



**Unga Feeds Limited, John Mwaniki v Mueni & another (Suing as the Legal Representative and Administrator of the Estate of Benjamin Mutua Wambua) (Civil Appeal 23 of 2015) [2022] KEHC 12588 (KLR) (3 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12588 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL 23 OF 2015  
MW MUIGAI, J  
AUGUST 3, 2022**

**BETWEEN**

**UNGA FEEDS LIMITED, JOHN MWANIKI ..... APPLICANT**

**AND**

**SARAH MUENI ..... 1<sup>ST</sup> RESPONDENT**

**REGINA MBEKE WAMBUA ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE  
ESTATE OF BENJAMIN MUTUA WAMBUA**

**RULING**

1. Vide a notice of motion application dated January 18, 2021, the Applicant seeks the following orders;
  - a. Spent
  - b. That the order dismissing the appeal for non-attendance made on November 9, 2021 be set aside and appeal reinstated and disposed of on merit.
  - c. That the costs of this application be in the cause.
2. The application is supported by the affidavit of Kinyanjui Theuri, Advocate in conduct of the matter. He contended that the lower court file has been missing and was only traced on February 25, 2021 which was confirmed when the matter came for mention to confirm its availability. He deposes that the evidence is in the court proceedings.
3. Thereafter he contacted the typing pool for staff purposes of processing the typed proceedings to enable them prepare the record of appeal and upon inquiry of the progress, he was informed that the person who was typing had contracted covid-19, gone home and therefore the typing pool had to go



isolation. Upon following up with the court registry on return of the typing pool he was informed that the appeal had a date in court and had been dismissed.

4. He deposed that he has not been indolent in prosecuting the appeal and their office file being mistakenly bundled in the archived files was very unfortunate and the Appellants should not be punished for the same. They should be allowed to prosecute the appeal which they have all along been desirous of prosecuting and which has an overwhelming chance of success.
5. He contends that unless the appeal is reinstated, the Appellants stand to suffer irreparable loss and the appeal rendered nugatory and a mere academic exercise. Further, that the Respondents will not suffer undue prejudice that cannot be compensated by way of costs if the application is allowed. That the Applicant's fundamental right to access justice and heard at trial and in the interest of justice that the application is made.

#### **Replying Affidavit Dated February 1, 2022**

6. Sarah Mueni Mutua And Regina Mbeke Wambua responded *vide* way of a Replying Affidavit in which they contended that the deceased died as a result of a road traffic accident that occurred on May 9, 2010 along Nairobi- Mombasa Road at Sabaki and they as legal representatives, instituted Machakos CMCC No 489 of 2021 on June 19, 2012 and judgement was delivered in January 22, 2015.
7. They contended that the appeal herein was filed on February 20, 2015 and the appellant/ applicant did not take any steps to prosecute the appeal for more than 4 years. They depose that the matter was fixed for mention on August 13, 2020 where both counsels appeared before the Deputy Registrar and the Respondent's counsel indicated that they were pursuing typed proceedings. The matter was mentioned severally before the Deputy Registrar but the Respondent had not complied. The Deputy Registrar gave the Respondent 60 days within which to file the Record of Appeal.
8. They opine that the Registry on its own Motion listed that matter for mention for directions on the Appeal on November 9, 2021 and issued a mention notice to both parties and the Respondent chose not to appear or file the Record of Appeal. Their Counsel wrote numerous correspondence and engaged in numerous mobile conversations with the Respondent's Counsel requesting them to sign consents forwarded for purpose of release of monies which had been deposited in court as security pending hearing and determination of the Appeal but the Respondent's Counsel refused and/ or neglected to sign it. They depose that as a matter of necessity, their Counsel fixed the matter for mention for directions on February 2, 2022.
9. They opine that the present application is made in bad faith and fashioned to further delay the matter to the detriment of the Estate of the deceased. Further, that the Respondents continue to delay the fruits of the lower court judgement which they are duly entitled to and this application is an afterthought only meant to delay justice as no justification whatsoever has been given as to why it has taken this long to be filed after the Appeal was dismissed on November 9, 2011.
10. They contend that the Application lacks merit and should be dismissed. They depose that they will be greatly prejudiced if the orders sought are granted.

#### **Supplementary Affidavit Dated February 11, 2022**

11. Kinyanjui Theuri, Counsel for the Applicant deposed that the Applicants have taken steps to prosecute the appeal which is evident in the court proceedings that the court file has been missing since 2017 when it was last in court for mention to confirm deposit of decretal sum and found on February 25, 2021.



