



**Menengai Refineries Limited v Machungo (Civil Appeal  
8A of 2018) [2022] KEHC 11337 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11337 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL 8A OF 2018  
TM MATHEKA, J  
JULY 28, 2022**

**BETWEEN**

**MENENGAI REFINERIES LIMITED ..... APPELLANT**

**AND**

**PETER MACHUNGO ..... RESPONDENT**

**RULING**

1. Before court is a Notice of Motion dated November 9, 2022, brought under section 3, and 3A of the [Civil Procedure Act](#), cap 21 Laws of Kenya and Order 42 Rule 21 of the [Civil Procedure Rules, 2010](#) and all other enabling provisions of the law.
2. The application seeks the following orders:
  1. Spent
  2. That there be stay of execution of the judgment delivered on October 31, 2017 and resultant decree in Nakuru CMCC No.183 of 2016 pending the hearing and determination of this application inter partes.
  3. That the order made on November 1, 2021 dismissing the appeal for want of prosecution be set aside.
  4. That the Appeal herein be restored for hearing.
  5. That costs of this Application be provided for.
3. The Appeal herein was filed on January 26, 2018 and thereafter the applicant applied for typed proceedings which were only availed to it on September 7, 2020 and it immediately prepared the Record of Appeal and filed it on September 16, 2020 and thereafter served the respondent on September 18, 2020.



4. Subsequently, the applicant requested for a mention date for purposes of taking directions. This never happened despite however the same did not bear any fruits despite numerous follow ups from the registry.
5. The applicant came to learn on February 7, 2022 that appeal was dismissed on November 1, 2021 when the advocate was served with a letter from the respondent advocates seeking release of the money which was deposited in a joint interest earning account.
6. That the applicant was not served with any notice before the appeal herein was dismissed for want of prosecution condemning the appellant unheard, a contravention of his natural and legal rights to be heard.
7. That the delay in having this appeal determined was also attributed by the scaling down of the court operations due to the corona virus pandemic which was beyond the control of the appellant.
8. That the appellant is more than desirous and interested to prosecute and pursue the appeal to its conclusion.
9. That the appellant has a meritorious case against the respondent and if orders sought are not granted the appellant will suffer irreparable loss and damage.
10. The Application is supported by the affidavit of Caroline Chelangat Advocate reiterating the above grounds.
11. The Application was opposed by a Replying Affidavit of Peterson Machungo, the respondent sworn and filed on March 1, 2022. He deponed that the application is bad in law, made in bad faith, lacks merit, inept, an afterthought and otherwise an abuse of the court process.
12. That he instituted this suit herein way back on March 8, 2016 seeking compensation against the Appellant which case was fully heard with both parties adducing evidence and upon full hearing of the case, the trial court entered its judgement in his favour on October 31, 2017.
13. He averred that the appellant was subsequently granted stay pending appeal on February 26, 2018 after which it filled the Memorandum of Appeal on January 26, 2018 and served the Record of Appeal upon his advocate on 18<sup>th</sup> September 2020 that had been filed on September 16, 2020.
14. That since serving the Record of Appeal, no further action has been taken by the appellant to have this matter heard and determined.
15. He averred that this application is baseless and tailor made to seek to delay and or deny him the rightful fruits of his judgment and prayed in the interest of justice that it be dismissed with costs to him.
16. The applicant relies on the application, the Supporting Affidavit and the annexures therewith. The respondent filed submissions in addition to the replying affidavit.

### **Respondent's Written Submissions**

17. The respondent filed his submissions on April 26, 2022.
18. He narrowed down his issues to two. Namely;
  - i. Whether the appeal herein which was dismissed for want of prosecution should be reinstated
  - ii. Who should have costs?



19. On the first issue, it was submitted for the respondent that the Record of Appeal was filed on September 16, 2020 and by November 1, 2021 the appellant had still not prosecuted the appeal and the honourable court rightly dismissed the same for want of prosecution. That the applicant has not given any explanation to the inactivity with respect to setting the appeal down for hearing between July 2021 and January 2022 when their advocate became aware of the order for dismissal.
20. The respondent invited the court to consider the case of *John Nabashon Mwangi v Kenya Finance Bank Limited (In Liquidation)* [2015] eKLR where the court held that the courts should sparingly dismiss the suits for want of prosecution as dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of justice and that before court reinstate a suit it should consider whether there are reasonable grounds to do so and after considering the prejudice that the defendant will suffer if the suit is reinstated against the prejudice the plaintiff will suffer if the suit was not reinstated.
21. Further that the Appellant has been indolent in prosecution of his appeal which act is prejudicial to the respondent, who has been waiting for the conclusion of this matter since October 31, 2017 and therefore it ought not to be accorded the benefits of equity. respondent relied on *Simon Wachira Nyaga v Patricia Wamwirwa* [2018] eKLR where the court held that equity aids the vigilant not the indolent and the law encourages a speedy resolution of every dispute.
22. On the second issue, the respondent's counsel submitted that due to the foregoing the respondent should be awarded the costs of this application and the appeal.

#### **Issues for Determination**

23. The only issue for determination is whether or not this court should set aside the order issued on November 1, 2021 and reinstate the Appeal.
24. The principles governing reinstatement of suit were restated 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 act 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.”
25. Section 3A of the *Civil Procedure Act* gives this court inherent power to make such orders as may be necessary for the ends of justice to be met. Order 51 Rule 15 of the *Civil Procedure Rules* gives the court power to set aside any order made ex parte. The court's discretionary power should be exercised judiciously.



26. The judicial discretion was elucidated in *Mbogo & another v Shah* EALR 1908. The court's discretion to set aside an *ex-parte* order of the nature of a dismissal order is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error. In the same vein this discretion is not intended to assist a litigant who deliberately seeks to obstruct or delay the course of justice.
27. Order 42, Rule 35(2) states;

“If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.”
28. The Memorandum of Appeal was filed on the January 26, 2018 and deemed served on the respondent vide the consent adopted by the court on the February 28, 2018. By November 1, 2021 when the appeal was listed for dismissal and dismissed it had not been fixed for hearing.
29. The appellant has annexed the letter dated February 22, 2021 to court requesting for a mention for purposes of taking directions before the judge. I note that there is no corresponding evidence that it was responded to prior to dismissal of Appellant's appeal on November 1, 2021. On further scrutiny, the record shows that a Notice to Show Cause was issued on August 25, 2021 and served on momanyidella@gmail.com. with a mention date of November 1, 2021. Evidently it was not served on emjumaadvocates@gmail.com the advocates for the appellant.
30. There is therefore a conspicuous error on the part of the court as there appeared to have been service on the advocate for the appellant. It is now apparent that that was not the position and the appeal ought not to have been dismissed.
31. The Applicant complied with the conditions for stay pending appeal before the lower court.
32. The dismissal order of November 1, 2021 be and is hereby set aside. The appeal is reinstated with no orders as to costs.
33. The order of stay remains in force.
34. The matter be mentioned before the Deputy Registrar in thirty (30) days for the availing of the lower court file.
35. Thereafter the appeal be fixed for mention before the judge for directions at the earliest in the new term.

**DATED, SIGNED AND DELIVERED VIA EMAIL THIS 28<sup>TH</sup> DAY OF JULY, 2022.**

**MUMBUA T. MATHEKA,**

**JUDGE.**

CA Edna

E.M Juma & Ombui, Advocates,

Saringi Momanyi. & Co. Advocates

