



REPUBLIC OF KENYA



KENYA LAW
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**Mbugua & another v Olago & another (Civil Appeal E119 of 2021)
[2023] KEHC 22790 (KLR) (27 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22790 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E119 OF 2021
HM NYAGA, J
SEPTEMBER 27, 2023**

BETWEEN

JOSEPH MBUGUA 1ST APPELLANT

NATHAN WAWERU 2ND APPELLANT

AND

DANIEL OTIENO OLAGO 1ST RESPONDENT

JONATHAN ONYANGO 2ND RESPONDENT

RULING

1. The Applicants through Notice of motion dated 20th March,2023 expressed to be brought under sections 1A,1B,3A and 95 of the *Civil Procedure Act* and order 45 rule 1,order 42 rule 6,order 42 rule 21 ,order 50 rule 6 and order 51 rule 1 of the *Civil Procedure Rules* seek among other orders that this Honorable court stay execution of the judgement delivered on 15th October,2021 by Hon Orange in Nakuru CMCC No. 1194 of 2016 and the consequential orders thereof, and be pleased to reinstate this Appeal being Nakuru HCCA No.119 of 2021 for hearing and determination in the normal way.
2. The Application is predicated on the grounds on its face and supported by an Affidavit sworn by Victor Ng'ang'a, advocate for the Applicants wherein he deposed that the Applicants filed the appeal herein against the aforesaid Judgement delivered on 15th October, 2021 in Nakuru CMCC 1194 of 2016 and that despite relentless efforts, the Appellants have not been able to obtain the relevant documents from the lower court to enable them file their record of appeal.
3. He averred that as a result, the appeal was dismissed for want of prosecution on 26th January, 2023 and thus they are exposed to imminent execution.
4. He deponed that the delay in filing the Record of Appeal was inadvertent and beyond the Appellant's control.



5. He contended that the Appellants have complied with stay conditions by paying Kshs 206,100/- to the Respondents' Advocates and that the delay in prosecuting the appeal is not so unreasonable or inordinate as to prejudice the Respondents as such delay can always be compensated by an award of damages and or costs.
6. It was his further deposition that unless the appeal is reinstated the appellants stand to be irreparably prejudiced and their appeal rendered nugatory despite it being meritorious.
7. The 1st Respondent opposed the Application via his replying affidavit sworn by his Advocate, Robert Ndubi, on 18th April, 2023.
8. He deposed that the Appeal was rightly dismissed by the court as the Appellants had not taken any steps for over 14 months to prosecute it and that the Appellant despite being granted sufficient time to show cause why the appeal should not be dismissed did not show cause to the satisfaction of the Honourable Judge.
9. He stated that there Applicants' failure to exhibit any correspondences requesting for proceedings or receipts for payments of deposit for proceedings confirms that they went to sleep after lodging the Memorandum of Appeal and obtaining stay of execution of the decree.
10. He averred that this application is devoid of merit and prayed for its dismissal with costs.
11. The parties thereafter took directions to dispose off the application through written submissions. Only the Applicants submissions are on record at the time of writing this ruling.

Applicant's Submissions

12. The Applicants submitted that the appeal has merits as demonstrated by the Memorandum of Appeal and in the event it is not heard to completion, they stand lose their constitutional right to appeal and to have their case heard and determined on merits. To support their submissions, reliance was placed on the cases of *Njai Stephen v Christine Khatiala Andika* [2019] eKLR & *Allan Otieno Osula v Gurdev Engineering & Construction Ltd* [2015] eKLR.
13. The Appellant also submitted that the Appeal was not ripe for dismissal where directions had not been issued. In support of this proposition, reliance was placed on the cases of *Jurgen Paul Flach v Jane Akoth Flach* [2014] eKLR; *Kirinyaga General Machinery v Hezekiel Mureithi Ileri* [2007] eKLR; & *Elem Investment Limited v John Mokora Otwoma* [2015] eKLR.

Analysis & Determination

14. The issue for determination is whether the appeal should be reinstated for hearing on merit.
15. On 26th January, 2023, the parties appeared before my brother Justice D.K. Magare on a notice to show cause as to why the appeal should not be dismissed. This is as provided for under order 42 rule 35 of the *Civil Procedure Rules* which state as follows;

“ 35. Dismissal for want of prosecution [order 42, rule 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.”

