



**Evans Bitange Migiro v Richard Bitega & 2 others (Civil Appeal  
14 of 2018) [2022] KEHC 10266 (KLR) (27 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10266 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
CIVIL APPEAL 14 OF 2018  
F GIKONYO, J  
JUNE 27, 2022**

**BETWEEN**

**EVANS BITANGE MIGIRO ..... APPLICANT**

**AND**

**RICHARD BITEGA ..... 1<sup>ST</sup> RESPONDENT**

**ESTHER WANJIRU ..... 2<sup>ND</sup> RESPONDENT**

**LUCKY HOUSE INTERNATIONAL LTD ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

- [1] Before me is a Notice of Motion expressed to be brought under Order 22 rule 34 of the *Civil Procedure Rules*, Sections 1A, 1B, 3A and 42 *Civil Procedure Act* and all other enabling provisions of the law. The appellant/applicant seeks orders that this Honorable court be pleased to set aside the order of dismissal of appeal made on 26<sup>th</sup> October 2021 and reinstate the appeal for hearing and determination.
- [2] The grounds upon which the application is premised are set out in the application and the appellant/applicant's supporting affidavit sworn on March 15, 2022.
- [3] The major grounds argued are;
  - i. That the appeal herein arises from the judgment of the court in CMCC 173/2011 Evans Bitange Migiro vs Richard Bitega & 2 Others.
  - ii. That the applicant preferred an appeal being Nakuru appeal no. 156/2013 which could not take off because the original file sent from Narok Magistrates Court was misplaced.
  - iii. That on May 28, 2018 the honourable judge in Nakuru ordered that the appeal be sent to Narok high court for hearing and final determination and pending application for reconstruction of the missing file be heard at Narok high court upon transfer.



- iv. The matter was mentioned before Gikonyo J on February 3, 2021 when the applicant's advocate Mr. Moriasi attended and was ordered to serve the notice for mention on the April 14, 2021.
- v. The honourable judge was not sitting on the week of April 7, 2021 to April 16, 2021 as per notice from the court hence the matter was not heard as scheduled.
- vi. The applicant's advocates on record wrote to the court on the May 18, 2021 requesting for a mention date to have directions from the court on how to proceed but the email was not responded to.
- vii. The applicants wrote to the court on the February 9, 2022 requesting for a mention date but received a reply that the appeal had been dismissed on the October 26, 2021 for want of prosecution upon remarks that the parties were served.
- viii. The applicant had never received any notice for hearing on the October 26, 2021 or previous mentions hence was condemned unheard.
- ix. The applicant is desirous of having the appeal heard and a determination tendered by the court hence prays for an order of the court setting aside the judgment for want of prosecution.

### **Analysis and Determination**

4. I have perused the record; I have noted that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were served as evidenced by the affidavit of service of Michael Kamu Njonjo sworn on May 20, 2022. I however, do not find evidence of service upon the 3<sup>rd</sup> respondent.
5. The 1<sup>st</sup> and 2<sup>nd</sup> respondents despite service have not filed any responses to the application. Therefore, the application is unopposed.
6. The application is asking for reinstatement of the appeal for hearing on merit. The right to be heard and the constitutional desire to serve substantive justice to all the parties, constitute the defined principles which should guide the court in making a decision on reinstatement of a suit which has been dismissed by the court. Thus, the court should always be conscious that dismissal of a suit arbitrarily drives away the plaintiff from the seat of judgment, and so, carefully examine the circumstances of dismissal in order to make an informed decision in an application for reinstatement.
7. The appellant/ applicant stated that his appeal had been scheduled for April 14, 2021. He stated on the week of April 7, 2021 to April 16, 2021 there was a notice that this court was not sitting. His advocates then wrote a letter to court on May 18, 2021 requesting for a mention date but the email was not responded to. He further wrote another letter to court on February 9, 2022 requesting for a mention date but this time round he received a reply that the appeal had been dismissed on October 26, 2021 for want of prosecution upon remarks that the parties were served. The applicant denies receiving any notice for hearing on October 26, 2021 or previous mentions.
8. I have perused the annexed extract email of May 18, 2021 and the letter dated February 8, 2022.
9. It bears repeating that, dismissal of a suit or appeal is like driving a permanent nail on the coffin of a party's right to be heard. Thus, to be so driven only in cases where it is absolutely clear that the continued pendency of the suit or appeal does not serve any interest of justice, but pure prejudice to the other party and the process. In this case, I should think that, the interest of justice would be served in reinstating the appeal. I am not bale to discern any prejudice which may be suffered by the respondents in reinstating the appeal.



**Conclusion and orders.**

10. In the upshot, the dismissal order made on October 26, 2021 is hereby set aside. Consequently, the suit is reinstated.
11. The appellant shall set down the appeal for hearing within the 60 days of today which failing the appeal will automatically stand dismissed.
12. In the circumstances of this suit, each party shall bear its own costs.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 27<sup>TH</sup> DAY OF JUNE, 2022.**

**F. GIKONYO M**

**JUDGE**

In the Presence of:

The Appellant - absent

The Respondent - absent

Mr. Kasaso - CA

