



REPUBLIC OF KENYA



**Kioko & another v Musyoki (Civil Appeal 11 of 2022)  
[2023] KEHC 23079 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 23079 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL 11 OF 2022  
MW MUIGAI, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**PETER KIOKO ..... 1<sup>ST</sup> APPELLANT**

**PETER GICHOVI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ELIZABETH WANZA MUSYOKI ..... RESPONDENT**

**RULING**

**Notice Of Motion**

1. Vide a Notice of Motion dated 10<sup>th</sup> June,2023 and filed in court on 12<sup>th</sup> June,2023 brought under Orders 45 Rule 1, Order 50 Rule 6 and 51 Rule 1 of the *Civil Procedure Rules, 2010*, Sections 1A, 1B, 3A and 95 of the *Civil Procedure Act*, Chapter 21, wherein the Applicants sought orders that:
  1. Spent
  2. Spent
  3. Pending the hearing and determination of the Appeal inter-partes, a stay of execution of the judgement and/or Decree issued on 3<sup>rd</sup> November 2020 in Kangundo CMCC No. 88 of 2019; and all consequential orders and proceedings thereto be and is hereby issued and/or granted.
  4. Pending the hearing and determination of this Application inter-partes, a stay of execution of the warrants of attachment and sale of property dated 26/5/2023 demanding for Kshs 952,990 and the sale of motor vehicle KBF 298D and all consequential orders and proceedings thereto be and is hereby issued and/or granted
  5. The Appellant's Appeal filed herein being Machakos HCCA No. 11 of 2022 be and is hereby reinstated to be heard and determined on merit not procedural technicalities.



6. Pending the hearing and determination of this Application the auctioneers tax there cost dated 7/6/2023 amounting to Kshs. 215,545 as per the warrants of attachment and sale dated 26/5/2023.
  7. A period of Sixty (60) days be granted to the Appellants to file and serve their Record of Appeal herein be and is hereby enlarged and or extended to enable the Appellant fully comply.
  8. This Court do make any such further and/or other orders and issue any other relief it may deem just to grant in the interest of justice.
  9. The costs of this Application abide the outcome of the Appeal.
2. Grounds upon which this Application is premised are on the face of the Application herein.

### **Supporting Affidavit**

3. The application is supported by an Affidavit dated 10<sup>th</sup> June,2023, sworn by Lawrence Njuguna, and Advocate, wherein he deposed that Judgement was entered in Kangundo PMCC No. 88 of 2019 and the Appellant being aggrieved by the judgment, instituted this Appeal.
4. He deposed further that the said Appeal was mentioned before the deputy registrar several times to confirm availability of the lower court file but the same had not yet been availed with the last mention date being 17/11/2022.
5. He lamented that the Appellants had not obtained the copies of proceedings, judgement and decree to enable them prepare the Record of Appeal. (annexed and marked copy of a letter requesting proceedings).
6. Deposing that on or about 16<sup>th</sup> March,2022 when the matter came for mention before the Deputy Registrar it was noted that the Appeal was dismissed on 7/7/2022.
7. He claimed that in view of the forgoing the Respondents have executed, attached and intend to sale motor vehicle registration number KBF 298D which will result in substantial loss and damage to the Appellants/Applicants (annexed and marked copy of the warrants of attachment and sale of motor vehicle).
8. It was deposed that the Appeal herein raises serious triable issues which require a just, proper evaluation and final determination by this Hon Court on merits as opposed to dismissal on technicalities. Further the decretal award by the lower court is quite substantive in relation to damages and injuries sustained and the said award requires a proper review and/or re-evaluation by this Hon Court so as not to unjustly enrich one party.
9. Lamenting that under Article 159 2 (d) of the *Constitution* of Kenya, 2010 this Hon Court is enjoined to administer justice without undue regard to procedural technicalities; further it is only just, fair and in the interest of justice that the Appeal herein is reinstated, heard and determined on merit.
10. According to the Affiant, this application has been made without undue and/or unreasonable delay since the Appeal herein stood dismissed on or about 16<sup>th</sup> March,2023.

