



**Eldodrill Holdings Limited & 2 others v Odende (Civil Appeal
127 of 2019) [2023] KEHC 18431 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18431 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL 127 OF 2019**

MS SHARIFF, J

MAY 31, 2023

BETWEEN

ELDODRILL HOLDINGS LIMITED 1ST APPELLANT

STEPHEN GITAU KARANJA 2ND APPELLANT

JUDY MWAURA 3RD APPELLANT

AND

TIMOTHY ODHIAMBO ODENDE RESPONDENT

RULING

A. Case Background

1. The Appellants were defendants in Winam Law Courts PMCC No. 249 of 2012; Timothy Odhiambo Odende vs Eldodrill Holdings Limited & 2 Others, wherein summary Judgment had been entered against them.
2. Subsequently thereto, the Appellants filed an application to set aside the said summary judgment but the same was disallowed hence their filing of the memorandum of appeal herein.
3. On October 13, 2020 Justice F. A. Ochieng issued directions that the Appellants do file their record of Appeal within 30 days from that day and that in the event of default the appeal was to stand abandoned. One John Ogutu counsel for the Respondent appeared in the absence of the Appellant and the court directed that the Respondent do serve the Appellants with its said orders and the appeal was set for mention on 25th November 2020.
4. On November 25, 2020 one Ragot counsel for the Respondent appeared before Justice F. A. Ochieng and conceded that the Appellant had not been served with neither the orders nor the mention notice and the case was thus rescheduled for mention on February 11, 2021 with directions that the Appellants be served. This time round the Appellants were duly served but did not attend court



wherefore the Respondent's advocates moved the court for dismissal of the Appeal and this court proceeded to mark the appeal as abandoned for failure to file the record of appeal within 30 days from the October 13, 2020.

B. Application

5. On March 19, 2021 the Appellants filed this application herein under Orders 42, 50 and 51 of the Civil Procedure Rules seeking to set aside the orders made on February 11, 2021 and for the reinstatement of their appeal. The application is supported by two affidavits; one sworn on March 17, 2021 by Stephen Gitau Karanja the 2nd defendant and another sworn on even date by Elijah Momanyi Mogona Advocate.
6. The gravamen of the Appellants' application is that they had no notice of the directions given on 13th October 2020 that enjoined them to file their record of appeal within 30 days. Further that in any event, whereas they had applied and paid for the typing of the proceedings in the lower court, the same had not been supplied timeously. The appellants attributed their failure to attend court on February 11, 2021 laxity on the part of their advocates and the latter through Mr. Elijah Momanyi Mogona stated that they had inadvertently failed to read their mail hence their failure to attend court.
7. This application is resisted by the Respondent through a replying affidavit by Miriam Onsongo Advocate sworn on July 27, 2021 wherein she deposes that the Appellants are guilty of laches in filing this application and that they had generally exhibited lack of interest in prosecuting their appeal hence the orders to mark it as abandoned. Further that there is noncompliance with order 42 Rule 12 of the Civil Procedure Rules as no memorandum of appeal has been served upon the Respondent. The Respondent's said advocate maintains that whereas parties had notice of the availability of the typed proceedings of the subordinate court, the Appellants opted to exhibit their indolence by failing to file the record of appeal at all wherefore they were underserving the orders sought.

Submissions

8. This application was canvassed by way of written submissions.
9. The Appellants submitted that the mistake of their advocates in failing to obtain the typed proceedings of the subordinate court in time and in not attending court sessions ought not be visited upon them. They maintain that they had solely relied upon their advocates in the conduct of the appeal and they had duly paid for the proceedings. The appellants' advocates blamed the court for failure to put them on notice of the availability of the typed proceedings and of the directions issued on October 13, 2020. They maintained that the notice was served late, well after the expiry of the 30 days wherefore there was no possibility of them complying thereto in any event.
10. The Respondent on his part has submitted that this court aids the vigilant and not the indolent. He posits that the Appellants as litigants are responsible for the conduct of their appeal and have a duty to follow up with their advocates, which duty they failed to discharge and should therefore shoulder the blame for their advocates' negligence. Reliance has been placed on the cases of Shadrack Cheserk vs Kiserem Mengichi & another (2016) eKLR which quoted Mbogo & another vs Shah (1968) E. A 93 thus:-

“ that while the court would exercise its discretion to avoid injustice or hardship resulting from inadvertence or excusable mistake or error, it would not assist a person who has deliberately sought to obstruct or delay the court of justice.”



