



REPUBLIC OF KENYA



KENYA LAW
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**Kaunya & another v Masinde (Civil Appeal 13 of 2008)
[2022] KEHC 10683 (KLR) (24 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 10683 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL APPEAL 13 OF 2008**

LK KIMARU, J

MAY 24, 2022

BETWEEN

MR. KAUNYA 1ST APPELLANT

MILLICENT AKINYI KAUNYA 2ND APPELLANT

AND

JAFRED MUDOGO MASINDE RESPONDENT

*(Arising from original Judgment and Decree of the Hon. P.N. Gichuhi
(Mrs) (PM) in Kitale Chief Magistrates Civil Case no. 21 of 1993)*

RULING

1. The appellants were aggrieved by the decision of the trial magistrate's court rendered on 4th of June 2008 whereby judgment was rendered in favour of the Respondent against them. The appeal was lodged on 27th of June 2008. From the court record, the appellants took no action on the suit until they were served with notice of the dismissal of the suit by the Deputy Registrar of this court on October 4, 2016. The appellants did not attempt to proceed with the appeal neither did they attend court when the court fixed the appeal for dismissal for want of prosecution on October 25, 2016. The respondent's Counsel attended court. The court dismissed the appeal for want of prosecution. This was eight years after the appeal had been lodged without the Appellants taking any action.
2. On October 26, 2021, the appellants filed a notice of motion predicated on sections 1A, 1B, 3, 63(e), 80 of the *Civil Procedure Act* and order 45 rule 1 of the *Civil Procedure Rules* seeking orders of this court to set aside the order that dismissed the appeal for want of prosecution. The appellants further prayed for an order of this court to have the appeal reinstated to hearing. The grounds in support of the application are stated on the face of the application and supported by the annexed affidavit of Edward Oka Kaunya. The appellants stated that they did not deliberately fail to prosecute the appeal. They explained that they were out of the country during the entire period that the appeal was not prosecuted.



Their absence from the country was due to political intimidation and threats which necessitated their relocation from the country. They attributed the failure by their then Counsel to inform them of the progress of the case thus resulting in the dismissal. They pleaded with the court to give them a chance to prosecute their appeal, which in their considered view, has an excellent chance of success. They pleaded with the court to give them a chance to ventilate their appeal on its merit.

3. The respondent opposed the application. He swore a replying affidavit in which he noted that the appellants had been indolent in the prosecution of their appeal. He observed that during the period prior to the dismissal of the appeal and post the dismissal of the appeal, a total of thirteen years had lapsed. He urged the court to find that this period was inordinate and unexplained and therefore the appellants did not deserve the favourable exercise of discretion by this court. The respondent deponed that the only reason why the appellants came to court was to scuttle the execution process that had been initiated to enforce the decree and judgment of the subordinate court. He reiterated that there were no grounds put forward by the Appellants that would make this court rule in their favour. He urged the court to dismiss the application with costs.
4. Prior to the hearing of the application, the parties agreed by consent to present to court written submissions in support of their respective opposing positions. The said submissions were duly filed. This court has carefully considered the said submissions. It has also considered the pleadings filed by the parties in this proceedings. The principles to be considered by this court to determine whether or not to allow the application have been considered by various courts and is now more or less settled. A litigant seeking to set aside an order of dismissal of a suit for want of prosecution must properly invoke the discretion of the court by establishing inter alia, the following: that the dismissal was caused by an excusable mistake, the dismissal was on account of an error on his part that persuades the court to exercise its discretion in his favour, that the delay was not so inordinate that a court of law properly exercising its mind would rule in favour of such applicant, that taking into consideration the totality of the facts before the court that it would be in the interest of justice to set aside the order of dismissal. The applicant must also establish that during the period that the case remained unprosecuted, he pursued the progress of the case with his advocate and acted immediately he discovered that the suit had been dismissed for want of prosecution (See *Tirth Construction Limited v Orion Hotels Limited* [2020] eKLR.
5. In present application, it was clear to this court that the appellants have been extremely indolent. They failed to prosecute their appeal for a period of eight years before the appeal was dismissed by the court, on its on motion, for want of prosecution. It is instructive that the appellants took no steps to have the appeal ready for hearing before the appeal was dismissed for want of prosecution. There is no evidence that a record of appeal was ever prepared. Even if this court were to accept the reason given by the appellants for their absence from the country during the material time, the appellants failed to persuade this court that they were diligent in the pursuit of the progress of the appeal with their advocate. with the advent of modern technology, where it literally costs nothing to communicate across continents, the appellants had no excuse not to communicate with their advocate to follow upon the progress of the appeal. This court is not persuaded by the excuse put forward by the appellants to the effect that their then advocate abandoned them after he left practice and was employed elsewhere. If the appellants had pursued the progress of their case, they would have known that the appeal was dismissed five years before they lodged the present application to have the order of dismissal set aside. This court will not therefore exercise its discretion in favour of such an indolent litigant.
6. That being the case, this court finds no merit with the appellants' application as a result of which the same is dismissed with costs to the respondent. The exparte order staying execution is hereby set aside. It is so ordered.



DATED at KITALE this 24th day of May 2022.

L. KIMARU

JUDGE