### **Grounds Of Opposition**

11. The Application is opposed by the grounds of opposition dated 3<sup>rd</sup> July,2023 on the grounds that:
  1. The Appellants Application is;



- a. Frivolous, incompetent and vexatious.
  - b. Bad in law.
  - c. Incurably defective.
  - d. An abuse of the court process.
  - e. An afterthought and brought in bad faith.
  - f. Brought after inordinate delay.
2. The Appellants have not given any good reasons as to why the orders sought should be granted as they were only woken up from their slumber by execution.
  3. The Application is brought after inordinate delay as the Appeal was dismissed on 7<sup>th</sup> July,2022 which is almost a year ago.
  4. The Appellants never obeyed the court order as they served the Respondent with the Application 11 days later and were ordered to serve within 3 days.
  5. The Applicants never filed an Appeal on time and came to this court via an application dated 21<sup>st</sup> March,2021 for leave to file Appeal out of time only after the Respondent had commenced execution which application was allowed by this court but the Respondent never took any action to prosecute the Appeal or obey court orders leading to its dismissal.
  6. The Appellants only moved the Court when Respondent attempts to execute and not on their own motion as evidenced in this Application and their previous one dated 21<sup>st</sup> January,2021 nearly a year ago.
  7. It is clear that the Appellants are not interested in the Appeal they had filed in court as they have never made any effort to prosecute the same or have it reinstated since the court dismissed it for want of prosecution.
12. The matter was disposed by written submissions.

## **Submissions**

### **The Appellants/applicant's Written Submissions**

13. The Applicants in their submissions dated 7<sup>th</sup> July,2023 and filed in court on 12<sup>th</sup> July,2023, wherein counsel for the Appellant submitted that when the matter came up for mention on 16/3/2023 before the Deputy Registrar the Appellants were informed that the Appeal had been dismissed on 7/7/2022.
14. It was averred that the Appellant prepared an Application for reinstatement and was informed by their clerk that the file could not be traced. Consequently, the Respondent proceeded to execute which necessitated the instant application. Opining that before the appeal was dismissed the Appellants had requested for proceedings but they had not obtained the certified copies of the proceedings, judgement and decree to enable the Appellants prepare a Record of Appeal but to no avail.
15. It was the Applicant's case that they are solicitous in prosecuting this Appeal despite the inadvertent and unwitting errors and/or mistakes by the Appellant's Advocates and/or the registry in failing to provide certified copies of the proceedings, judgement and decree and it will be just and proper that this



appeal should be reinstated, heard and determined on merit rather than on procedural technicalities. Reliance was made on Article 50 (1) of the Constitution of Kenya,2010 as follows:

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

16. Further credence was placed on Article 159 2 (d) of the Constitution which states that:

“justice shall be administered without undue regard to procedural technicalities”

17. Consequently, counsel relied on the case of Grace Njeri Theuri V John Mburu Wainaina [2022] eKLR, to support his position on the procedural technicalities.

18. The Appellant herein prayed that the Appeal be reinstated and readmitted for hearing on merit and in accordance with the dictates of justice, truth and equity.

### **The Respondent’s Submissions**

19. Respondent in her submissions dated and filed in court on 12<sup>th</sup> July,2023, counsel for the Respondent relied on the grounds of opposition dated 3/7/2023 wholly and added that no good and convincing reasons has been given by the Appellants to warrant the granting of the orders sought.

20. It was the counsel’s submission that the appeal which the Appellants had filed out of time on 7<sup>th</sup> July,2022. Opining that there is nowhere the Applicant seeks for orders of the said dismissal to be vacated. They only seek for reinstatement of the Appeal; the court cannot grant prayers which have not been sought as parties are bound by their pleadings.

21. It was the Respondent’s case that the Applicants never filed the Appeal on time and came to this court via application dated 21<sup>st</sup> March,2021 for leave to file appeal out of time only after the Respondent had commenced execution which Application was allowed by this court but the Appellants never took any action to prosecute the Appeal or obey court orders leading to its dismissal.