11. The Respondent has also emphasized that the overriding objective of the court is to do justice to the parties. In this instance the Respondent posits that he is entitled to enjoy the fruits of the Judgment and that a reinstatement of this appeal will procrastinate his such enjoyment. The case of *Hezron Alois Nyachae vs James Obiri Oenga & another* (2015) eKLR has been cited in this regard.
12. The respondent further posits that a court of equity aids the vigilant and not the indolent and he has invited this court to be guided by the holding in the case of *Smith vs Clay* (1767) Eng. R55 (1767) 3 Bro CC 646, (1767) 29 ER 743 which has been cited with approval in several Kenyan Cases for instance in the case of *Gitamaiyu Trading Company Ltd vs Nyakinyua Mugumo Kiambaa Co. Ltd & 11 others* (2019) eKLR thus:-

“A court of Equity has always refused it’s to aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive, and does nothing. Equity would not countenance laches beyond the period for which a legal remedy had been limited by statute, and that where the right had been barred, the equitable right to the same thing was also barred; expedite reipublicae at sit finis litium; is a maximum that has prevailed in this court at all times, without the help of parliament.”
13. The Respondent submits that to reinstate the Appellants’ appeal is to abuse court process and he relies on the case of *Cecilia Wanja Waweru vs Jackson Wainaina Muiruri & another* (2014) eKLR.

Analysis and Determination

14. I have considered the Appellants’ application, the two supporting affidavits, the replying affidavit, the rival submissions and the authorities cited by the Respondent and I have established as of fact that indeed the Appellants were never served with the order containing the directions made on October 13, 2020 timeously wherefore they could not have acted on it within the set timeline. The Respondent’s advocates who were directed to serve the said order, extracted the same long after the expiry of the 30 days compliance period and served the order after the 25th of November 2020. Whereas there was apparent laxity on the part of the Appellants and their advocates in preparing and filing the record of appeal prior to the October 13, 2020, I do find that the omission on the part of the Respondent’s advocates to serve them with the directions of the court was the instrumental in setting into motion subsequent events that culminated in the marking of their appeal as abandoned.
15. The overriding objective of this court is to administer substantive justice to parties. Shutting a party from the seat of justice ought to be the last resort. I thus echo the principles governing reinstatement of suit as were laid down in the case of *John Nashon Mwangi vs Kenya Finance Bank Ltd (in Liquidation)* (2015) eKLR thus:-

“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 the right to be heard and the Constitutional desire to serve substantive justice to all 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... 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 acts 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.”

16. On the balance I do find that the application herein is merited and I do hereby set aside the orders made on February 11, 2021 and I do hereby reinstate the Appellants appeal on the following terms:-
- a. The Appellants to file their record of appeal within 7 days from the date hereof and in the event of default, the appeal shall stand dismissed.
 - b. An order of stay of execution of the Judgment of Winam PMCC No. 249 of 2012 is hereby issued until this appeal is heard and determined on condition that the appellants do deposit in a joint interest earning accounts of parties advocates the sum of Kshs 955,000 within 30 days from the date hereon.
 - c. In the event of default in compliance with order (b) hereinabove, the stay order shall automatically lapse and the Respondent shall be at liberty to execute.
 - d. Each party shall bear their own costs. of this application.
 - e. This appeal shall be mentioned on the 27th day of June 2023 to confirm compliance and to take directions on the appeal.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 31ST DAY OF MAY 2023

MWANAISHA S. SHARIFF

JUDGE

