



REPUBLIC OF KENYA



**Mburu v Kibuchi t/a Tango Auctioneers & 4 others (Civil Appeal  
01 of 2020) [2022] KEHC 11860 (KLR) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11860 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
CIVIL APPEAL 01 OF 2020  
CM KARIUKI, J  
MAY 26, 2022**

**BETWEEN**

**GEORGE MBUTO MBURU ..... APPLICANT**

**AND**

**JOHN MUTHEE NGUNJIRI ..... 1<sup>ST</sup> DEFENDANT**

**FRANCIS MUNYIRI KIBUCHI T/A TANGO AUCTIONEERS & 3  
OTHERS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. By an application dated 23<sup>rd</sup> September, 2021 the Applicant seeks appeal to be re-admitted for hearing under Order 17 Rule 2 & 3 of *Civil Procedure Rules*.
2. Same is supported by affidavit of Mbugua Advocate sworn on 23<sup>rd</sup> September, 2021.
3. Same is opposed.
4. The parties canvassed same via submissions.

**Applicant's Submissions:**

5. The applicant submits that, there were difficulties in operations due to a sudden closure wrought by Corona Virus disease affecting one of their support staff hindering as from showing cause on the date when the appeal was dismissed. They still believe that the lower court file must be available at the registry to enable progress in the appeal since they shall require a certified copy of proceedings in the matter.
6. It is submitted that, dismissal is a draconian order which drives away the litigant from the seat of justice. Therefore, in spite of the gaps pointed out, still justice would be served in reinstating the appeal but with strict condition. No prejudice will be suffered by the Respondent in reinstating the appeal.



7. Reliance is made on the case of *John Nahashon Mwangi v Kenya Finance Bank Limited (in liquidation)* [2015] Eklr.

**Respondents' Submissions:**

8. It is submitted that the Applicant instructed his then Advocates on record to write to the 1<sup>st</sup> and 3<sup>rd</sup> Respondents Advocates and request for a tabulation of the costs of the suit. In the said letter dated 4<sup>th</sup> December, 2019 (Respondents' annexure NK/'1'), the Applicant intimated his intention of settling the decretal sum and the costs of the suit.
9. It is evident that the said letter was not written on a 'without prejudice' basis, and on the basis of its contents, it can clearly be interpreted to mean that the Applicant was contended with the judgment of the trial court.
10. On the 29<sup>th</sup> July, 2021, the current appeal was listed for notice to show cause why it should not be dismissed for want of prosecution. The court issued a proper notice of its intention to dismiss the appeal if the Applicant did not give a plausible reason for not prosecuting the appeal.
11. It is not in dispute that the court did issue notice by publishing the cause list in its website, and in addition, it sent it to all the concerned Advocates, the Applicant's Advocate included. The provisions of Order 42 Rules 35 (2) of the *Civil Procedure Rules* mandate the court to issue notice to the concerned parties. The Applicant cannot thus fault the court on the mode it used to issue notice.
12. Reliance is sought on *Jim Rodgers Gitonga Njeru v Al-Husnain Motors Limited & 2 Others* [2018] eKLR, case.the court held:

“From the proceedings of 21<sup>st</sup> July, 2015, it is discernible Issues, analysis and determination
13. After going through the record and the parties submissions, I find the issues are whether the application is merited and what is the order as to costs?
14. The instant appeal was lodged on 8/1/2020.Apparently the record shows that since then the matter was inactive until 29/7/2021,a period of one and half years when it came for mention as court was publishing on weekly cause list inactive matters for dismissal for want of prosecution.
15. On 29/07 2021 the applicant advocate appeared to show cause for the delay in prosecuting the matter but respondent never appeared. In court the applicant advocate addressed court, and stated that they were in lower court seeking stay of execution pending appeal meanwhile the proceedings had been paid for. Then court then fixed matter for mention on 20/9/2021 to await confirmation of actions on the facts stated in court.
16. When the matter came for mention on above date, none of the parties nor advocates appeared and thus the court dismissed the matter and court ordered closure of the file.On 23/9/2021 the applicants lodged an application under certificate of urgency seeking reinstatement of the appeal.The application is premised on the grounds that proceedings from lower court have not been supplied by the lower court to facilitate compilation of the record of appeal and that notice to show cause was not issued to the applicants side.
17. The proceedings were apparently applied on 4/5/2021 after one year and 4 months after filing the appeal. However, there is no receipt to evidence payment of the application for the proceedings. There is no explanation as to the delay in application for the proceedings even assuming they were paid for on 4/5/2021.



18. Secondly when the matter came on 29/7/2021 and the applicant counsel appeared in court, addressed court and took a date for notice to show cause on 20/9/2021 but he has not shown any justification why him or the client never appeared for the matter that day and his excuse that the matter escaped his attention vide his affidavit sworn on 23//2021is spurious.

I. In a replying affidavit of respondents” advocate it is averred that” The current litigation started way back in 2012, whereby the Applicant sued the Respondents, and in turn the 3rd Respondent counterclaimed against the Applicant. On 25th November, 2019, the trial court dismissed the Applicant’s claim against the Respondents, and allowed the 3rd Respondent’s counterclaim of Kshs.87,300/- with costs.

II. Upon learning of the said decision, the Applicant instructed his then Advocates on record to write to the 1st and 3rd Respondents Advocates and request for a tabulation of the costs of the suit. In the said letter dated 4th December, 2019 (Respondents’ annexure NK/’1’), the Applicant intimated his intention of settling the decretal sum and the costs of the suit. It is evident that the said letter was not written on a ‘without prejudice’ basis, and on the basis of its contents, it can clearly be interpreted to mean that the Applicant was contended with the judgment of the trial court.

III. The same averment is not rebutted being a clear evidence of applicant intention to settle the matter as adjudicated by the court and thus no interest in pursuing the appeal.

19. In the case of *Virginia Muchandi Muthengi v Elisha K. Njagi* [2020] eKLR, the court observed:

“In the cases of Richard Nchapi Leiyangu v IEBC & 2 Others the court when dealing with the court’s exercise of its discretionary powers, sated inter alia;

“is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error, but not to assist as person who deliberately seeks to obstruct or delay the court of justice.”

What would one say of a party who prefers an appeal and takes not steps, shows no interest and does nothing for 6 years? The inevitable conclusion is that such a party obstructed and delayed the course of justice. The appeal was not dismissed because of an error or mistake. It was dismissed for want of prosecution for inordinate delay.”

20. The court finds no justification in the circumstances and facts of the case set out above to breath life again to the instant dead appeal.

21. Thus the court finds no merit in the application and same is dismissed with costs to the respondents assed at ksh 6000.

**DATED AND SIGNED AT NYAHURURU THIS 26TH DAY OF MAY, 2022.**

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**CHARLES KARIUKI**

**JUDGE**

