



**Kabutia & another v Karimi (Suing as the guardian and next friend of Morine Gatwiri) (Civil Appeal E024 & E025 of 2022 (Consolidated)) [2022] KEHC 10690 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10690 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E024 & E025 OF 2022 (CONSOLIDATED)**

**EM MURIITHI, J  
JUNE 30, 2022**

**BETWEEN**

**ALICE KABUTIA ..... 1<sup>ST</sup> APPELLANT**

**EDWARD CHIBWAYI AMWAYI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**PIUS KARIMI ..... RESPONDENT**

**SUING AS THE GUARDIAN AND NEXT FRIEND OF MORINE GATWIRI**

**AS CONSOLIDATED WITH  
CIVIL APPEAL E025 OF 2022**

**BETWEEN**

**ALICE KABUTIA ..... 1<sup>ST</sup> APPELLANT**

**EDWARD CHIBWAYI AMWAYI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**PIUS KARIMI ..... RESPONDENT**

**SUING AS THE GUARDIAN AND NEXT FRIEND OF DENNIS MUGAMBI**

**RULING**

**Introduction**

1. This is a ruling on an application under certificate of urgency dated 9/6/2022 by Alice Kabutia and Edward Chibwayi Amwayi, the appellants/applicants herein, brought pursuant to sections 1A, 1B, 3A



& 95 of the Civil Procedure Act, order 45 rule 1, order 42 rule 6, order 42 rule 21, order 50 rule 6 and order 51 rule 1 of the Civil Procedure Rules and all other enabling provisions of the law Constitution, where they seek specific orders in the two related appeals as follows:

1. Spent
  2. That pending the hearing and determination of this application inter-partes, there be an order of stay of execution of the judgment of the Honorable Judge delivered/issued on October 21, 2021 in Meru CMCC 77/2020 and all consequential orders and proceedings hereto be and are hereby issued.
  3. That pending the hearing and determination of this application inter-partes, there be an order of stay of execution of the judgment of the Honorable Judge delivered/issued on 9/6/2022 dismissing the appeal and all consequential orders and proceedings hereto be and are hereby issued.
  4. That this appeal being MeruHCCA No.E024 of2022; Alice Kabutia & Edward Chibwayi Amwayi vPius Karimi(Suing as the guardian and next friend of Morine Gatwiri) be and is hereby reinstated for hearing and determination in the normal way. [The appellants make a similar prayer in Meru HCCA No.E025 of2022]
  5. That this honorable court do make any such further order(s) and issue any other relief it may deem just to grant in the interest of justice.
  6. That costs of the application be provided for.
2. The application is premised on the grounds on the face of the application and the supporting affidavit of Victor Ng'ang'a sworn on even date. He avers that the appellants instituted this appeal vide a memorandum of appeal dated 14/1/2022 against the whole of the judgment of Hon. E. Tsimonjero in Meru Civil Suit N.77 of 2020 delivered on October 21, 2021. He attributes the delay in filing the record of appeal to their inability to obtain the relevant documents from the lower court, despite relentless efforts, as a result of which the appeal was dismissed on 9/6/2022. He avers that the dismissal of the appeal, which they believe is arguable, has greatly exposed them to the imminent execution. He avers that since the delay in filing the record of appeal was inadvertent and beyond their control, and the same was reasonable as to prejudice the Respondent, they ought to be indulged and heard on merits, because they already deposited Ksh.197,750 [Ksh320250 in HCCA No. E025 of 2022] in court as security for costs pending the hearing and determination of the appeal. He avers that unless the appeal is reinstated, the Appellants will suffer irreparable loss, harm, prejudice and damage and their appeal will be rendered nugatory despite being meritorious. He avers that the application has been made without undue delay, and the delay in filing the record of appeal can always be compensated by an award of damages and/or costs. He relies on the provisions of articles 48 and 159(2)(d) of the Constitution.
  3. The respondent opposed the application vide grounds of opposition filed on 15/6/2022. According to him, prayer 3 of the application is superfluous, mischievous and obsolete since the ruling of 9/6/2022 which is intended to be stayed was in relation to Meru HC Misc. App. No. E003/2022 for leave to file appeal out of time, which leave was granted conditionally on 2 separate occasions, but those orders were vacated in tandem with section 65(1) of the Civil Procedure Act, for non-compliance by the appellants. He avers that the said ruling is incapable of being stayed as the matter is now res judicata and the court is functus officio as set out under sections 7 and 8 of the Civil Procedure Act. He avers that prayer 3 of the application renders this court incompetent to hear this appeal due to the statutory limitation imposed by section 77 of the Civil Procedure Act, whereby this court will be sitting on appeal on its own decision contrary to the Respondent's right to fair hearing and procedural regularity as provided under articles



