



REPUBLIC OF KENYA



Kiptanui & another v Maina (Suing as personal representative of the Estate of Sarah Wangui (Deceased)) (Civil Appeal E030 of 2021) [2023] KEHC 18259 (KLR) (30 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18259 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL E030 OF 2021**

**JK SERGON, J
MAY 30, 2023**

BETWEEN

JULIUS KIPTANUI 1ST APPELLANT

MOMBASA MAIZE MILLERS LIMITED 2ND APPELLANT

AND

RACHEAL NYAWIRA MAINA RESPONDENT

**SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SARAH
WANGUI (DECEASED)**

RULING

1. The Appellants/Applicants filed a Notice of Motion dated 7th February, 2023 under certificate seeking for the following orders:
 1. Spent.
 2. Spent.
 3. That this Honourable Court be pleased to set aside its order made on 27th January, 2023 dismissing this appeal for want of prosecution and order reinstatement of the appeal for hearing.
 4. That the costs of this application to abide the outcome of the Appeal.
2. The Application is supported by the grounds laid out on its face and the facts stated in the affidavit of Fundi Lewis Lucheli, the Applicants' Advocate who avers that on 17th January, 2023 he received a hearing notice listing the instant appeal for hearing on 27th January, 2023, however, on the said 27th January, 2023 when he logged into Honourable Lady Justice A.N. Onger's virtual court session, he was informed that the judge was not sitting and that there was a notice to that effect.



3. The Advocate further avers that in an attempt to fix another hearing date at the Kericho High Court Civil Registry, he was informed by the Court assistant one Mr. Ochieng that the instant matter had been cause listed before Lady Justice Kavedza Diana and not Lady Justice A.N Ong'eri and that the said Justice Kavedza was proceeding virtually but was having the physical files at Kitale Law Courts as she was on transfer.
4. It was his averment that he managed to join Lady Justice Kavedza Diana's virtual session at 9:30am on the same date and was admitted in her virtual session but upon requesting to have the matter mentioned, the said Judge informed him that she had already dealt with the civil matters and said that she will recall the matter later as she was handling criminal matters physically at the Kitale Law Courts.
5. He avers that he waited on the virtual court platform from 9:30am to 2.00pm on the said date but the Honourable Judge did not log back and that on 2nd March, 2023, their Mr. Dancun Njoga Advocate received a call followed by a letter from Mr. Moses Mbeche advocate, from the Respondent's advocates firm informing him that the instant appeal was on 27th January, 2023 dismissed for want of prosecution.
6. He further avers that a hearing was served but there was confusion during the Rapid Response Initiative that led to the dismissal of the appeal and that the Applicants lodged an application for stay pending appeal in the trial court on 5th October, 2021 which application was allowed by consent of the parties whereby the sum of Kshs 5,241,594/= being part of the decretal sum was deposited in a joint interest earning account in the names of both counsels on record and a sum of Kshs. 300,000,000/= released to the Respondent's advocates.
7. The advocate avers that their court assistants have made several visits to the High Court Civil Registry since and written a letter to the Chief Magistrate requesting for typed and certified proceeding and judgement to enable them prepare the record of appeal and eventually list the appeal for direction/hearing and that his representatives have made countless visits to the trial court registry to pursue the typed proceedings and judgement only to be told that the same have not been typed.
8. It is his averment that when he was in the process of preparing the decree, he was informed that the instant appeal had on 27th January, 2023 been dismissed for want of prosecution, four days after requesting for certified copies of proceedings and the judgement of the trial court hence it is unjust to conclude that the Appellants failed to take steps to prosecute their appeal when the delay in in procuring copies of the certified judgement and proceedings was beyond their control.
9. He further avers that it is in the interest of justice that the order of the Honourable court made on 27th January, 2022 dismissing the Appellants' appeal for want of prosecution be set aside and the appeal be reinstated for hearing on merits and that the dismissal of the appeal is prejudicial to the appellants as they have been denied the fair chance to be heard, a constitutional right to fair hearing as enshrined under Article 50 of *the Constitution* of Kenya 2010.
10. He avers that the application has been brought without undue delay, in good faith and it is in the interests of justice that the orders sought be granted and that the Respondent will not be prejudiced in the event that the application is allowed.
11. In retort, the Respondent through a Replying Affidavit dated 13th February 2023, sworn by Rachael Nyawira Maina, avers that the appellants had lost any conceivable or perceivable interest in the appeal as the court gave the said appellants leave to appeal on 9th November, 2021 but the appellants have never taken any serious initiative to have the matter certified ready for the hearing.



12. She further avers that the Appellants have never applied for certified copies of proceedings neither has the appellant served the Respondent with records of appeal and that a period of one 1-year inaction by appellants is oppressive and prejudicial to the Respondent.
13. She avers that it is not true that the appellant advocates and or court assistants have made several visits to high court registry with a view of requesting for copies and certified proceedings as such assertions should be supported with evidence and that when the matter came for dismissal, the Respondent's advocates were present in court but the appellant and or their representatives failed to appear.
14. It is her averment that the application does not have merits and should be dismissed with costs.
15. Directions were given that the Application be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.
16. The Appellants/Applicants in their written submissions dated 20th February, 2023 reiterated the contents of their Supporting affidavit and submitted that a hearing notice was served upon them but there was confusion during the Rapid Response Initiative service that led to the dismissal of their appeal and that their court assistants have made several visits to the High Court Civil Registry since and written a letter to the Chief Magistrate requesting for typed and certified proceedings and judgment to enable them prepare the record of appeal and eventually list the appeal for directions/hearing.
17. the Appellant relied on the case of *Cecilia Wanja Waweru v Jackson Wainaina Muiruri & another* [2014] eKLR where the court of Appeal held that:

“There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case. We are of the considered view that the learned Judge in considering the application, should have looked at the appellant's conduct from the time the appeal was filed up to the date the application for reinstatement was filed...

