



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Jewel Holdings Limited v International Foundation for Corrective & Rehabilitative Medicine  
(Civil Appeal 561 of 2014) [2023] KEHC 2919 (KLR) (Civ) (31 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2919 (KLR)

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

**CIVIL**

**CIVIL APPEAL 561 OF 2014**

**JK SERGON, J**

**MARCH 31, 2023**

**BETWEEN**

**JEWEL HOLDINGS LIMITED ..... APPELLANT**

**AND**

**INTERNATIONAL FOUNDATION FOR CORRECTIVE & REHABILITATIVE  
MEDICINE ..... RESPONDENT**

**RULING**

1. The appellant/applicant in this instance has brought the Notice of Motion dated 13<sup>th</sup> June 2022 supported by the grounds set out in its body and the facts deponed in the supporting affidavit. The applicant sought for the substantive order that this court set aside its order of 3<sup>rd</sup> June, 2022, dismissing the appeal and the appeal be reinstated for appropriate directions and hearing.
2. The respondent opposed the Motion by filing the replying affidavit sworn on 22<sup>nd</sup> February 2023.
3. The application was canvassed through the filing of written submissions.
4. I have considered the grounds laid out on the body of the Motion; the facts deponed in the affidavits supporting and opposing it; and the rival submissions.
5. In his affidavit filed in support of the motion dated 4/4/2022, Mr. Edgar Wendoh Lubulellah advocate to the applicant, stated they were allowed on May 27, 202 to log onto the Microsoft Teams link before Hon. Judge Chepkwony, but the court did not convene or hear the case, and no new notice of the upcoming hearing was given to the applicant.
6. The applicant avers that despite the lapse in service of a fresh Notice to Show Cause upon them, the court proceeded to determine the same on 3<sup>rd</sup> June 2022 without notice to them and dismissed this appeal.



7. In its submissions the applicant submitted that in the case at hand, directions were never given and proceedings from the lower court were never availed, for the court to be able to invoke the mechanism of dismissal for want of prosecution under Order 42 Rule 35 (1) of the Civil Procedure Rules.
8. The applicant placed their reliance on the cases of *Kirinyaga General Machinery v Hezekiel Mureithi Ileri* (2007) eKLR. *Suresh Ruginath & Another v Sagar Moban S.M Ram* (2012) eKLR & *Grace Njeri Theuri v John Mburu Wainaina* (2022) eKLR where the common holding was that an appeal cannot be dismissed before:
  - i. the appeal is admitted for hearing,
  - ii. directions on the hearing of the appeal have been given, and
  - iii. the High Court receives the file and lower court proceedings.
9. The applicant further submitted that the lengthy period it took to obtain the proceedings from the lower court and the High Court Deputy Registrar's failure to set them down for admission and the issuance of directions in accordance with the applicable court rules were the causes of the delay in the prosecution of the appeal, which was neither intentional nor the applicant's fault.
10. In response, the respondent stated that the applicant failed to pursue its appeal after the Memorandum of Appeal was filed and served, refused to do so for a period of around eight years, and never took any action to ensure that the appeal was heard and decided.
11. The respondent further stated that the averments by the applicant that it did not have notice that the matter was coming up for hearing of the Notice to Show Cause on the 3<sup>rd</sup> June 2022 are baseless and cannot be sustained in the present circumstances since a notice had indeed been issued by the court to the parties herein.
12. The respondent submitted that for the following reasons, the applicant has not provided enough justification for the court to exercise discretion in its favor: the applicant failed to pursue its appeal for almost eight years after filing its Memorandum, and after the applicant last followed up on the typed proceedings from the lower court on January 31, 2018, they made no further attempts to obtain them until the matter was scheduled for Notice to show cause.
13. I have given due consideration to the parties' respective positions as deposed. Order 12 Rule 7 of the *Civil Procedure Rules* under which the Application is brought provides:

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just”.
14. The application is asking for reinstatement of the appeal for hearing on merit. I will not re-invent the wheel on this subject. I stated the principles governing reinstatement of suit in the case of *John Nabashon Mwangi v Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR as follows:

“The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of the *Constitution*. Article 50 coupled with article 159 of the Constitution on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the court. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff



in an arbitrary manner from the seat of judgment. Such act are comparable only to the proverbial “Sword of the Damocles” which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated.”

15. In an application for reinstatement of a dismissed suit or appeal, 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. I have considered the reasons that were offered by the appellant regarding their failure to attend court on the 1<sup>st</sup> April, 2022 with anxious minds. I have asked myself whether failure to attend court on 1<sup>st</sup> April, 2022, constituted an excusable mistake, an error of judgment or was it meant to deliberately delay the cause of justice.

16. The applicant stated that they were never served with a notice that the matter was coming up for hearing of the Notice to Show Cause on 3<sup>rd</sup> June 2022 and the fact that the delay in prosecuting the appeal was not deliberate and not their fault but it was occasioned by the long time it has taken them to get the typed proceedings from the lower court.
17. It is also clear to note that the it has taken the applicant eight years form the time they had filed their memorandum to prosecute this appeal and that it they have not shown taken any reasonable steps since 2018 to procure the proceedings in order to complete the record of appeal.
18. It is also noted that the applicant has not presented any evidence to the court to indicate that the applicant followed up with the court in the years between 2018 and now when the matter was listed for Notice to show Cause.
19. The applicant’s explanation that the lapse in setting the appeal down for admission, directions and subsequently hearing is not attributed to them but rather the registries since they have been unable to file the record of appeal but are ready and willing to file the same soon as the registry supplies them with the typed proceedings. I think the explanation given by the applicant is not sufficient and the fact that, it’s been eight years since the appeal was filed, it is clearly lack of seriousness from the applicant who should be moving the court.
20. However, dismissal is a draconian order which drives away the litigant from the seat of justice. Therefore, in spite of the gaps I have noted, I still think that justice would be served in reinstating the appeal but with strict condition. No prejudice will be suffered by the respondent in reinstating the appeal.
21. Accordingly, I set aside the dismissal order and reinstate the appeal. In the circumstances of this case, a fair order on costs is to order which I hereby do that each party bears their own costs.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS THIS 31<sup>ST</sup> DAY OF MARCH, 2023.**



.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant/Applicant

..... for the Respondent