47 and 50(1) of *the Constitution*. He avers that review cannot issue as the facts and evidence in issue are very same ones the court dealt with in its ruling of 9/6/2022. He avers that prayer 4 of the application is ultra vires since no such appeal was in existence as at the time of the ruling of 9/6/2022, hence the court is being asked to reinstate a fictitious appeal. He avers that the multiplicity of applications filed in Meru HC Misc App. No. E003/2022 by the Appellants is an abuse of court process and malice thereby this application is a fresh attempt to unjustly prevent the Respondent from enjoying the fruits of his judgment. He avers that the application and the parent appeal are void ab initio for offending section 79G of the *Civil Procedure Act*, for want of leave to appeal out of time, and urges the court to dismiss the application with costs.

4. On 16/6/2022, the court heard oral submissions from counsels for both parties.

#### **Analysis and Determination**

5. I have considered the application, the arguments by the parties as well as the provisions of the law relied on.
6. The issues for determination whether the matter is res judicata and whether the court is functus officio; whether the appeal will be reinstated, and whether stay ought to be granted.

#### **Res Judicata and Functus officio**

7. Section 7 of the *Civil Procedure Act* provides as follows:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

8. This doctrine was expounded by the court of appeal in the case of *IEBC v Maina Kiai & 5 others* [2017] eKLR (Makhandia, Ouko (as he then was), Kiage, M’noti & Murgor, JJ A) where it was held thus:-

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms:

- i. The suit or issue was directly and substantially in issue in the former suit.
- ii. That former suit was between the same parties or parties under whom they or any of them claim.
- iii. Those parties were litigating under the same title.
- iv. The issue was heard and finally determined in the former suit.
- v. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.



9. The doctrine of *Functus Officio* was stated by the Court of Appeal in the case of *Telcom Kenya Ltd v John Ochanda (Suing on his own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR (Githinji, Karanja & Kiage JJ A) as follows:-

“*Functus officio* is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19<sup>th</sup> Century. In the Canadian case of *Chandler v Alberta Association of Architects* [1989] 2 SCR 848, Sopinka J traced the origins of the doctrines as follows (at p 860):

“The general rule that a final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal *In re St Nazaire Co*, (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions: Where there had been a slip in drawing it up, and, where there was an error in expressing the manifest intention of the court. See *Paper Machinery Ltd. vs. J.O. Rose Engineering Corp.*, [1934] S.C.R. 186”

10. Since the Appeal herein was never heard and finally determined on merit by this Court, this matter is not *res judicata*. In addition, as this Court has power of review under section 80 of the *Civil Procedure Act* of a judgment generally and against dismissal of an appeal for default of appearance (a fortiori for want of prosecution or failure to comply with directions as to filing of the record of appeal) in accordance with the rules 20 and 21 of the *Civil Procedure Rules*, the court cannot be said to be *functus officio*.

### **Reinstatement of the Appeal**

11. The appellants have brought their application under the provisions of order 45 rule 1, order 42 rule 6, order 42 rule 21, order 50 rule 6 and order 51 rule 1 of the *Civil Procedure Rules*. Order 42 rule 21 provides for re-admission of appeal dismissed for default as follows:

“Where an appeal is dismissed under rule 20, the appellant may apply to the court to which such appeal is preferred for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing, the court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.”

12. The court in *John Nabashon Mwangi v Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR (F. Gikonyo J) considered the principles governing reinstatement of suits and said 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.”

I agree.

13. The appellants were on 2 different occasions directed to file the record of appeal, but they defaulted, which resulted in the dismissal of the appeal. They are now before this court once more seeking



indulgence to file therecord of appeal. They contend that the delay in filing the same was inadvertent and beyond their control, as they have been unable to obtain the lower court proceedings, despite relentless efforts. In *Bernard Muthee & another v Anita Kamba Mwiti* [2021] eKLR, this Court observed thus:

“Concerning the reasons advanced of difficulties in obtaining the record of typed proceedings form the court registry, this Court recognizes that there is an avenue to file an initial record of appeal and thereafter file a supplementary record once the proceedings are obtained. This would have been the best course to take and would be more convincing bearing in mind that it was over a period of 8 months between the date when the appellants were ordered to file their record of appeal on December 5, 2019 and when the order confirming the dismissal was made on July 27, 2020. The appellants have also failed to annex evidence in form of correspondence or otherwise to confirm what efforts, if any, they made to secure the said typed proceedings. It is not enough to make mere averments devoid of supporting evidence.”