We have to ask ourselves whether the failure by the appellant to prosecute the appeal in the High Court and/or the delay in filing the application for reinstatement constituted an excusable mistake or was it meant to deliberately delay the cause of justice....”
18. The Appellants thus submitted that it is unjust to conclude that the Appellants failed to take steps to prosecute their appeal when the delay in procuring copies of the certified judgement and proceedings was beyond their control.
19. In retort the Respondent reiterated the content of her Replying Affidavit and begged for protection as provided in Article 159(b) of *the Constitution* and explained that the appellants submitted to the constitutional right to be heard but they forgot that the right to be heard shall not be delayed to the detriment of another party.
20. It was the Respondent submission that the letter seeking for typed proceedings was done in May, 2022 yet leave to appeal was given on 9th November, 2021, that this in itself amounted to inordinate delay and that the appellants assertion to events leading to dismissal of the appeal on 27th January 2023 are not true.
21. The Respondents reiterated that the Respondent's advocates appeared in court and confirmed that the appellants' advocates were not present despite being served with notice and that the court may have acknowledged that at the time of dismissing the appeal there was no record of appeal filed and the same has not been filed to date.



22. It was the Respondent's further submissions that the appellants are only delaying the fruits of the respondent's Judgement and prayed that the court's orders dated 27th January, 2023 dismissing the appeal be upheld.
23. I have considered the Application, the Replying affidavit and the rival submissions and the law. The issue that is before me is whether the Applicants have made out a good case to justify the grant of orders for reinstatement of the Appeal.
24. Indeed, both the dismissal of this appeal for want of prosecution and its reinstatement is an act of the exercise of this court's discretionary power. In *John Nabashon Mwangi v Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR it was held that:

“...The decision of the court is purely a matter of discretion which as it has been said time and again should be exercised judicially on defined principles of law. 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 Dancles” 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.”

25. In *Cecilia Wanja Waweru v Jackson Wainaina Muiruri & another* (supra) relied upon by the Applicant, it was held that:

“There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case. We are of the considered view that the learned Judge in considering the application, should have looked at the appellant's conduct from the time the appeal was filed up to the date the application for reinstatement was filed...

We have to ask ourselves whether the failure by the appellant to prosecute the appeal in the High Court and/or the delay in filing the application for reinstatement constituted an excusable mistake or was it meant to deliberately delay the cause of justice....”

26. I note that the dismissal of the appeal herein was on 27th January 2023, the applicant became aware of the said dismissal on 2nd February, 2023 and this application was filed on 7th February, 2023 just 5 days later. Thus, it cannot be said that there was inordinate delay in bringing the application.
27. The Applicants advocates acknowledged receipt of a hearing notice dated 17th January, 2023 listing the instant appeal for hearing on 27th January, 2023 and explained that on the said date when he logged in to the virtual court at 9am, he was informed that Honourable Lady Justice A.N. Ongeru was not sitting and there was a notice to that effect. That when he attempted to fix another hearing date at



the registry, they were informed that the matter had been cause listed before Honourable Lady Justice Kavedza Diana who was proceeding virtually and had the physical file with her in Kitale since she was on transfer.

28. The Applicants Advocate has explained how he joined Lady Justice Kavedza's virtual court and was admitted but their matter had already been dealt but Justice Kavedza requested that he wait as she will recall the matter after physically hearing the criminal cases but the Judge did not log back. The Applicants' Advocate has also explained that they have attended the High Court Civil Registry to procure the typed proceedings to no avail and even produced a letter dated 26th May, 2023 to the Chief Magistrate requesting for the certified copies of the proceedings and judgements.
29. The Respondent on the other hand has stated that the Applicants' assertions are untrue and are meant to delay the matter further to the detriment of the Respondent.
30. I have taken into consideration that the respondent has strongly opposed the reinstatement of the appeal herein. I however, find that the application is not fatally defective, and in my view, by applying the legal requirements of fair trial under Article 50 of *the Constitution* and requirements for dispensation of substantive justice under Article 159(2) (b) of *the constitution*, this application should be allowed to give parties a chance to argue the substantive appeal. I also find that the respondent will not suffer prejudice if the appeal is reinstated.
31. Consequently, and for the above reasons, I allow the application consequently the order dismissing the appeal for want of prosecution is set aside. The Appeal is hereby reinstated and should be prosecuted within of 120 days. In default, the Appeal shall stand automatically dismissed. Costs to abide the outcome of the Appeal.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 30TH DAY OF MAY, 2023.

.....

J.K. SERGON

JUDGE

In the presence of:

C/Assistant - Rutoh

Mbeche for the Respondent

Fundi for the Appellants

