



REPUBLIC OF KENYA



**Wandeto v Kiragu & another (Civil Appeal E030 of 2021)
[2024] KEHC 13261 (KLR) (29 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13261 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E030 OF 2021
SM MOHOCHI, J
OCTOBER 29, 2024**

BETWEEN

DAVID MWANGI WANDETO APPELLANT

AND

STEPHEN NJUGUNA KIRAGU 1ST RESPONDENT

JOSEPH MAINA MWANGI 2ND RESPONDENT

RULING

1. The Appellant/Applicant moved this Court vide Notice of Motion Application dated 7th June, 2024 and filed on 11th June, 2024 brought under Article 50 of *the Constitution*, Order 45 Rule 1 and 2 of the Civil Procedure Rules and Section 80, 1A, 1B and 3A of the *Civil Procedure Act*.
2. The Applicant is seeking for orders of review of the Ruling delivered on 25th January, 2023 dismissing an Appeal through a Memorandum of Appeal dated 24th March, 2021 and for the Costs of the Application to be provided for.

Applicant's Case

3. The Application was on the grounds on its face and supported by the affidavit of Sally Njoki Mbeche Advocate, of even date wherein she deposed that the Honourable Justice P.M. Kizito dismissed the Appeal without affording the Applicant and opportunity to be heard.
4. That the dismissal was based on a perceived procedural irregularity as the appeal was filed within the prescribed time limits and in accordance with the applicable procedural rules.
5. It was averred further that the Court was informed that the file was missing. That they diligently attempted to trace the file by writing numerous letters to the Court's Deputy Registrar and Executive Officer both on 26th August 2021 and again to the Executive Officer on 14th November, 2022. It was



her contention that the Court dismissed the Appeal without considering the missing Court file and without affording the Applicant an opportunity to present his case.

6. She argued that it would be in the interest of justice if the Application is allowed and that the Respondent will not be prejudiced if the application is allowed.

1st Respondent's Case

7. In the Replying Affidavit sworn on 19th July, 2024 by Stephen Njuguna Mwangi, the 2nd Respondent opposed the Application and deposed that on 25th January, 2023 the Applicant was given an opportunity to be heard before dismissal of his Appeal for want of prosecution and was represented by Mr, Mbeche, Advocate. That the Appeal was dismissed on the basis that the Applicant had not taken positive steps to prosecute his Appeal. That there was no apparent error on the record or discovery of any new evidence that was not within the Applicant's reach when Appeal was dismissed.
8. It was further the Applicant's case that from the time the Appeal was dismissed, the instant Application was filed after one year and five months which was argued to be a very long time and no explanation for the delay has been given.
9. He deposed further that the Applicant is gambling with the Court process since he filed a Notice of Appeal in to the Court of Appeal on 25th January, 2023 after being dissatisfied with the decision of Magare J. Therefore, there is still an existing Appeal in the Court of Appeal and the present application for review, whichever of the two may succeed.
10. The Respondent further contended that the Applicant had filed and Application dated 12th June, 2023 in Nakuru Civil Application No. 205 of 2023 involving the same parties but withdrew it secretly.

Applicant Submissions

11. In the submissions dated 19th July, 2024, the Applicant submitted that the Applicant was denied the right to access justice that the file was missing and despite the Court being informed of that, proceeded to dismiss the appeal. the Applicant placed reliance on the case of Yani Haryanto vs E.D. & F. Man (Sugar) Limited Civil Appeal No. 122 of 1992 where the Court of Appeal was of the opinion inter alia that despite lodging a Notice of Appeal the Court has jurisdiction to entertain an application for review. That an appeal is not instituted in Court until the Record of Appeal is lodged.
12. To submit that the Application is premised on the grounding of any other sufficient reason, Counsel relied on Paul Mwaniki v National Hospital Insurance Funds Board of Management [2020] eKLR where the Court cited Evan Bwire vs Andrew Nginda [2000] LLR 8340 where the principles for review were laid down. Counsel further submitted that the threshold of filing for review has been met.

1st Respondent's Submissions

13. Through counsel, the 1st Respondent filed submissions on 2nd August, 2024 and in submitting why the Application is without merit relied on the decision in Kisya Investments Ltd vs Attorney General & Another [1995] eKLR where the Court held that a party that filed a Notice of Appeal cannot file an Application for review however, a party cannot be prevented from filing a Notice of Appeal if the party first files an application for review.
14. Reliance was also placed in the case of HA vs LB [2022] eKLR where Odunga J (as he then was) opined that a party cannot exercise the right of appeal and review at the same time.



15. Finally, he relied on the decision in Hosea Nyandika Mosangwe vs Milton Ndege Onyancha [2022] which cited the case of Anjit Kumar Rath vs state of Orisa & 9 Others at page 608 where the Supreme Court of India discussed the scope of review and Tokesi Mabili and Others vs Simion Litsanga as well as Republic vs Advocates Disciplinary Tribiuna Ex-Parte Apollo Mboya [2019] eKLR that had a similar view.

Applicant's reply to Respondent's submissions dated 23rd August, 2024

16. It was submitted that a Notice of Appeal only signifies the intention to Appeal and does not amount to an Appeal. That as per Rule 77(2) of the Court of Appeal Rules a Notice of Appeal is deemed to have been filed subject to Rules 84 and 97. That if an appeal is not instituted in accordance with Rule 84 one is not barred from applying for review. That the position was also discussed in Christopher Musau vs Daly & Figgis.
17. The Applicant relied on Civil appeal No 191 of 2002 Dr. Samson Auma vs Jared Shikuku & Another. The Court in this regard delved on the issue of adjournment and opined that once an adjournment is raised, the Court had to deal with it first and allow it or reject it.
18. It was further submitted that the decision not to give an Applicant an opportunity to be heard was in breach of rules of Natural Justice as was held in Onyango Oloo vs Attorney General [1986-1989] EA 456.

Analysis and Determination

19. 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”.
20. I am being invited to consider the exercise of discretion by Magare J on the 25th January 2023, of which I note the matter was coming up pursuant to Notice to show cause why the Appeal should not be dismissed for want of prosecution.
21. The Proceedings indicate the presence of Mr. Mbeche for the Appellant, and the Respondent being absent. The reference of the file having been missing recorded by the Court could only be attributable to Mr. Mbeche as it goes further “as we have been writing letters”.
22. This was an attempt by the Applicant/Appellant to show cause and the Learned Judge was unpersuaded.
23. As these proceedings are on the Advocate for the Respondent walks in and is recorded as supporting the dismissal.



24. I have considered the exhibited letters in support of the assertion that the file had been missing noting that the Applicant had written three letters to the Executive officer in the Chief Magistrate’s Court and the Deputy Registrar on the 26th August 2021, and one follow-up letter to the Executive Officer in the Chief Magistrate’s Court on the 14th November 2022. It is unclear if the said letters were ever received as they do not bear a Court receipt stamp.
25. I however note that the Court in exercise of its discretion considered this fact which I do not think would suffice in review under the “any other sufficient reason parameter”.
26. This Court is unable to undertake a review in the face of a filed Notice of Appeal seeking to challenge the same ruling.
27. The Applicant was afforded his due right to be heard on the 21st January 2023 and that on the said day was unable to persuade the Court on the measures he had so far undertaken to ensure the Appeal is prosecuted.
28. This Court finds no merit in the Notice of Motion Application dated 7th June, 2024 and accordingly dismiss the same.
29. The Costs of this Application is granted to the Respondent.

It is so ordered.

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 29TH DAY OF OCTOBER, 2024.

MOHOCHI S.M

JUDGE

