2 others v Cheptoo & another (Suing on their own Behalf and as a Personal Representative of the Late Justine Kiprop Cheptoo (Deceased)) (Civil Appeal E402 of 2022) [2024] KEHC 13338 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13338 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL APPEAL E402 OF 2022  
AN ONGERI, J  
OCTOBER 31, 2024**

**BETWEEN**

**JOSEPH ARAP CHEBOCHO ..... 1<sup>ST</sup> APPELLANT  
OUTREACH SACCO ..... 2<sup>ND</sup> APPELLANT  
FRANCIS WAWERU MACHARIA ..... 3<sup>RD</sup> APPELLANT**

**AND**

**ZIPPORAH CHEPTOO ..... 1<sup>ST</sup> RESPONDENT  
WILLIAM CHEGLAGAT CHEPTOO ..... 2<sup>ND</sup> RESPONDENT  
SUING ON THEIR OWN BEHALF AND AS A PERSONAL REPRESENTATIVE  
OF THE LATE JUSTINE KIPROP CHEPTOO (DECEASED)**

**RULING**

1. The application coming for consideration in this ruling is the one dated 5/5/2024 brought under Sections 1A, 1B, 3A and 95 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya and order 45 rule 1 Order 42 rule 21 Order 50 Rule 6 and Order 51 rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law seeking the following orders;
  - i. That this application be certified urgent, service be dispensed with thereof and the same be heard ex-parte in the first instance
  - ii. That pending the hearing and determination of this application there be an order of stay of execution of the judgment delivered Hon. D.O. Mbeja delivered on 16/4/2021 in Milimani CMCC 75454 of 2019 and all consequential proceedings thereto.



- iii. That pending the hearing and determination of this appeal there be an order of stay of execution of the judgment delivered by Hon. D. O. Mbeja delivered on 16/4/2021 in Milimani CMCC 75454 of 2019 and all consequential proceedings thereto.
  - iv. That this appeal being Milimani HCCA E402 of 2022 be and is hereby reinstated for hearing and determination on merit.
  - v. That this Honourable Court do make any such further Order (s) and issue any other relief it may deem just to grant in the interest of justice.
  - vi. That the costs of the application be in the cause.
2. The respondent opposed the application vide the replying affidavit of Musili Mbiti sworn on 2/7/2024. In it he deponed that judgement in Milimani CMCC No. 75454 of 2019 was delivered on 16/4/2021 and the applicant proceeded to appeal. On 21/2/2024 the applicants appeal was dismissed for want of prosecution. the appellants have not given sufficient reasons as to why they took over two years to prosecute their appeal.
  3. He deponed that the sole intention of the applicants is to delay finalization of this matter. The applicants are abusing judicial process by continuing to frustrate the plaintiff who has been in court seeking justice since 2019. That justice delayed is justice denied.
  4. The parties filed written submissions as follows; the applicant submitted that the appeal arises from the decision of Hon. D. O. Mbeja delivered on 16/4/2021 in Milimani CMCC 75454 of 2019 and being aggrieved by the decision the appellant initiated an appeal being Milimani HCCA E402 of 2022.
  5. That pending the hearing and determination of the appeal the applicants deposited Kshs. 1,000,000.00 in court. The appeal stood dismissed on or about the 21/2/ 2024 for want of prosecution as the appellants had filed a Record of Appeal less the certified copies of the proceedings, judgment and decree.
  6. The applicants have requested for the certified copies of the proceedings, judgment and decree but the same has not been availed to the applicants for purposes of filing the Record of Appeal. The applicants contended that failure to file a Record of Appeal should not be visited on the Appellant/ applicant as they have shown that they are desirous in prosecuting this appeal through requesting for proceedings and filing a Record of Appeal less typed proceedings.
  7. Further that it is only just and fair that the Appeal be re-instated/ re-admitted and heard to a logical conclusion and on merit as the appeal raises triable issues which needs to be heard and determined on merit.
  8. The respondent alternatively submitted that the applicants have failed to prosecute this appeal and thus the application herein was not made in good faith but with the sole intention of delaying the respondent's fruits of judgement.
  9. Further, that no sufficient cause has been shown to the court as to why the applicants took over two years to prosecute their appeal. The applicants further filed the application to reinstate the appeal on 3/5/2004 three months after dismissal. There is therefore deliberate intention of delaying the respondent the fruits of judgement.
  10. The sole issue for determination is whether the appeal should be reinstated for hearing.
  11. I find that the court has a discretion to reinstate a matter which has been dismissed.



12. The discretion is exercised judicially upon certain conditions; Reinstatement of a suit is at the discretion of the court, which discretion ought to be exercised in a just manner, as was held in *Bilha Ngonyo Isaac vs. Kembu Farm Ltd & another & another* [2018] eKLR ((JN. Mulwa J)), which echoed the decision of the court in *Shah vs. Mbogo & Another* (1967) EA 116 (Harris J), where the court stated on the matter of discretion:

“The 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 obstruct or delay the course of justice.”

13. I find that the Record of Appeal has been filed.

14. I allow the application dated 5/5/2024 on the following conditions;

- i. That the appellant pays thrown away costs of ks.20,000 within 30 days of this date.
- ii. That the appeal be prosecuted within 60 days of this date.

15. Since the Record of Appeal has been filed, this appeal be and is hereby admitted for hearing before a single Judge of the High Court.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 31<sup>ST</sup> DAY OF OCTOBER, 2024.**

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**A. N. ONGERI**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent

