



Roy Parcel Services Limited v Ouma (Suing as the legal representative of the Estate of George Ouma Oloo - Deceased) & 2 others (Civil Appeal 647 of 2019) [2023] KEHC 1291 (KLR) (Civ) (24 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1291 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 647 OF 2019

JK SERGON, J

FEBRUARY 24, 2023

BETWEEN

ROY PARCEL SERVICES LIMITED APPELLANT

AND

PEREZ ATIENO OUMA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF GEORGE OUMA OLOO - DECEASED) 1ST RESPONDENT

WE TILLEY 'M' LIMITED 2ND RESPONDENT

JOHN ANDIGO ANDREW 3RD RESPONDENT

RULING

1. The appellant/applicant in this instance has brought the notice of motion dated November 1, 2022 supported by the grounds laid out on its face and the facts stated in the affidavit of advocate Rose N Munyasi. The applicant sought for an order to the effect that the dismissal order made on October 7, 2022 be set aside and a further order for reinstatement of the appeal.
2. The 1st respondent resisted the motion by swearing the replying affidavit on December 16, 2022.
3. The 2nd and 3rd respondents did not participate at the hearing of the motion, according to the record.
4. At the interparties hearing of the instant motion, the parties' advocates essentially relied on the averments made in their respective documents filed.
5. I have considered the grounds set out on the face of the motion together with the facts deponed in the affidavits supporting and opposing the motion.



6. It is clear that the orders sought in the instant motion are for the setting aside of the dismissal order and for the reinstatement of the appeal.
7. On the part of the applicant, Rose N Munyasi states in her affidavit that her office compiled and filed the record of appeal in the matter on March 30, 2021 and thereafter wrote to the Deputy Registrar-Civil Appeals Division vide the letter dated March 21, 2021 and sought for a date before a judge for directions on the prosecution of the appeal.
8. The advocate further states in her affidavit that the matter was slated for bring up on October 25, 2022 but that the same was instead dismissed by the court for want of prosecution on October 2, 2022 without the knowledge of the applicant's advocate.
9. It is also stated by the advocate that the applicant is keen on prosecuting its appeal and urges this court to exercise substantive justice in its favour, adding that it would serve the interest of justice given the nature of the appeal and that the respondent does not stand to be prejudiced if the appeal is reinstated.
10. During oral arguments, counsel Odeo further submits that the notice to show cause was not served upon the applicant.
11. In retort, the 1st respondent states that there has been an inordinate and inexcusable delay in the prosecution of the appeal and that to allow the order for reinstatement sought would be prejudicial to him since he is hindered from enjoying the fruits of his judgment.
12. The 1st respondent therefore urges this court not to interfere with the dismissal order in place and to dismiss the instant motion with costs.
13. His advocate, Okao, also argues that upon dismissing the appeal, the court became *functus officio* and hence the orders sought cannot be granted by this court.
14. On the subject of '*functus officio*' it is not in dispute that the appeal in the present instance was not heard on merits prior to its dismissal.
15. Upon my consideration of the averments made by the 1st respondent above, I have not come across anything in the law to indicate that following the dismissal of a matter that was not heard on merit, a court of law cannot consider an application seeking the reinstatement of the said matter.
16. Upon my perusal of the record, I observed that the applicant filed the memorandum of appeal in the present appeal on November 6, 2019.
17. The record shows that the applicant thereafter sought for and was granted a conditional order for a stay of execution of the impugned judgment vide the ruling delivered by the High Court on October 1, 2020. It is apparent that the applicant complied with the conditions ordered for the provision of security for the due performance of the decree.
18. Going by the record, no further action took place in the appeal though I note that the applicant has annexed to the motion a copy of the letter dated March 21, 2022 addressed to the Deputy Registrar requesting for a date for directions on the appeal. However, there is nothing on the record to indicate whether the abovementioned letter was received by the court.
19. From my consideration of the averments on record, it is apparent that the applicant filed the record of appeal, though no copy thereof has been made available in the court file.



20. Suffice it to say that subsequently, the Deputy Registrar issued a notice to show cause on August 18, 2022 requiring the parties through their advocates to attend court on October 7, 2022 to show cause as to why the appeal should not be dismissed for want of prosecution.
21. The record shows that an affidavit of service was sworn by Rosemary Wanjiru on 20th September, 2022 to indicate that service of the notice to show cause was effected upon the parties' respective advocates. It is therefore more plausible than not that the applicant's advocate was duly served.
22. The record further shows that none of the parties were in attendance on the abovementioned date, resulting in the dismissal order on October 7, 2022.
23. From the above circumstances, it is apparent that the delay in the prosecution of the appeal was mainly the result of inadvertence on the part of the applicant's advocate in not taking active steps to prosecute the appeal and in failing to attend court for hearing of the notice to show cause; and on the applicant who did not bring any credible evidence to demonstrate any active steps taken in following up on the progress of the appeal with his advocate.
24. That notwithstanding, upon considering the nature of the claim and the decision resulting in the appeal which in my view raises triable issues on joinder and whether the suit was time barred, I am convinced that it would be in the interest of substantive justice to grant the applicant an opportunity to pursue its appeal.
25. Further to the foregoing, I am not convinced that the 1st respondent who was the plaintiff in the suit, has demonstrated by way of credible evidence the manner in which he will be prejudiced if the appeal is reinstated.
26. Consequently, the notice of motion dated November 1, 2022 is found to be meritorious and it is allowed therefore giving rise to a grant of the following orders:
 - i. The dismissal order made by the court on October 7, 2022 be and is hereby set aside. Consequently, the appeal is hereby ordered reinstated.
 - ii. The applicant/appellant should prosecute its appeal within 60 days from today, failing which the appeal shall stand dismissed.
 - iii. Costs of the motion to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2023.

.....

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant/Applicant

.....for the 1st Respondent

.....for the 2nd Respondent

.....for the 3rd Respondent

