



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Ndavi v Mwangangi (Civil Appeal 764 of 2019)  
[2023] KEHC 27159 (KLR) (Civ) (22 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27159 (KLR)

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

**CIVIL**

**CIVIL APPEAL 764 OF 2019**

**AN ONGERI, J**

**DECEMBER 22, 2023**

**BETWEEN**

**JOSEPH MUTUKU NDAVI ..... APPELLANT**

**AND**

**ZIPPORAH SYOMBUA MWANGANGI ..... RESPONDENT**

**RULING**

1. There are two applications coming for consideration in this ruling dated 2/6/2023 and 6/9/2023 respectively.
2. The application dated 2/6/2023 is seeking the following orders;
  - i. That the 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 November 21, 2019 by Hon. D. O. Mbeja in Milimani CMCC 9219 of 2017.
  - iii. That pending the hearing and determining of this appeal there be an order of stay of execution of the judgment delivered on November 21, 2019 by Hon. D. O. Mbeja in Milimani CMCC 9219 of 2017.
  - iv. That this appeal being Milimani 764 of 2019 be 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.
3. The respondents opposed the application dated 2/6/2023. They also filed an application dated 6/9/2023 seeking the following orders;
    - i. This honourable court be pleased to review the ruling delivered by Honourable Lady Justice A. Ongeru on 19<sup>th</sup> May 2023 directing that the decretal sum be released to the respondent as the appeal was dismissed under order 42 rule 35 (2) to have the decretal sum released to the respondents' advocates instead to facilitate our further action.
    - ii. That the cost of this application be provided for.
  4. This appeal was dismissed on 19/5/2023 and the court ordered release of the decretal sum to the respondent.
  5. The appellants did not appear in court on that day when the appeal was dismissed.
  6. The application dated 2/6/2023 is seeking reinstatement of this suit which was dismissed on 12/8/2023.
  7. The application is supported by the affidavit of Lawrence Njuguna who deposed that the delay in prosecuting the appeal was caused by failure of the court registry in supplying them with the proceedings.
  8. Further that there was an inadvertent mistake by the previous advocates handling this matter in handing over the file to the current advocate.
  9. The respondents opposed the application dated 2/6/2023 and submitted that the appellants failed to show cause why the appeal should not be dismissed and how they are seeking a second bite at the apple through this application.
  10. The respondents urged the court to allow their application dated 6/9/2023 seeking release of the decretal sum since there is no competent appeal before this court.
  11. There are two opposing applications in this case. One seeking to reinstate the appeal dismissed on 12/5/2023 and the other seeking release of the funds deposited pursuant to the dismissal of the appeal.
  12. I find that the delay in prosecuting the appeal was occasioned by the conduct of the appellant's advocates.
  13. Since the record of appeal has been filed it is in the interest of justice that the appellant be granted a chance to prosecute the appeal.
  14. The respondent will not suffer prejudice that cannot be compensated by an award of damages.
  15. I dismiss the application dated 6/9/2023 with no orders as to costs.
  16. I allow the application dated 2/6/2023 on the conditions;
    - i. That The appellant pays thrown away costs of kshs.20,000 within 30 days of this date.
    - ii. That the appeal be fully prosecuted within 90 days of this date.



**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS  
22<sup>ND</sup> DAY OF DECEMBER, 2023.**

**A. N. ONGERI**

**JUDGE**

**In the presence of:**

..... for the Appellant

..... for the Respondent