14. In the present case, the appellants have annexed a letter filed on February 14, 2022 addressed to the Executive Officer of Meru Law Courts requesting for typed court proceedings, certified copies of judgment and decree.
15. The considerations to be made in determining whether or not to dismiss matters for want of prosecution and whether to order reinstatement were considered in the case of *Ivita v Kyumbu*, Civil Suit No. 340 of 1971 (1975) EA 441, 449, *Ivita v Kyumbu* [1975] eKLR where Chesoni J. (as he then was) held as follows: “

“So the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties notwithstanding the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time. Where the defendant satisfies the court that there has been prolonged delay and the plaintiff does not give sufficient reason for the delay the court will presume that the delay is not only prolonged but it is also inexcusable and in such case the suit may be dismissed. To put it in the words of Salmon LJ in *Allen v McAlpine*, at p 561, as a rule, when inordinate delay is established until a credible excuse is made out, the natural inference would be that it is inexcusable. It is an all time saying, which will never wear out however often said that, justice delayed is justice denied.”

16. The court is, however, alive to the fact that re-instatement of an appeal is a matter of discretion, which must be exercised judiciously. I find that the delay in having the record of appeal filed to have been excusable as the same has been sufficiently explained on the delay in proceedings of the trial court. The appellant must be faulted, however, for failure to diligently deal with the appeal and the applications for stay in this matter which occasioned the intervention of the court in multiple applications for extension of time to comply with orders of stay of execution pending appeal. For their default and to cure the



costs thrown away by the necessity of application for reinstatement, the court shall impose reasonable costs to be paid by the appellant's counsel to the Respondents in the appeals.

### Stay of execution

17. Order 42 rule 6 of the *Civil Procedure Rules*, 2010 empowers a court to stay execution, either of its judgment or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided by the rule 6 (2) as follows: "No order for stay of execution shall be made under subrule (1) unless– (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."
18. The decision of the court sought to be stayed was made on 9/6/2022 whereas the instant application, although dated 9/6/2022, was filed on 13/6/2022. That cannot be termed as inordinate delay. The Appellants deposed that they already deposited the decretal sum in court as security for costs, and although the sums of award appear modest, the appellants may suffer irreparably if the same were released to the respondent, whose means of refunding the same are unknown, in the event the appeal succeeds.
19. Section 79G of the *Civil Procedure Act* empowers the court to enlarge the time for appealing, provided that the applicant satisfies the court that he had good and sufficient cause for not filing the appeal in time. The appellant alleges that they were handicapped in their quest for lodging the record of appeal in time by the unavailability of the typed proceedings.
20. Order 51 rule 6 of the *Civil Procedure Rules* provides for power to enlarge time as follows:

"Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise."
21. Although, as urged by the respondent, the appellants have not expressly sought for extension of time to file their appeal, it would be a natural consequence if the appeal were to be reinstated, to extend the time for filing the record of appeal out of time.
22. The appellants filed a memorandum of appeal in this court on 18/2/2022, and the grounds raised therein cannot be said to be frivolous or vexatious.
23. As the payment of judgment awards is secured by the deposit in court of the decretal sums, the interest of justice requires that the appeal be readmitted to hearing if the appellant is now able to file the record of appeal within the seven (7) days as urged in the oral submissions before the court. The Respondent is opposed to the application without explaining the prejudice he would suffer in the event the appeal is reinstated, and this court takes the view that delay in final settlement of the decretal sum, if the appeal be unsuccessful, may be compensated by an award of costs.



## **Orders**

24. Accordingly, for the reason set out above, and in line with the policy of the court not to drive a litigant from the seat of judgment without a hearing, this court will thus exercise its discretion and reinstate the appeal, the appellants' application dated 9/6/2022 is hereby allowed upon terms.
25. The record of appeal shall be filed within seven (7) days from the date hereof, in default of which the appeal shall stand dismissed.
26. The appellants' counsel shall personally pay to the respondent the costs of the application assessed by this court at Ksh 10,000 for each application to a total of Ksh 20,000 for the two applications subject of the appeals herein, and the same shall be paid before the next hearing date.
27. Directions on the hearing of the appeals upon compliance of the Orders herein set for Thursday July 7, 2022.

Order accordingly.

**DATED AND DELIVERED ON THIS 30<sup>TH</sup> DAY OF JUNE, 2022.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

M/S KIMONDO GACHOKA & Co. Advocates for the Appellants.

M/S KAIMBA PETER & Co. Advocates for the Respondent/Applicant.

