



**Kaguongo v Wandai (Miscellaneous Civil Application
E077 of 2022) [2023] KEHC 3678 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3678 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
MISCELLANEOUS CIVIL APPLICATION E077 OF 2022**

**GL NZIOKA, J
APRIL 27, 2023**

BETWEEN

MICHAEL KANYORO KAGUONGO APPLICANT

AND

WILLIAM OLEKERETO WANDAI RESPONDENT

RULING

1. The subject application herein is dated November 8, 2022 brought under the provisions of section 1A, 1B, 3A and 95 of the *Civil Procedure Act* (Cap 21) Laws of Kenya, Order 45 Rule 1, Order 42 Rule 6 and Rule 21, Order 50 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules, 2010*, and all enabling provisions of the law.
2. The applicant is seeking for orders that: -
 - a) Spent
 - b) Spent
 - c) Spent
 - d) That the appeal file be reopened and this appeal being Naivasha HCCA No 21 of 2019; Michael Kanyoro Kaguongo v William Olekereto Wandai be and is hereby reinstated for hearing and determination in the normal way.
 - e) That the Honourable Court do make any further order(s) and issue any other relief it may deem just to grant in the interest of justice.
 - f) That the costs of the application be in the cause.



3. The application is supported by the grounds thereto and the affidavit of even date sworn by Victor Nganga. He avers that the appellants instituted an appeal against the whole judgment of; Hon M Mutua in Naivasha CMCC 313 of 2017, delivered on March 18, 2019.
4. That on October 3, 2022, the appellant's lawyer logged in to court using the old link and was not admitted. He called the court assistant and was provided with a new link. That he logged in and when the judge concluded with the session he asked for the file to be recalled but was advised to follow up with the registry. That upon following up with at the registry, he was discovered that the appeal had been dismissed on October 3, 2022 for non-attendance.
5. That the appeal having being dismissed, it exposes the appellants to imminent execution and is greatly apprehensive that the respondent may at any time commence execution. He states that the non-attendance was inadvertent and beyond the appellant's control.
6. Further, the non-attendance was not unreasonable and/or inordinate so as to prejudice the respondent and the delay can be compensated by way of damages. Furthermore, that the appellants have deposited in court a bank guarantee of Kshs 907,550 being security of costs pending the hearing and determination of the appeal.
7. That under Article 48 of the *Constitution of Kenya, 2010* access to justice is guaranteed and unlimited, and under Article 159 (2) (d) of the *Constitution of Kenya, 2010*, the court is enjoined to administer justice without undue regard to procedural technicalities.
8. Further, the appellants have an arguable appeal which they are keen on prosecuting and are desirous and fully committed to the just and timely disposal of thereof. That it is only just, fair and in the interest of justice that the appeal is re-admitted and/or re-instated and they be granted an opportunity to prosecute the same.
9. However, the application was opposed vide a replying affidavit dated January 18, 2023 sworn by Mong'are Gekong'a, an advocate of the High Court practising in the firm of Gekong'a & Company Advocates and having conduct of the matter. He avers that he received instructions from the respondent to file a suit for the very severe injuries he sustained as a result of a road traffic accident that occurred on September 8, 2017.
10. That, the suit was defended by the firm of Kimondo Gachoka & Company Advocates and the Honourable court delivered its judgment on March 18, 2019, in favour of the respondent herein. However, the applicant being dissatisfied with the said judgment filed an appeal vide Naivasha High Court Appeal No 21 of 2019 in the year 2019.
11. That since filing the appeal, the applicant has not taken any steps to prosecute it nor filed or served the record of appeal. That, the court mentioned the appeal on several occasions to confirm compliance by the appellant and even gave them timelines to file and serve the record of appeal but they failed to file and serve the record of appeal and several notices to show cause why the appeal should not be dismissed were issued.
12. Subsequently, the court issued to both parties a notice to show cause why the appeal should not be dismissed fixed for October 3, 2022. However, when the matter came up for the same on the said date, the applicant failed to attend court and the appeal was dismissed with costs to the respondent.
13. He avers that the applicant is yet to file and serve the record of appeal and is therefore guilty of lethargy and inertia and cannot be allowed to benefit from its indolence. Thus, the application is scandalous, void, malicious, an afterthought and a scheme to delay and/or obstruct justice and lacks merit and therefore ought to be disregarded.



14. At the conclusion of the arguments by the parties I have considered the application in light of the material placed before the court, in particular, the record of the court in High Court Civil Appeal No 21 of 2019, which is the subject of the matter herein and it reveals that, the memorandum of appeal was filed in court on April 16, 2019 and since then no record of appeal has been filed.
15. The court record further reveals that, the matter was mentioned on May 18, 2021, September 23, 2021, November 25, 2021, and the appellant granted the last opportunity to prepare and file a record of appeal, failing of which a notice to show cause would be issued. By April 4, 2022, no record of appeal had been filed and an order for the notice to show cause was issued.
16. On October 3, 2022, the court was informed that, the appellant had been served with the notice to show cause but they were not in court, and being satisfied of the same, dismissed the appeal.
17. I note from the supporting affidavit that the explanation tendered for the non-appearance of court was use of an old link to log into court but no explanation has been tendered for lack of the record of appeal; and/or on the notice to show cause.
18. In the interest of justice. I shall open up file High Court Civil Appeal No. 21 of 2019, for the purposes of according the applicant an opportunity to show cause on the notice to show cause issued therein.
19. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 27TH DAY OF APRIL 2023

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Nganga for the Appellant

Ms. Sitati h/b for Ms. Kiberenge for the Respondent

Ms Ogutu; Court Assistant

