



REPUBLIC OF KENYA



**KENYA LAW**  
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**Otieno v Bendeka Holdings Limited & another (Environment and Land Appeal 7 of 2021) [2023] KEELC 17409 (KLR) (18 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17409 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL 7 OF 2021**

**E ASATI, J**

**MAY 18, 2023**

**BETWEEN**

**JOHN LANGO OTIENO ..... APPELLANT**

**AND**

**BENDEKA HOLDINGS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**STEPHEN JUMA NDEDA ..... 2<sup>ND</sup> RESPONDENT**

*(eing an appeal from the ruling of Hon. Gesora (CM) delivered on 25 th January 2021 in KISUMU CMC E&L CASE NO. 67 OF 2020)*

**RULING**

1. The court record shows that the appeal herein was lodged in court vide the Memorandum of Appeal dated February 10, 2021 and filed in court on the same date. That on September 22, 2022 in the presence of Counsel for the Appellant and Counsel for the 1<sup>st</sup> Respondent, the court made orders, *inter alia*, that the Appellant do file and serve record of appeal with submissions within 30 days, failure of which appeal stands dismissed. The matter was then listed for mention to confirm compliance on November 15, 2022. That on November 15, 2022 only Counsel for the 1<sup>st</sup> Respondent was present when the matter was called out and referring to the court order of September 22, 2022, Counsel urged the court to dismiss the appeal. The court consequently made an order that in view of the court order of September 22, 2022 and the fact that the appellant had not complied with it, the appeal was dismissed. The court awarded costs to the 1<sup>st</sup> Respondent.
2. Vide the Notice of Motion application dated December 7, 2022 now before court for determination, the appellant seeks to have the dismissal order set aside, the appeal reinstated and costs to be in the cause. It is brought pursuant to the provisions of sections 1A, 1B & 3A of the Civil Procedure Act Cap 21 Laws of Kenya and article 159 of the Constitution of Kenya 2010. The grounds upon which the application was brought are that the dismissal violates the applicant's right to be heard and fair



trial, that the reinstatement will not prejudice the Respondent as the appeal will be heard on merits. That the applicant has always been ready for the case. That the failure to appear in court on the part of the applicant was not intentional and is therefore excusable. That the appellant's Advocate logged in before Justice Okongo instead of Justice Asati in the belief that the matter was listed before him. That the failure to appear on the appellant's advocate's part was not intended to obstruct or delay the course of justice. The application was supported by the contents of the Supporting Affidavit sworn by the applicant John Lango Otieno on December 7, 2022 and the Further Affidavit of Robert Maua and the annexures thereto.

3. The application was opposed vide the contents of the Replying Affidavit sworn by Counsel for the Respondent on February 23, 2023 wherein Counsel outlined the history of the appeal and deposed that the appellant has not been keen in prosecuting the appeal. That the appellant had not demonstrated that it had requested for proceedings or that the appellant had taken deliberate steps to ensure the expeditious disposal of its appeal since filing it in February 2021.
4. The application was canvassed by way of written submissions by consent of the parties.
5. I have considered the application and the explanation given for non-compliance with the court order of 22/9/2022 and non-attendance in court on November 15, 2022 when the dismissal order was made. I have also considered the history of the matter as outlined by the Respondent and the rejoinder thereto in the Further Affidavit. The explanation given for delay in prosecuting the appeal is that proceedings have not been typed and supplied by the court to the appellant so as to enable preparation of the Record of Appeal. However, there is no sufficient demonstration of the efforts made by the appellant to obtain the proceedings. I have taken note of the letter dated September 26, 2022 annexed to the Further Affidavit addressed to the CM's Court Kisumu requesting for typed proceedings. From the date of the letter it is clear that the same was made more than one year after the appeal was lodged and specifically after the court made the order on 22/9/2022 that the appeal will stand dismissed if the record of appeal was not filed within the next 30 days. There nothing on the letter to show that it was received at the CM's Court registry. There is no evidence of efforts made prior or to the date of the letter since the appeal was lodged in February, 2021. Both parties are entitled to the right to fair trial and to be heard expeditiously. The overriding objective of the *Civil Procedure Act* as contained in section 1A of the *Civil Procedure Act* under which the application is made is to facilitate the just, expeditious, proportionate and affordable resolution of the disputes governed by the Act. The appellant has had the appeal pending in court for almost 2 years without having it prosecuted. In the meantime, the Respondent/Decree Holder is waiting indefinitely to access the fruits of the judgement. The court has a duty under section 1B of the *Civil Procedure Act* to further the overriding objective. The court is guided by the Court of Appeal observation in *Harit Sheth t/a Harit Sheth Advocate Vs Shamas Charamia* [2010] eKLR that;

The Principal aims of the overriding objective include the need to act justly in every situation. The need to have regard to the principle of proportionality and the need to create level playing ground for all the parties coming before the court by ensuring that the principal of equality of arms is maintained and that as far as practicable to place the parties on equal foot.

And the case of *Benard Muthee & Another Vs Anita Kamba Mwiti* [2021] eKLR where the court observed that;

“concerning the reasons advance of difficulties in obtaining the record of typed proceedings from 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<sup>th</sup>,



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.

6. I find that the application lacks merit. The application dated December 7, 2022 is dismissed. Costs of the application to the 1<sup>st</sup> Respondent.

7. It is so ordered.

**RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 18<sup>TH</sup> DAY OF MAY 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI**

**JUDGE.**

**In the presence of:**

**Maureen - Court Assistant.**

Rombo Advocate holding brief for Maua Advocate for the Appellant/Applicant.

Mabalu Advocate holding brief for Abande Advocate for the 1<sup>st</sup> Respondent.

