



Makokha (Suing as the Administrator and Personal Representative of the Estate of James Makokha Mutekhele -DCD) & another v Brar (Civil Appeal 93 of 2019) [2024] KEHC 15026 (KLR) (29 November 2024) (Ruling)

Neutral citation: [2024] KEHC 15026 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL 93 OF 2019
DK KEMEL, J
NOVEMBER 29, 2024**

BETWEEN

DORICE NASAMBUNU MAKOKHA (SUING AS THE ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF JAMES MAKOKHA MUTEKHELE - DCD) 1ST APPLICANT

CHRISTINE NAKHUMICHA MAKOKHA (SUING AS THE ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF JAMES MAKOKHA MUTEKHELE - DCD) 2ND APPLICANT

AND

MAWINDER SINGH BRAR RESPONDENT

RULING

1. The Applicants herein filed a notice of motion application dated 5th April 2024 pursuant to Section 80 and sections 1A and 2(2) of the [Civil Procedure Act](#) and Order 45 Rule 1 of the Civil Procedure Rules, seeking orders to have this Honourable Court review and set aside the Orders issued on 26th September 2022 dismissing their appeal for want of prosecution and for the reinstatement of their appeal.
2. The application was premised on the grounds on the face thereof and a supporting affidavit as sworn by the Appellant’s counsel Cleveland M. Mwebi on 5th April 2024, wherein he averred inter alia; that the appeal was filed on 14th October 2019; that the lower Court proceedings and judgment were supplied to the Applicant’s Counsel in August 2023; that the decree was signed on 17th August 2023; that in November 2023, the Applicants tried to lodge their record of appeal but they were informed that their file could not be traced ; that in December 2023, the file was traced and that the Applicants were informed that the file was placed before the judge on 26th September 2022 and that the appeal was dismissed for want of prosecution; that the applicants wish to have the orders given on 26th September 2022 reviewed and/or set aside and that their appeal be reinstated.



3. The application was opposed. The Respondent's advocate filed a replying affidavit dated 5th May, 2024 wherein it was averred inter alia; that three years had lapsed since the appeal was lodged in 2019; that the extracted decree was obtained one year after the dismissal of the appeal; that the claim of missing file has not been properly explained by documentary evidence; that the Appellants have purported to hinge on procedural complexities specifically designed to disrupt and conceal the Appellants' pervasive neglect of their obligation to prosecute the appeal; that the application is an afterthought and is an abuse of court process and ought to be dismissed.
4. By directives of the Court, this application was to be dispensed with by way of written submissions. Only the Appellant complied with this directive.
5. I have considered the application, rival affidavits and the submissions. The issue for determination is whether this application has merit.
6. This application is governed by the provisions of Order 12 Rule 7 of the Civil Procedure rules which states as follows –
 - “7. Where under this order judgment has been entered or the suit has been dismissed by the court, on application, may set aside the judgment or order upon such terms as may be just.”
7. Indeed, both the dismissal of this appeal for want of prosecution and its reinstatement is an act of the exercise of this court's discretionary power. Thus, the principles in the case of Mbogo & Anor –vs- Shah (1968) E.A 93 apply.
8. I note that the dismissal of the appeal herein was on 26th September 2022 and that this application was filed on 5th April 2024, one year and six months later. Thus, it cannot be said that there was inordinate delay in bringing the application. The Applicants explained the reason for their delay namely that they were awaiting the decree and certified copies of typed proceedings which were necessary as espoused under Order 42 Rule 3 of the Civil Procedure Rules, that the best procedure is to decline to hear the matter and to direct the Appellant to comply with Order 42 Rule 2 of the Civil Procedure Rules if the Court finds that a certified copy of the decree or order has not been included in the record of appeal.
9. It is imperative to note that the Respondent's opposition mainly dwelt on the Appellants' delay to set down the appeal. The annexures presented by the Appellants clearly indicate that they were still communicating with the court registry as late as late as September/October, 2023 over the court proceedings and decree. This was oblivious of the fact that the appeal had already been dismissed in September, 2022. It is quite obvious that the Appellant were unaware of the developments. The affidavits of service of the notice to show cause appears to be scant in terms of the requisite information on service of the notices. I am inclined to give the Appellants the benefit of doubt and grant them an opportunity to prosecute their appeal and that they have presented cogent reasons warranting the setting aside of the orders of dismissal of the appeal and reinstatement of the same. There will be no prejudice on the part of the Respondent if the application is allowed as long as the Appellants are given strict timelines within which to set the appeal down for hearing. In the circumstances, I find that the application is not fatally defective, and in my view, by applying the legal requirements of fair trial under Article 50 of *the Constitution* and requirements for dispensation of substantive justice under Article 159(2) (b) of *the constitution*, this application should be allowed to give parties a chance to argue the substantive appeal. I also find that the respondent will not suffer prejudice if the appeal is reinstated.



10. Consequently, and for the above reasons, i allow the application and grant prayer (b). The Appellant will however, fix the appeal for hearing within the current year 2024, otherwise the appeal will stand dismissed for want of prosecution by 31/12/2024, with costs to Respondent.

DATED AND DELIVERED AT SIAYA THIS 29TH DAY OF NOVEMBER, 2024.

D. KEMEI

JUDGE

In the presence of:

No appearance Onkangifor Appellants/Applicants

Matta..... for Respondent

Kizito/Ogendo.....Court Assistant

