



**Kiprono v Kigen (Miscellaneous Civil Application E041 of 2022)
[2023] KEHC 17644 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17644 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
MISCELLANEOUS CIVIL APPLICATION E041 OF 2022**

RL KORIR, J

MAY 25, 2023

BETWEEN

HENRY KIPRONO MILGO ALIAS HENRY KIPRONO APPLICANT

AND

VICTOR KIPLANGAT KIGEN RESPONDENT

RULING

1. The applicant filed a notice of motion application dated April 4, 2023 which sought the following orders:
 - i. Spent.
 - i. That the Honourable Court be pleased to set aside the order dismissing the Applicant/Appellant's appeal issued on March 20, 2023 and reinstate the Applicant's Appeal to be heard and determined on its merits.
2. The Application was brought under Section 3A of the *Civil Procedure Act*, order 12 rule 7 and order 51 rule 1 of the *Civil Procedure Rules, 2010*. The Application was premised on the grounds on the face of the Application and further by the Supporting Affidavit sworn by Willy Maina, the Appellant's advocate on April 4, 2023.

The Applicant's Case.

3. The Applicant stated that the Appeal he wanted reinstated was part of a series flowing from Misc. High Court Applications Numbers E24, E25 & E26 all of 2022 where two applications (E25 & E26) were allowed while E24 was pending.
4. It was the Applicant's case that as a result of the applications being allowed, he filed Appeal Numbers E041 and E042 all of 2022 on October 25, 2022 and they came up for directions on January 23, 2023



where the court gave the date of March 20, 2023 for directions. That therefore order 17 rule 2(1) of the *Civil Procedure Rules* did not apply.

5. The Applicant opined that counsels in this matter appeared online as the Appellant was in Nakuru and the Respondent's counsel was in Nairobi. That the Applicant logged in using the court's online link on March 20, 2023 but the court did not conduct any matters online as it conducted its matters in open court where directions were given.
6. It was the Applicant's case that he had an arguable appeal whose chances of success were high and that he was desirous and willing to prosecute it to its logical conclusion. That the Respondent would not be prejudiced in any way if this Application was allowed.
7. The Applicant stated that the present Application had been brought timeously and without unnecessary delay.
8. Mr. Maina, advocate for the Applicant appeared before me on May 11, 2023 and stated that he had spoken with the Respondent's law firm who indicated to him that they would not oppose the Application. Mr. Maina further submitted that the court issued a Notice and this Appeal was part of a series ie, E41 and E42 all of 2022 which were still active.
9. I have gone through the proceedings and I have noted that the Application was not opposed. The Applicant filed an Affidavit of Service dated May 10, 2023 where he indicated that he served the Respondent's firm on May 4, 2023 with a copy of their Application and a Hearing Notice through their official email address. I am satisfied that the Respondent was properly served.
10. Reinstatement of a suit is at the discretion of the court. Such discretion ought to be exercised in a just manner, as was held in *Bilba Ngonyo Isaac vs. Kembu Farm Ltd & another & another* (2018) eKLR which referred to the decision of the court in *Shah vs. Mbogo & another* (1967) EA 116, where the court stated:-

“The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”

11. I have gone through the proceedings and I note that parties appeared before the court on January 23, 2023 where they were directed to attend court on March 20, 2023 for directions. I have also noted in the proceedings that the parties were issued with a Notice to Show Cause on why the Appeal should not be dismissed. The Notice was issued under Order 17 Rule 2(1) of the *Civil Procedure Rules*.
12. Order 17 rule 2(1) of the *Civil Procedure Rules* provides as follows: -

In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

13. From the proceedings, it was quite clear that the Appeal was active as the parties were last in court on January 23, 2023. It was therefore a mistake when the Notice to Show Cause was issued and parties directed to attend court on the date that parties were supposed to take directions regarding the hearing



of the appeal. In *Belinda Murai & Others vs Amos Wainaina* (1979) eKLR, the Court of Appeal held that:-

“.....A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made...”

14. I am satisfied with the Applicant’s explanation for not attending the show cause hearing on March 20, 2023. He stated that on March 20, 2023 the court did not conduct a virtual session but instead an open court where the dismissal order was issued.
15. I also note that the Application was filed timeously having being filed on April 11, 2023 which was about a month since the Appeal was dismissed for want of prosecution.
16. In end, I find the Notice of Motion Application dated April 4, 2023 has merit and it is allowed. I make the following orders: -
 - i. The Applicant’s Appeal dated October 21, 2022 is reinstated.
 - ii. Parties to take Directions on the hearing of the Appeal.
 - iii. The Application is allowed without costs.

RULING DELIVERED, DATED AND SIGNED THIS 25TH DAY OF MAY, 2023.

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R. LAGAT-KORIR

JUDGE

Ruling delivered in the virtual presence of Mr. Maina for the Applicant, N/A for the Respondent and Siele(Court Assistant)

