



Wanjala v Channan Agricultural Contractors Limited (Civil Appeal 5 of 2018) [2023] KEHC 26722 (KLR) (19 December 2023) (Ruling)

Neutral citation: [2023] KEHC 26722 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL 5 OF 2018
DK KEMEL, J
DECEMBER 19, 2023**

BETWEEN

RICHARD MUKHEBI WANJALA APPELLANT

AND

CHANNAN AGRICULTURAL CONTRACTORS LIMITED RESPONDENT

RULING

1. Before me is an application by way of notice of motion dated July 12, 2023 filed on July 17, 2023.
2. The application is made pursuant to section 80 of the *Civil Procedure Act*; order 45 rule 1 (a) & (2) and rule 2 (2), of the *Civil Procedure Rules* and any other enabling provisions. The appellant seeks two orders –
 - i. Spent;
 - ii. That this court be pleased to review and set aside the order issued on September 8, 2021 dismissing the appellant’s appeal hereof and reinstate the same for hearing.
 - iii. That the costs of the application be provided for.
3. The application has grounds on the face of the notice of motion that on July 3, 2023, on perusing the court record the appellant’s Counsel realised that the appeal was dismissed for want of prosecution on September 8, 2021 without notice to the appellant. The appellant’s counsel further noted that despite request to the deputy registrar *vide* letter dated February 22, 2018 applying for certified typed copy of proceedings in Bungoma CMCC No. 600 of 2016, no response has been given to him. Subsequently, the appellant’s counsel *vide* a letter dated November 15, 2020 inquired on the progress of the certified typed copy of proceedings. On July 17, 2021, the appellant’s counsel inquired from the deputy registrar on the status of the requested certified typed copy of proceedings only for him to get a letter dated July 27, 2021, inquiring as to why he was yet to prosecute his appeal for three years now. The appellant’s



counsel replied to the deputy registrar's letter *vide* a letter dated August 31, 2021 and also *vide* another letter dated March 19, 2022 following up on his letter dated August 31, 2021. Further, on September 5, 2022, the appellant's counsel requested the deputy registrar to reply to his correspondence dated August 31, 2021.

4. The application was filed with a supporting affidavit sworn on July 12, 2023 by Omundi Bw'onchiri advocate for the appellant which amplifies the grounds of the application.
5. The application has been opposed through grounds of opposition dated August 7, 2021 and filed in Court on August 8, 2023, which are in the following terms –
 - i. That the appellant has not given good or sufficient causes for the two years delay in filing the application to reinstate the appeal.
 - ii. That the application is an afterthought, an abuse and misuse of judicial process.
 - iii. That the respondent shall suffer great prejudice if an order seeking to reinstate the appeal is granted or the application is allowed.
 - iv. That the application is mischievous, contemptuous and an abuse of and misuse of judicial processes.
 - v. That the application and prayers sought are unmeritorious and ought to be dismissed with costs to the Respondent.
 - vi. That the affidavit in support of the application is sworn by Counsel on record and depones upon contentious issues in violation of practice law.
6. The application was canvassed through the filing of written submissions. In this regard, I have perused and considered the submissions filed by the Appellant and those filed by the Respondent and the authorities relied upon thereof.
7. It is now settled that for courts to review their decision they must do so in compliance with section 80 of the *Civil Procedure Act* and order 45 rule 1 of the *Civil Procedure Rules*. Mativo J in *Nasibwa Wakenya Moses v University of Nairobi & another* [2019] eKLR observed that;

“Section 80 gives the power of review while order 45 sets out the rules. The rules restrict the grounds for review. Put differently, the rules lay down the jurisdiction and scope of review. They limit it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.

.....

19. A review is permissible on the grounds of discovery by the applicant of some new and important matter or evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree or order was passed. The underlying object of this provision is neither to enable the court to write a second Judgment nor to give a second innings to the party who has lost the case because of his negligence or indifference. Therefore, a party seeking a review must show that there was no remiss on his part in adducing all possible evidence at the trial.”



8. This application is governed by the provisions of order 12 rule 7 of the [Civil Procedure rules](#) which states as follows –

“7. Where under this order judgment has been entered or the suit has been dismissed, the court, on an application, may set aside the judgment or order upon such terms as may be just”

9. It is my view that failure to quote the provisions under which the application is brought on the application and by extension quoting the wrong provisions is not a bar that could prevent the Court from doing substantive justice in the matter. The primary duty of the Court is to do justice and that duty cannot be fettered by procedural technicalities. The [Constitution](#) under article 159 on judicial authority has urged courts to do justice without undue regard to procedural technicality. Article 159(2) (d) states:

“Justice shall be administered without undue regard to procedural technicalities.”

10. The court has inherent powers to give orders which are necessary to meet the ends of justice. Section 3A of the [Civil Procedure Act](#) provides:

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

11. This is further buttressed by section 1A & 1B of the [Civil Procedure Act](#) which provides for overriding objectives of the Act which is to facilitate the just, expeditious resolution of disputes.

12. Indeed, both the dismissal of this appeal for want of prosecution and its reinstatement is an act of the exercise of this court’s discretionary power. Thus, the principles in the case of *Mbogo & anor v Shah* (1968) EA 93 apply.

13. I note that the dismissal of the appeal herein was on September 8, 2021 and that this application was filed on July 17, 2023, just almost two (2) years later. Thus, it cannot be said that there was inordinate delay in bringing the application.

14. I have taken into consideration 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 that the appellant has given plausible reasons that he was not aware of the dismissal for want of prosecution notice. It is clear that the appellant’s counsel has been following up on the progress of the requested certified typed proceedings. 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 as they will have their day in court.

15. I will thus allow the application but will not award any costs of the application now, as none of the parties attended Court for hearing of the Notice for dismissal of the appeal for want of prosecution.

16. Consequently, and for the above reasons, I allow the application in terms of prayer (b) herein. Costs shall abide in the appeal. The appellant is ordered to set down the appeal for hearing within the next three months, failing which the appeal will stand dismissed for want of prosecution with costs to respondent.



DATED AND DELIVERED AT BUNGOMA THIS 19TH DAY
OF DECEMBER, 2023

D. KEMEI

JUDGE

In the presence of:

Onyando for Bw' Onchiri for Appellant

Mugasia for Respondent

Kizito Court Administrator

