



**Waweru v Ngama & another (Civil Appeal 273 of 2018)
[2022] KEHC 12559 (KLR) (Civ) (19 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12559 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 273 OF 2018

JK SERGON, J

AUGUST 19, 2022

BETWEEN

JAMES NJOMO WAWERU APPELLANT

AND

PAUL KIBERA NGAMA 1ST RESPONDENT

ROBERT TANUI 2ND RESPONDENT

RULING

1. This ruling is the outcome of two applications. The first application is the motion dated 6th June, 2022 taken out by the appellant/applicant whereof the applicant sought for the following orders:
 - i. That this application be certified as urgent.
 - ii. That the honourable court hear and determine this matter in the first instance and service of the application be dispensed with.
 - iii. That the court be pleased to grant an order for stay execution of the orders for dismissal of the appeal made on 24th March 2022 pending the hearing and determination of this application.
 - iv. That the orders made by the Hon. Lady Justice Dorah Chepkwony made on 24th March 2022 be set aside.
 - v. That the appeal herein be re-admitted and set down for hearing on such date as may be convenient to the court.
 - vi. That the respondent be ordered to provide security for ksh.1,764,925.50 deposited *vide* the order of the court on 12th November 2018 and withdrawn from the joint account without notice to the appellant.



- vii. That such further and other relief be granted to the appellant as this court deems fit and expedient in the circumstances.
- viii. That the costs of this application be in the cause.
2. The appellant/applicant filed the affidavit sworn by Jane Ngare in support of the motion. When served with the motion, Paul Kibera Njama, the 1st respondent herein filed a replying affidavit he swore to oppose the motion.
 3. I have considered the grounds stated on the aforesaid motion and the facts deponed in the rival affidavits. I have further considered the grounds of opposition and the rival oral submissions made by learned counsels.
 4. It is the submission of the appellant/applicant that on March 24, 2022 this court dismissed the appeal for want of prosecution prematurely before setting the same for directions. It is also stated that the Notice to Show Cause was not served upon the appellant/applicant.
 5. For the above reasons this court was beseeched to set aside the dismissal order. In the averments made in the supporting affidavit, the appellant avers that he took all the necessary steps to prosecute the appeal and what remained was not within his control.
 6. He stated that he has demonstrated that he made several attempts to set the appeal for directions to have it ready for prosecution. It is also deponed in the supporting affidavit that the respondent proceeded to withdraw the deposit i.e ksh.1,764,925/= from the joint interest account without notice to the appellant and the respondent is now threatening to execute against the appellant for interest.
 7. The respondent on the other hand opposed the application arguing that the application is defective since it relates to a non-existent order allegedly made on 24th March, 2022 and that the same is premised on the wrong provisions of the law. The appellant further pointed out that the consolidated appeals were dismissed on 25th March, 2022 and therefore there is no subsisting proceedings. The respondent further averred that the applicant is guilty of material non-disclosure hence he should not benefit from the discretionary power of the court.
 8. Having considered the material placed before this court together with the oral rival submissions, it is apparent that on 25th March 2022, the respondent's advocate appeared before Lady Justice D. Chepkwony for the hearing of the Notice to Show Cause. The record shows that the respondent's advocate argued in support of the Notice to Show Cause to have the appeal dismissed for want of prosecution, which argument the Honourable Judge agreed.
 9. It is clear from the annexures attached to the replying affidavit sworn by Paul Kibera Ngama that the Notice to Show Cause was published online with emails of the advocates for hearing every Friday over a period of a month in March 2022 of the appeals filed in 2018 which had not been prosecuted.
 10. The appellant merely denied knowledge of the hearing date of the Notice to Show Cause but did not controvert the averment that those notices were published in the Judiciary website and portal for all and sundry to see. It is also apparent that the appellant has not taken the liberty in this application to explain the reason for his failure to prosecute the appeal which has been pending since 2018. Consequently, I find no merit in the motion dated 6th June, 2022.
 11. The second application is the motion dated 4th July, 2022 taken out by Robert Tanui, the appellant/applicant herein whereof he sought for the following orders:



- i. That this application be certified urgent, service be dispensed with thereof and the same be heard *ex-parte* in the first instance.
 - ii. That pending the hearing and determination of this application inter-partes, there be an order of stay of execution of the judgment of the honourable Judge delivered/issued on 7th March 2018 in Nairobi CMCC no. 4303/2014 and all consequential orders and proceedings hereto be and are hereby issued.
 - iii. That pending the hearing and determination of this application inter-partes, there be an order of stay of execution of the order of the Honourable Judge delivered/issued on 25th March, 2022 dismissing the consolidated appeals and all consequential orders and proceedings hereto be and are hereby issued.
 - iv. That the consolidated appeals be and are hereby reinstated for hearing and determination in the normal way with time to file and serve the record(s) of appeal being enlarged.
 - v. That this Honourable court do make any such further order(s) and issue any other relief it may deem just to grant in the interest of justice.
 - vi. That the costs of the application be in the cause.
12. The appellant filed the affidavit sworn by Victor Ng'ang'a in support of the motion. The respondents filed a replying affidavit and grounds of opposition to resist the motion.
 13. I have considered the grounds set out on the motion plus the facts deponed in the rival affidavits. I have further considered the grounds of opposition and the oral rival submissions.
 14. It is the argument of the appellant/applicant that the delay to prosecute the appeal was inadvertent and for reasons beyond his control. The respondent on his part is of the submission that the appellant/applicant is guilty of laches and should not be favoured with the discretion of this court.
 15. The respondent stated that the appellant merely served the memorandum of appeal but failed to take any other step to have the appeal ready for hearing.
 16. The record shows that the appeal was dismissed for want of prosecution on 25th March 2022 by the court upon hearing a Notice to Show Cause where the appellant failed to show cause.
 17. The appellant has now approached this court seeking to have the dismissal order set aside. The appellant has merely stated that the failure to prosecute the appeal was due to factors beyond his control. He has however failed to explain to this court why he did not attend court to answer to the Notice to Show Cause.
 18. The reason he is now advancing before this court is a good ground which should have been presented to court at the time of hearing the Notice to Show Cause. It is clear in my mind that the appellant/applicant has failed to present plausible grounds why the order dismissing the appeal should be set aside. I find the motion dated 4/7/2021 to be without merit.
 19. In the end, I find the motion dated 6th June, 2022 and that dated 4th July, 2022 to be without merits. They are both ordered dismissed with costs of each application being assessed at kshs.15,000/= awarded to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 19TH DAY OF AUGUST, 2022.

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J. K. SERGON

JUDGE

In the presence of:

.....for the Applicant

.....for the Respondent