22. It was submitted by counsel for the Respondent that the Applicants only move this court when Respondent attempts to execute and not on their own motion as evidenced in this application and previous one dated 21<sup>st</sup> January,2022, averring that the Appellants are not interested in the Appeal they had filed in court as they have never made any effort to prosecute the same or have it reinstated since the court dismissed it for want of prosecution on 7/7/2022.

23. According to the counsel, the sole purpose of the Applicants from their previous applications is to frustrate the process of execution and to deny the Respondent from enjoying the fruits of a lawfully obtained judgement as the Applicant only moves the court when the Respondent attempts to execute.

24. It was the position of the Respondent that the Applicants did not state that they were not aware of the dismissal of the appeal, nor any effort they made to prosecute the appeal or follow up in court to know its position. Contending that the it is only Respondent who made a follow up and personally served the Applicants’ counsel with a breakdown of costs for the dismissal of appeal on 16 March,2023 and the Applicant still never made any effort to seek for reinstatement of the Appeal only to rush to court via this application under the Certificate of Urgency.

25. The Respondent requested this Honorable Court to dismiss the Appellant’s Application dated 10<sup>th</sup> June,2023 with costs to the respondent as it lacks merit, an afterthought and abuse of the court process.



## Determination/analysis

26. I have considered the application for reinstatement of an appeal dismissed on 7/7/2022 by this court grounds thereof, supporting affidavit and annexures. I have also considered the Grounds of Opposition and submissions together with case law as cited by both counsel for their respective clients.

## Issue For Determination

### Whether The Application Is Meritorious.

27. The Trial Court delivered judgment in Kangundo PMCC No. 88 of 2019 in favor of the Respondent. The Appellant being aggrieved by the judgement, instituted this instant appeal. From the court record there is the warrants of attachment and sale of property dated 26/5/2023 demanding for Kshs 952,990.00 and sale of motor vehicles KBF 298D.
28. The Appeal was given a mention date before the Deputy Registrar to confirm availability of the lower court file on 28/4/2022 and the court gave several other mention dates until 17/11/2022 where the court was not sitting and was fixed 16/3/2023 for mention. The matter came up for mention on 16/3/2023 before the Deputy Registrar, the appellant was informed that the appeal had been dismissed on 7/7/2022. According to the Appellants they prepared an application for reinstatement and were again informed that the file could not be traced and consequently the Respondent proceeded to execute which necessitated this instant appeal.
29. Vide a Ruling dated 18<sup>th</sup> November, 2021 this Court reinstated the terms and orders and enlarged time to comply with court order and the appeal was deemed as filed and directions for hearing of the appeal was to be obtained on a date to be taken by parties in the registry.
30. The Appellants filed his Memorandum of Appeal on 2<sup>nd</sup> February, 2022 but had not filed and served his Record Appeal within stipulated time. Hence the said appeal was dismissed on 7/7/2022 by this court.
31. In the case of *Peter Kipkurui Chemoiwo v Richard Chepsergon* [2021] eKLR, the Court of Appeal held that:

“From our own assessment of the matter, the learned Judge did not err. The Appellant filed his memorandum of appeal on 15th September, 2021, filed an application for stay of execution on 2nd October, 2021, obtained interim orders maintaining status quo on 3<sup>rd</sup> October, 2021 pending hearing and determination of the application and filed the record of appeal on 5th July, 2013. Thereafter, the Appellant made no effort to prosecute his appeal and was only roused from slumber when the Respondent filed his application to dismiss the appeal for want of prosecution.”

32. The steps leading to the dismissal of an appeal for want of prosecution are as hereunder.
33. Under Order 42 Rule 35, it is provided that:

“ 35.

- (1) Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.



- (2) If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.”

34. Section 79B of the *Civil Procedure Act* provides as follows:

“Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily”.

35. Order 42 Rule 13 of *Civil Procedure Rules* provides as follows: -

- “1) On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the appellant shall cause the appeal to be listed for the giving of directions by a judge in chambers.
- 2) Any objection to the jurisdiction of the appellate court shall be raised before the judge before he gives directions under this rule.
- 3) The judge in chambers may give directions concerning the appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of any record or part thereof and any exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise.
- 4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—
  - a) the memorandum of appeal;
  - b) the pleadings;
  - c) the notes of the trial magistrate made at the hearing;
  - d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
  - e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
  - f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:Provided that—
  - i. a translation into English shall be provided of any document not in that language;
  - ii. the judge may dispense with the production of any document or part of a document which is not



relevant, other than those specified in paragraphs (a), (b) and (f).”