16. From the court record, only the Advocate for the Appellants was present. The learned Judge after hearing her, dismissed the Appeal with costs assessed at Kshs 35,000/-.
17. I have looked at the application. It is basically providing reasons that the applicants ought to have presented at the time the matter was fixed for the notice to show cause.
18. In bringing this application, the applicants are asking me to litigate over an issue already dealt with by the court, albeit differently constituted.
19. It is uncontroverted that the Appeal herein was listed for Notice to show cause why the same should not be dismissed on 26th January, 2023. The Counsel for the Appellants only prayed for 45 days to file the Record of Appeal without explaining the reasons for delay. The court was not satisfied and proceeded to dismiss the Appeal.
20. The Appellants without supportive evidence now claim that the reasons for the failure to prosecute their appeal within reasonable time was beyond their control as their relentless efforts to obtain requisite documents from the lower court to enable them file their record of Appeal bore no fruits.
21. In *Bernard Muthee & another v Anita Kamba Muwiti* [2021] eKLR, the Court observed thus:

“Concerning the reasons advanced of difficulties in obtaining the record of typed proceedings form the court registry, this Court recognizes that there is an avenue to file an initial record of appeal and thereafter file a supplementary record once the proceedings are obtained. This would have been the best course to take and would be more convincing bearing in mind that it was over a period of 8 months between the date when the appellants were ordered to file their record of appeal on December 5, 2019 and when the order confirming the dismissal was made on July 27, 2020. The appellants have also failed to annex evidence in form of correspondence or otherwise to confirm what efforts, if any, they made to secure the said typed proceedings. It is not enough to make mere averments devoid of supporting evidence.”
22. It is not clear why the aforesaid ground was not earlier raised when the matter was heard on 26th January, 2023. I believe this was an issue which was within the knowledge of the Appellants then and if it was backed by concrete evidence the court would have considered it. Therefore, there is no justifiable ground to set aside and or stay the orders of the court issued on 26th January, 2023.
23. It was submitted that directions had not been issued as envisaged under order 42 rule 35 and as such the appeal was not ripe for dismissal for want of prosecution. The court had powers under order 42 rule 35 sub-rule (2) to dismiss the appeal even if directions had not been given. If the court erred in so finding, then this is an issue for appeal.
24. Re-instatement of an appeal/suit is a matter of discretion, which must be exercised judiciously and If this Court is to exercise its discretion in favour of a party, the party is obliged to place before it some material to justify the exercise of that discretion. Clearly the Applicants have not placed any concrete material before this court for it to exercise its discretion in their favour.
25. The Judgement of the lower court has not been annexed by any party however it is undisputable that the same was delivered on 15th October, 2021. There is a ruling on record dated 9th March, 2022 by the



lower court granting stay of execution on conditions that the Applicants herein do deposit the decretal sum in a joint interest earning account in the names of both advocates for the parties within 21 days thereof.

26. The Applicants have attached a deposit slip dated 4th May, 2022 to prove compliance with the above order. From there the Appellants have never taken any steps to set down their appeal for hearing.
27. I am alive to article 159 of the Constitution and the overriding objective which decries undue regard to technicalities. However, it is equally an important principle of the Constitution that justice must be dispensed without undue delay. As the Supreme Court emphasised in Raila Odinga and 5 Others v IEBC & 3 Others [2013] eKLR and in Nicholas Kiptoo arap Korir Salat v IEBC & 7 Others [2014] eKLR, article 159 is not a panacea in each and every instance of breach of procedure. It avails only in deserving cases.
28. The Appellants filed their Appeal on 2nd November, 2021 and without any sufficient cause failed to follow up on the same for close to two years before it was dismissed on 26th January, 2023. This was plain indolence and dilatoriness, which is not excusable.
29. The considerations to be made in determining whether or not to dismiss matters for want of prosecution and whether to order reinstatement were considered in the case of Ivita v Kyumbu, Civil Suit No. 340 of 1971 (1975) EA 441, 449, Ivita v Kyumbu [1975] eKLR where Chesoni J. (as he then was) held as follows:

“So the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant; so both parties to the suit must be considered...”

30. The fact that the applicants had already complied with orders of stay of execution that were issued by the trial court did not give them a right to sit idle and not prosecute the appeal. The Record of Appeal filed on 31st March 2023 was an exercise in futility as there was no appeal in existence at the time, having been dismissed way back on 26th January, 2023.
31. From the foregoing, it is my opinion that the application is wanting in merits.
32. In conclusion, I proceed to dismiss the application with costs to the 1st respondent.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 27TH DAY OF SEPTEMBER, 2023.

H. M. NYAGA

JUDGE

In the presence of;

C/A Jeniffer

Ms Bosibori for 1st Respondent

N/A for Applicant

