



**Nairobi Serena Hotel v Machuka & another (Civil Appeal 690 of 2017)  
[2023] KEHC 21717 (KLR) (Civ) (24 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21717 (KLR)

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

**CIVIL**

**CIVIL APPEAL 690 OF 2017**

**AN ONGERI, J**

**AUGUST 24, 2023**

**BETWEEN**

**NAIROBI SERENA HOTEL ..... APPELLANT**

**AND**

**WYCLIFF MAKORI MACHUKA ..... 1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application coming for consideration in this ruling is dated April 28, 2023 brought under the following provisions of Section 1A, 1B and 3A of the [Civil Procedure Act](#) and Order 17 rule 2 of the [Civil Procedure Rules](#) seeking the following prayers
  - i. That this application be certified urgent and be heard *ex-parte* at the first instance.
  - ii. That this honourable court be pleased to issue an interim order for stay of execution against the judgment delivered on December 23, 2016 pending the hearing of this application, inter partes.
  - iii. That the orders of this honourable court be pleased to set aside the orders made on April 20, 2023 dismissing the appellant's suit and all other consequential orders thereto.
  - iv. That this honourable court be pleased to reinstate the appellant/applicant's suit.
  - v. That costs of the application be in the cause.



2. The parties filed written submissions which I have duly considered.
3. The sole issue for determination is whether the appeal should be reinstated for hearing.
4. It is not in dispute that the appeal was automatically dismissed by effluxion of time.
5. Upon the expiry of the 45 days granted by the court the appeal lapsed.
6. The court has discretion to reinstate a matter which has been dismissed for want of prosecution.
7. In the case of *FM v EKW* (2019) eKLR relied on and cited in the the case of *Kenya Pipeline Company Limited Vs Mafuta Products Limited* (2014) eKLR) and that of *Shah Vs 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.”

8. The Record of Appeal and original file are now available and I find that it is in the interest of justice that the appellant be given an opportunity to prosecute this appeal.
9. I reinstate the appeal and admit it for hearing before a single Judge.
10. Each party to file written submissions within 21 days of this date.
11. Mention on October 6, 2023 for a judgment date.
12. The appellant/applicant to pay the respondent thrown away costs of kshs 20,000 before October 6, 2023.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24<sup>TH</sup> DAY OF AUGUST, 2023.**

.....

**A. N. ONGERI**

**JUDGE**

**In the presence of:**

.....for the Appellant

..... for the 1<sup>st</sup> Respondent

..... for the 2<sup>nd</sup> Respondent