36. The conditions set in the above provisions envisage that a party exercising right of appeal has procedural steps to follow as outlined above.
37. The court noted in this instant matter that directions were issued before an appeal was dismissed. It is apparent that the court could dismiss the Appeal pursuant to Order 42 rule 35 of the Civil Procedure Rules. It is also evident that the Court gave several other mention dates until 17/11/2022 when the court was not sitting and mention fixed on 16/3/2023.
38. There is no evidence that the lower court file and proceedings had been forwarded to the High Court through the Registrar.
39. Under Article 50(1) of the Constitution of Kenya, 2010, the said Article 50(1) of Constitution of Kenya provides as follows:

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”
40. Every aggrieved has a legal right to appeal within the law that one should not be shut from being fairly heard or having his day in court. In the same breath, right of a party to enjoy the fruits of his judgment must be weighed against the right of a party to access justice to have his dispute heard and determined by a court or tribunal of competent jurisdiction expeditiously and not to hold the Court ransom.
41. In the present case the Appellants opined that before the appeal was dismissed, they had requested for proceedings but did not obtain the certified copies of the proceedings, judgement and decree to enable them prepare a Record of Appeal further that they have followed up on the proceedings, judgement and decree but to no avail.
42. The Respondent on the other hand submitted that there is nowhere the Appellants sought orders of the said dismissal to be vacated as they only sought for reinstatement of the appeal upon execution. Respondent further submitted that the Appellants are not interested in the appeal they had filed in court as they never made any effort to prosecute the same or have the appeal reinstated after dismissal since the Court dismissed it for want of prosecution on 7<sup>th</sup> July, 2022.
43. I note from the court record that the Appellants attached a copy of application to the Trial Court dated 10<sup>th</sup> August, 2021 requesting for the typed proceedings, certified copies of judgement and decree.
44. I also note the fact that the Appellants appeal was dismissed on 7<sup>th</sup> July, 2022 and filed the application for reinstatement on 10<sup>th</sup> June 2023 almost eleven (11) months after the said dismissal. However, in my view the Appellants have demonstrated what occasioned the delay in filling the record of appeal which is a requirement to fixing the appeal for directions and hearing thereto was occasioned by the delay in obtaining the typed proceedings.
45. The delay in prosecuting the appeal was thus not deliberate but occasioned by the long time it took to obtain the proceedings. The said delay is not inordinate and has been explained and evidence furnished. The Appellants are not to blame for the long period it took the lower court to type and supply her with the proceedings.
46. The upshot of the above is that the court is inclined to exercise its discretion and allow appeal to be heard on its merit rather than dismissing it for want of prosecution.



47. In *Key Freight Kenya Limited v Mohammed Abdi* [2022] eKLR, it was observed that

".... that the respondent has strongly opposed the reinstatement of the appeal herein for various reasons. 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.

### **Disposition**

- a. The Appellants' Appeal filed herein is hereby reinstated to be heard and determined on merit.
- b. The Appellants to file and serve their Record of Appeal within sixty (60) days from the date of this ruling.
- c. The Auctioneers herein do tax their costs dated 7/6/2023 amounting to Kshs. 215,545.00 as per the warrants of attachment and sale dated 26/5/2023 within 30 days from the date of this ruling.
- d. The Appellants shall pay half the decretal sum awarded by the Trial court to the Respondent and the balance in an interest earning Account in the names of both Advocates of the parties or Bank Guarantee within 90 days.
- e. Costs to abide the outcome of the appeal.

It is so ordered.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 28<sup>TH</sup> DAY OF SEPT 2023 (PHYSICAL/VIRTUAL CONFERENCE).**

**M.W. MUIGAI**

**JUDGE**

**In the presence of:**

No Appearance - for the Appellants

No Appearance - for the Respondents

Geofferey/patrick - Court Assistant(s)

