



**Mugambi & another v Kingoo (Civil Appeal E002 of 2020)
[2022] KEHC 11262 (KLR) (25 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11262 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E002 OF 2020
LM NJUGUNA, J
MAY 25, 2022**

BETWEEN

DENNIS MUTHURI MUGAMBI 1ST APPELLANT

MOHAMED ABSHIR MOHAMMED 2ND APPELLANT

AND

STEPHEN GITAU KINGOO RESPONDENT

RULING

1. Before this court is an application by way of notice of Motion dated January 26, 2022 filed by the appellants herein.
2. The application has been brought under sections 1A, 1B, 3A and 95 of the *Civil Procedure Act* and order 45 rule 1, order 42 rule 21, order 50 rule 6 and order 51 rule 1 of the *Civil Procedure Rules, 2010*, and seeks for orders that:
 - i. Spent.
 - ii. Pending the hearing and determination of this application inter partes, there be an order of stay of execution of the ruling of the honourable Judge delivered on 18. 10 2021 and all consequential orders and proceedings hereto be and are hereby stayed.
 - iii. The appeal be and hereby reinstated for hearing and determination in the normal way.
 - iv. The 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.
 - v. Costs of this application be in the cause.
3. The application is premised on grounds on its face; that the appellants herein filed an application dated September 25, 2020 seeking for stay of execution of the judgment/decree issued by Hon H Nyakweba



(PM) on September 1, 2020 pending hearing and determination of Embu Civil Appeal No 30 of 2020. That the court on December 8, 2020 granted in its ruling a stay and outlined the set out stay conditions which prompted the appellant to file another application dated March 23, 2021 seeking for extension to comply with the stay orders issued by the court. Counsel proceeded that the application was set for hearing on May 11, 2021 but unfortunately the appellants were not in court and it only came to their realization that the file had been placed before the honourable Judge and the registry had been directed to serve the parties with the new hearing date via mail. It was stated that the appellants later found out from the proceedings that the file had been placed before the honourable Judge and the same had been dismissed due to none attendance. The appellants reiterated that they were never served with the hearing notice from the court registry as had been directed by the honourable Judge and as such, the mistake made by the registry should not be visited upon the appellants. That the appellants so far have fully complied with the stay conditions as directed by the court on December 8, 2020 and that they were still desirous to prosecute their appeal. In the end, they prayed that the appeal herein be re-instated.

4. The application was opposed through grounds of opposition dated April 20, 2022 as hereunder:
 - i. That after filing of the appeal, the respondents failed to comply with the provisions of order 42 rule 11 of the *Civil Procedure Rules*.
 - ii. That the relevant aspect of this provision is the requirement for the appellants to schedule the appeal for direction even before the registrar complies and transmits the record of appeal to the appeal's court and therefore, the appellants have not even attempted to commence prosecuting the appeal by complying with order 42 rule 11 of the *Civil Procedure Rules*.
 - iii. That since filing of memorandum of appeal, there are no positive significant steps the appellants have taken to prosecute the appeal.
 - iv. That the court issued sufficient notices severally to the appellants as required by the law and rules.
 - v. That the modes of service aforesaid constituted sufficient notices to the appellants who cannot therefore validly argue that they were received late after the appeal was dismissed as there is no evidence of failure of the appellants email.
 - vi. That the appellants have not denied that the notices by the registrar were prematurely issued including not challenging there validity thus the dismissal order is valid and should not be set aside.
 - vii. That the respondent has been advised by their advocates which advice the respondent verily believes to be true that the dismissal of the appeal upon giving of the notice did not constitute a mistake or an error on the face of the record.
 - viii. That the applicant's application fails to meet the requirements for setting aside regular court orders.
 - ix. That the application is frivolous, vexatious and an abuse of the court process and should be struck out with costs to the respondent.
5. The court has considered the application herein, the grounds of opposition and the submissions by the applicants/appellants and the main issue for determination is whether this court can grant the orders sought before it.



6. The dismissal of the appeal and its reinstatement is an act of the exercise of this court’s discretionary power. [See *Shah v Mbogo and Another* [1967] EA 116]. In the same breadth, in *Wachira Karani v Bildad Wachira* [2016] eKLR Mativo J held that:

“Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause...”

7. Similarly, in the case of *John Nabashon Mwangi v Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR as follows:

“The fundamental principles of justice are enshrined in the entire constitution and specifically in article 159 of the constitution. Article 50 coupled with article 159 of the constitution on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the court. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such acts are comparable only to the proverbial ‘sword of the damocles’ which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the plaintiff will suffer if the suit is not reinstated.”

8. The grounds upon which the application for reinstatement of the appeal is made is that the appellants were not served with the hearing notice for the appeal when it came up for hearing and on the October 18, 2021, when it was dismissed for non-attendance.
9. The instant application is under section 3A of the *Civil Procedure Act* cap 21 Laws of Kenya and which section donates unto this court the inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. It is by invoking these powers that I will proceed to determine the application herein.
10. From the record, the memorandum of appeal dated September 18, 2020 was filed on September 21, 2020 against the judgment of Hon H Nyakweba and in the memorandum ten grounds were preferred. The appeal herein was admitted for hearing on June 22, 2021 and the court directed that notices be issued through the registry. I have since perused the court records and I note that by an oversight, the firm of Kimondo, Gachoka & Company Advocates, were not served with a hearing notice for the hearing of the appeal when it came up in court on the October 18, 2021.
11. The orders sought in the application are discretionary in nature and the court has unfettered discretion to set aside an *ex parte* order where sufficient cause has been demonstrated. According to the Court of Appeal in the case of *CMC Holdings Ltd v James Mumo Nzioki* Civil Appeal No. 329 of 2001 [2004] eKLR, it was stated that this wide discretion of the court is intended to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. The test



which courts have set to determine whether or not to set aside ex-parte orders is “whether sufficient cause has been shown”.

12. I note that under article 50(1) of the Constitution of Kenya 2010, every person is entitled to have a fair trial and in this case, a hearing. It therefore follows that every person ought not to be shut out from accessing court or having his day in court. Indeed, the right of a party to enjoy the fruits of his judgment must be weighed against the right of a party to access court to have his dispute heard and determined by a court or tribunal of competent jurisdiction. It has been held by this court and the superior courts that dismissal of suits (in this case appeal) is a draconian act which drives away the litigant from the seat of justice. It is my view that that dismissing the application herein would be shutting out the applicants/appellants from accessing justice and would be contrary to article 50(1) of the Constitution of Kenya. [Also see article 159(2) (b) of the Constitution on substantive justice].
13. It is therefore my view that this court ought to exercise its discretion and set aside the dismissal orders made by this honourable court for the reasons set above and the fact that the respondent has not exhibited any prejudice it will suffer if the applicants/appellants are given a chance to prosecute the appeal herein.
14. In the end, I hold that:
 - i. The application is merited in terms of prayer 3 and I do hereby allow the same.
 - ii. The appellants to prosecute the appeal within 90 days from the date of this ruling failing which, the same shall stand dismissed.
 - iii. Costs shall abide the outcome of the appeal.
15. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 25TH DAY OF MAY, 2022.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent

