



**Asino & another v Nyakundi (Civil Appeal E006 of 2021)
[2023] KEHC 2258 (KLR) (27 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2258 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E006 OF 2021
KW KIARIE, J
MARCH 27, 2023**

BETWEEN

SAM KENYATTA ASINO 1ST APPLICANT

WYCLIFFE LIUD OKERO ODERO 2ND APPLICANT

AND

EUNICE KEMONTO NYAKUNDI RESPONDENT

RULING

1. On 26th January 2023 the applicants herein, moved the court by way of Notice of Motion under sections 1A, 1B, 3A & 95 of the *Civil Procedure Act*, Order 45 Rule 1, Order 50 Rule 6 & Order 51 Rule 1 of the *Civil Procedure Rules*. The applicants were represented by the firm of Kimondo Gachoka & Company Advocates. They are seeking the following orders:
 - a. That this application be and is hereby certified urgent and heard ex-parte on priority basis in view of its urgent nature and service of the same be dispensed with in the first instance. [Spent]
 - b. That pending the hearing and determination of this application inter alia, a stay of execution of the judgment and/or Decree issued on 3rd December, 2020 by hon. Celesa Okore in Oyugis CMCC 166 of 2020 and all consequential orders and proceedings thereto be and is hereby issued and/or granted.
 - c. That pending the hearing and determination of this appeal inter parties, a stay of execution of the judgment and/or Decree issued on 3rd December, 2020 by Hon. Celesa Okore in Oyugis CMCC 166 of 2020 and all consequential orders and proceedings thereto be and is hereby issued and/or granted.
 - d. That this honorable court reinstate and readmit this appeal being Homa Bay HCCA 6 of 2021.



- e. That this honorable court do make any such further and/or other orders and issue any other relief it may deem just to grant in the interest of justice.
 - f. That the costs of this application abide the outcome of the appeal.
2. The application was premised on the following grounds:
- a. That the appellants' appeal is against the judgment and/or decree issued on 3rd December, 2020 in CMCC No. 166 of 2017.
 - b. That on 10/8/2021 the honorable Deputy Registrar issued directions on the disposal of the appeal.
 - c. That the appellants' did not comply with the said directions by filing the record of appeal dated 11th August 2021.
 - d. That on 9/11/2021 the honorable judge dismissed the appeal for want of prosecution yet directions had not been issued on the disposal of the appeal.
 - e. That the delay in filing this application was occasioned by the advocate handling this file while she was handing over her files she inadvertently and unwittingly failed to disclose the status of this file.
 - f. That this application has been made without undue and/or unreasonable delay.
 - g. That the appeal does raise triable issues which need to be reinstated and/or readmitted, heard and determined by this honorable court.
 - h. That this application ought to be granted in the interest of equity and justice.
3. The application was opposed by the respondent. She was represented by the firm of Ochoki & Company Advocates. She raised the following grounds:
- a. That the application is bereft and devoid of any merit, vexatious, intended to frustrate, embarrass and/or abuse the court process and ought to be dismissed with costs.
 - b. That the appellants/applicants are well aware that execution is a lawful process and for one to be able to halt the same he/she has to meet the requisite threshold before the same is granted.
 - c. That the appellants/applicants are orchestrating a scheme to ensure that I do not enjoy the fruits of this judgment
4. I do not comprehend why the applicants are invoking Order 45 of the Civil Procedure Rules when their main prayer is reinstatement of their appeal which was dismissed for want of prosecution. The Order is inapplicable.
5. I have checked the record and I am satisfied that the appeal was erroneously dismissed by the Deputy Registrar. The Deputy Registrar has no capacity to dismiss an appeal. The role of the DR in a file is purely administrative except when he/she is acting as a taxing master.
6. I allow the application. I also make an order that the appellants deposit half the decretal amount in an interest earning jointly operated account by the two firms of advocates on record within 30 days of this ruling. There will be a stay of execution for 30 days to allow the account to be opened and the money to be deposited. Costs will abide with the outcome of the appeal.

DELIVERED AND SIGNED AT HOMA BAY THIS 27TH DAY OF MARCH, 2023.



KIARIE WAWERU KIARIE
JUDGE

