



REPUBLIC OF KENYA



**Kariuki v Gesare (Civil Appeal 114 of 2019)
[2023] KEHC 1326 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1326 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 114 OF 2019
CW GITHUA, J
FEBRUARY 23, 2023**

BETWEEN

CHARLES KARIUKI APPLICANT

AND

NAOMI GESARE RESPONDENT

RULING

1. The applicant, Charles Kariuki through his advocates on record M/S Kimondo Gachoka & Company Advocates presented a Notice of Motion dated 6th June 2022 seeking a total of six prayers. Three of the said prayers are now spent since they were seeking interim reliefs pending determination of the application. The three prayers pending this court's determination are as follows;
 - i. That the applicant's appeal which was dismissed on 25th November 2021 be reinstated for hearing and determination on merit.
 - ii. That the court makes any further order or issue any other relief it may deem just to grant in the interest of justice.
 - iii. That costs of the application be in the cause.
2. The application is premised on the grounds stated on its face which are replicated in the supporting affidavit sworn by the applicant's learned counsel Ms. Joyce Chichi. Ms. Chichi deposed that failure to file a Supplementary record of appeal as directed by the court which is what caused dismissal of the appeal was not deliberate but was occasioned by circumstances beyond the applicant's control; that the delay in filing the Supplementary record of appeal was caused by their inability to obtain a signed copy of decree from the lower court in time due to various factors which included delayed issuance of invoice for payment of further court fees for the decree and misplacement of the lower court file. Counsel annexed correspondence with the Executive Officer Kisii Law Courts marked as JCI to support her claim that the lower court file was at some point in time misplaced.



3. Further, the applicant asserted that the supplementary record of appeal has since been filed and that since the applicant had already filed the record of appeal and written submissions before the appeal was dismissed, it was in the interest of justice that the appeal be reinstated for hearing and determination on its merits.
4. The application is opposed. There is a replying affidavit sworn by the respondent Naomi Gesare who in a nutshell deposed that there was inordinate delay of about 10 months in filing the instant application and since equity favours the vigilant not the indolent, the application should be dismissed.
5. Though parties consented to prosecuting the application through written submissions, only the applicant filed submissions in support of the application as learned counsel for the respondent, Mr. Omotto intimated to the court on 19th December 2022 that the respondent was no longer interested in filing submissions but would rely entirely on the replying affidavit filed in opposition to the motion.
6. In his submissions, the applicant reiterated the reasons stated in the grounds anchoring the motion and in the supporting affidavit for failure to file the Supplementary record of appeal on time as directed by the court and emphasized that he was desirous of pursuing his appeal and that it was only just and fair that the appeal is reinstated; that if the court declined to reinstate the appeal, he will suffer irreparable loss and damage as this will amount to denial of his right to be heard whereas the respondent has not shown that she was likely to suffer any prejudice if the appeal was reinstated.
7. The applicant relied on, inter alia, the Court of Appeal decision in *Richard Ncharpi Leiyagu v IEBC & 2 Others* [2013] eKLR and the persuasive authority of *John Nabashon Mwangi V Kenya Finance Bank Ltd (In liquidation)* 2015 eKLR in supporting his submissions that his constitutionally guaranteed right to a hearing was paramount and should be protected and facilitated by the court.
8. It is trite that the decision regarding whether or not to reinstate a dismissed appeal is discretionary. In the exercise of its discretion, the court must interrogate whether the applicant has established reasonable grounds to warrant reinstatement of the appeal. The court must also consider the reason behind dismissal of the appeal because different considerations would come into play depending on the reason behind the dismissal in question, say for instance, the factors a court would consider in an application seeking reinstatement of an appeal dismissed for want of prosecution would be different from the factors the court would take into account in an application like the present one. But in all cases irrespective of the reason for the dismissal, the court must balance the competing interests of the parties bearing in mind the principles that guide the exercise of judicial authority particularly the constitutional principles espoused in *the Constitution* of Kenya 2010 with regard to access to justice and the need for courts to promote dispensation of substantive as opposed to procedural justice.
9. In this case, the applicant's appeal was dismissed because of his advocate's failure to file a supplementary record of appeal within the time frame limited by the court.

The court record shows that the applicant was initially given leave to file a Supplementary record of appeal within 14 days of 4th October 2021. This time was later extended several times without compliance by the applicant until 25th November 2021 when the appeal was dismissed.
10. The explanation given for failure to file the supplementary record of appeal on time is not convincing since the applicant's counsel apparently applied for a copy of the decree through letter exhibited as part of annexures marked JCI which is dated 27th December 2021 about nine (9) months after the appeal was dismissed. The correspondence addressed to the Executive Officer of the trial court seeking his intervention in tracing the lower court file is dated 1st April 2022 about five months after the appeal was dismissed.



11. The above notwithstanding, I am cognizant of the fact that substantial steps had been made towards hearing of the appeal before the applicant sought and obtained leave to file the supplementary record of appeal. The court record also confirms that the applicant filed the supplementary record of appeal on 6th June 2022 albeit without leave of the court. This therefore means that all material necessary for determination of the appeal on its merits is now before the court.
12. It is worth noting that in the new constitutional dispensation, courts are enjoined to administer substantive justice which requires them to strive to decide cases on merit and in the case of dismissed suits or appeals, to reinstate them for hearing unless doing so would cause irreparable prejudice to the opposite party.
13. In this case, the respondent has not claimed or even suggested that she will suffer any prejudice if the appeal was reinstated. On my part, taking all relevant factors into account, I am satisfied that the respondent is not likely to suffer any prejudice which cannot be ameliorated by an award of costs if the application was allowed. On the other hand, if the application was dismissed, the applicant will definitely suffer great prejudice as he will be removed from the seat of justice on account of omissions or inaction by his advocates for which he was not to blame. In any event, it would be unjust to punish the applicant for the sins of his advocates.
14. In view of the foregoing, I am persuaded to find that the interests of justice will be served if the applicant was given another opportunity to prosecute his appeal to its logical conclusion.

I thus find merit in the application but in order to stem any further unnecessary delay in the determination of the appeal, I will reinstate the appeal on condition that it is prosecuted within the next six (6) months in default of which it will stand dismissed with costs to the respondent.
15. Having reinstated the appeal and considering that as stated earlier, the applicant filed the supplementary record of appeal out of time and without leave of the court, I will exercise my discretion and admit the supplementary record of appeal and deem it as properly filed.
16. Costs follow the event and are awarded at the discretion of the court. Costs of the application are awarded to the respondent but they will be borne by the applicant's advocates on record since it is their lack of diligence that led to the dismissal of the appeal.
17. It is so ordered.

DATED, SIGNED AND DELIVERED AT KISII THIS 23RD DAY OF FEBRUARY 2023.

C.W. GITHUA

JUDGE

In the presence of:

Ms Cheruiyot holding brief for Mr. Ndolo for the Appellant

No appearance for the respondent

Ms. Aphline Court Assistant

