



REPUBLIC OF KENYA



KENYA LAW
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**Wainaina v Kemboi (Civil Appeal E452 of 2022)
[2023] KEHC 21724 (KLR) (Civ) (25 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21724 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E452 OF 2022

AN ONGERI, J

AUGUST 25, 2023

BETWEEN

SAMUEL CHEGE WAINAINA APPELLANT

AND

KENNEDY KIBIWOT KEMBOI RESPONDENT

RULING

1. The application coming for consideration in this ruling is the one dated May 17, 2023 brought under sections 1A, 1B, 3A and 95 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya and order 50 rule 6 and order 51 rule 1 of the *Civil Procedure Rules, 2010* and all other enabling provisions of the law seeking for the following orders;
 - i. That this application be certified urgent, service be dispensed with thereof and the same be heard ex-parte in the first instance.
 - ii. That pending the hearing and determination of this application there be an order of stay of execution of the judgment delivered on May 31, 2022 by hon B J Ofisi in Milimani SCCC E782 of 2021.
 - iii. That pending the hearing and determination of this appeal there be an order of stay of execution of the judgment delivered on May 31, 2022 by hon B J Ofisi in Milimani SCCC E782 of 2021.
 - iv. That this appeal being Milimani E452 of 2022 be and is hereby reinstated for hearing and determination on merit.
 - v. That this honourable court grant the appellant leave to file a supplementary record of appeal.



- vi. That this honourable court do make any such further order(s) and issue any other relief it may deem just to grant in the interest of justice.
 - vii. That the costs of the application be in the cause.
2. The application is based on the following grounds on the face of it as follows;
- i. That on May 31, 2022 judgment was entered in Milimani SCCC E782 of 2021 by hon B J Ofisi.
 - ii. That applicant's appealed against the said judgment as the trial magistrate erred by failing to consider the submissions and legal principles and precedences in awarding special damages.
 - iii. That this appeal came before this honourable court and Lady Justice Ongeri ordered the applicant to file the record of appeal together with their submissions.
 - iv. That this order was based on the submissions of Mr. Savwa who confirmed to this court that the proceedings and judgment in Milimani SCCC E782 of 2021 were typed and ready for collection.
 - v. That the applicant was informed that the registry was undergoing a review and arrangement exercise of all the files in the registry when they went to collect the said proceedings and judgment.
 - vi. That the matter was dismissed on March 28, 2023 since the applicant had not obtained the certified copies of the proceedings and decree but had filed an incomplete record of appeal.
 - vii. That the applicant has been following up on the proceedings and judgment but to no avail.
 - viii. That the applicant received a letter from the firm of Odemu Savwa and company advocates dated May 15, 2023 which was threatening execution for the decretal amounts.
 - ix. That this will result in the applicant suffering loss and irreparable damage and his appeal rendered nugatory yet the appeal raised triable issues.
 - x. That it is only just and fair that the appeal be re-instated/re-admitted and heard in the normal way and this court allow applicant to file their supplementary record of appeal the appellants had already filed their record of appeal.
 - xi. That it is in the interest of justice that the appeal be reinstated and the same be heard to a logical conclusion.
 - xii. That this application will not occasion any prejudice to the respondent or any damage that cannot be compensated by way of costs if this application is allowed.
 - xiii. That this application has been made without unreasonable/inordinate delay.
3. The application is supported by the affidavit of Lawrence Njuguna, the applicant's advocate sworn on May 17, 2023 which is a reiterates of the above stated grounds.
4. The respondent filed grounds of opposition (G O O) to the application dated May 17, 2023 in the following terms;
- a. That the instant notice of motion application is without basis and altogether an abuse of the court process as the supportive affidavit contains no facts and/or evidence of probative value that would support the issuance of any one of the prayers and orders sought.



- b. That the honorable court lacks jurisdiction to entertain the instant application dated May 17, 2023.
5. The parties filed written submissions as follows; the applicant submitted that they requested for certified copies of the proceedings, decree and judgement through a letter dated April 14, 2023 but were informed that the registry was undergoing an exercise of arranging the filed and the same could not be availed. That the failure to prepare the record of appeal was not occasioned by the applicants but the court registry and therefore the applicant has been solicitous in prosecuting the appeal.
6. The respondent submitted that The applicant herein filed a memorandum of appeal dated June 3, 2022 on June 25, 2022 and an application under certificate of urgency for stay of Execution and orders were issued by the learned justice (Dr) Sergon, Counsel was instructed to file a record of appeal within 30 days from the 25th of June when we appeared before the court, the applicant failed to file the said record of appeal.
7. The Judge had indicated that there would be consequences for failure to comply with the said directive as this was an appeal from the small claims court and needed to be disposed of expeditiously. The matter came up on the March 1, 2023 before this honorable court and the applicant was allowed more time to file a complete record of appeal. On 28th March the applicant failed to appear and had not complied with the directions of the court and this led to the dismissal of the appeal with costs.
8. The respondent argued that there is nothing to revert to as there was no appeal in the first place; that it has been conceded that the review sought is not pegged on discovery of new matter or on account of some mistake or error apparent on the face of the record; that the application is pegged on other sufficient reason being that the court registry have not furnished them with a decree and or proceedings.
9. The sole issue for determination is whether the appeal should be reinstated for hearing.
10. The appeal was dismissed for want of prosecution under Order 17 rule 2 which states as follows;
- (1) 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.
 - (2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.
 - (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.
 - (4) The court may dismiss the suit for non-compliance with any direction given under this order.
 - (5) A suit stands dismissed after two years where no step has been undertaken.
 - (6) A party may apply to court after dismissal of a suit under this order.
11. The applicant is seeking review of the orders dismissing this appeal. The provision for review orders is order 45 which states as follows;
- (1) Any person considering himself aggrieved—
 - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due



diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.
12. I find that the record is clear that the appellant was directed on August 25, 2022 to file and serve the record of appeal within 30 days from that date.
13. That period lapsed on September 25, 2022 and the case was rightfully dismissed for want of prosecution.
14. However, this court has a discretion to grant the appellant an opportunity to prosecute his case.
15. In the case of *FM v EKW* (2019) eKLR relied on and cited in the case of *Kenya Pipeline Company Limited v Mafuta Products Limited* (2014) eKLR) and relying on the case of *Shah v Mbogo* (1967) EA 166 the court held as follows;
- “.... the discretion of the court must always be exercised judiciously with the sole intention of dispensing justice to both or all the parties. Each case must therefore be evaluated on its unique fact and circumstances. Among the factors to be considered is whether the applicant will suffer any prejudice if denied an opportunity to be heard on merit.”
16. I find that it is in the interest of justice that the appellant be given one last chance to be heard.
17. There is no prejudice the respondent can suffer that cannot be compensated by an award of costs.
18. I allow the application dated May 17, 2023 on the following terms;
- i. That the order dismissing this suit be and is hereby set aside and the appeal is reinstated.
 - ii. That the appellant pays thrown away costs of Kshs 20,000 before the appeal is heard.
 - iii. That appeal be prosecuted within 60 days of this date.
 - iv. That the appellant files and serves the record of appeal together with written submissions within 30 days of this date.
 - v. That thereafter, the respondent to file and serve their submissions within 30 days.
19. This matter will be mentioned on October 5, 2023 for a judgment date.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 25TH DAY OF AUGUST, 2023.

A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant



..... for the Respondent