12. His office has been writing letters to court requesting for typed proceedings and further follow ups through phone calls. In further response, he contends that they have been unable to prepare the record of appeal as the response they got from the court staff was that the trial court proceedings were not legible and some pages torn leaving them in wonder on how to proceed.
13. He deposed that unfortunately, the matter was not diarized which mistake was inadvertent hence their non-attendance when the appeal was dismissed. The application is not an afterthought and the monies cannot be released when there is a pending appeal. He contends that the Replying Affidavit is entirely based on technicalities and misconception of facts and the same is a claw back to the spirit of the Article 159 (2) (d) of the Constitution.
14. The Application was disposed of by written submissions.

### **Applicants Submissions**

15. The Appellant/Applicant filed submissions dated February 14, 2022 in which he submitted on two grounds. As to whether the Application herein has merit, while relying on the case of John Nabashon Mwangi v Kenya Finance Bank Limited (in Liquidation) [2015] eKLR where the court stated that ;
 

“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 Dancles” 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.”
16. It was submitted that the Appellants stand to suffer prejudice if the Appeal is not reinstated as they have expressed their dissatisfaction in the Trial Court award in filing the Memorandum of Appeal. Further that the Respondents wish to have the decretal sum of Kshs 2,601,460 paid to them which is a colossal amount that if the Appeal is not reinstated then he will suffer great prejudice. It was submitted that the court should not be quick to move the Appellants from the seat of justice and that despite being cognizant of the fact that the Respondents are entitled to the fruits of judgement in the trial court, he too is deserving of justice by having the Appeal heard and determined on merits Reliance was placed on the case of Joseph Kinyua v GO Ombachi [2019] eKLR and Katsuri Limited v Nyeri Wholesalers Limited [2014]
17. It was submitted that the prejudice that the Respondents stands to suffer can be compensated by costs. The Appellants submits that so as to aid in dispensation of justice, the Deputy Registrar would avail typed proceedings to him within the shortest time possible to enable him finalize on its record for Appeal and the matter fixed for hearing on priority basis.
18. While citing Order 42 Rule 35 (1) of the Civil Procedure Rules, the case of Suresh Ruginath Ramga & Another v Sagar Mohan SM Ram CA 433/202, Kirinyaga General Machinery vs Hezekiel Muereithi



*Ireri HCCC 48 of 2008* it was submitted that directions should have been issued before the Appeal was dismissed. The Appellants contended that they have never been furnished with typed proceedings despite numerous requests. Further reliance was placed on the case of *Kenya Nut Company Limited v Samson Ogutu Rachar* [2015] eKLR, *Joseph Gachugia & Another v John Wagura Ikiki t#a Kenya Motor Garage* [2015] eKLR, *Joseph Nyambu vs Director General NEMA & Another* [2014] eKLR, *Richard Ngetich & Another v Francis Vozena Kidiga* [2014] eKLR and *Mbaku Ngunga & Another v Sila Mumo Muli* [2018]eKLR.

19. It was submitted that security has been deposited with the court and in the event the Appeal fails, the Respondents will still access the security funds therefore no prejudice will be suffered if the Appeal is heard and determined on merit.
20. The Appellant opines that he has no control over the typing pool for purposes of expediting typing of proceedings and that had they been furnished with the proceedings, the Record of Appeal would have been prepared and possibly the Appeal would have been finalized.
21. The court is invited to make orders as may be necessary for the ends of justice in accordance with Section 3A, Article 159 (2) of the *Constitution of Kenya*. The Appellant relied on the case of *Belinda Murai & Others vs Amos Wainaina* [1979] eKLR and *Philip Chemwolo & Another vs Augustine Kubende* [1986]eKLR.

### **Respondent Submissions**

22. The Respondent filed submissions dated April 28, 2022 in which it while relying on the case of *George Owuor Okaka vs Paul K Muruga* [2021] eKLR was submitted that the delay in filing the Memorandum of Appeal is inordinate, no plausible explanation has been offered for it and the Respondent will suffer grave prejudice if the application is allowed.
23. It was submitted that the letter dated February 21, 2017 was received on May 17, 2021, the Appellants took 3 months before bringing this letter to court. That between the filing of the Appeal on February 20, 2015 and the writing of the letter dated February 21, 2017 is a whopping 2 years and one day. The delays are not explained.
24. Further, the second letter dated February 21, 2017 has 2 stamps, one for May 17, 2021 and the other for November 14, 2011 long before the matter was determined. The Respondent contends that it is not a follow up letter and they were never served with the said letter. They question the authenticity of the said letter.
25. It was submitted that the letter dated September 24, 2020 was a reactionary letter that came after the Respondents moved the court on August 13, 2020. This was five years four days after filing the Appeal and Five years seven months after the first and second letters. The allegation that the Appellant made numerous phone calls to the registry remains an allegation. The Appellants have been indolent, hell bent on protracting this appeal to deny the Respondents the fruits of their judgement and the value of the award.
26. While relying on the case of *Bilha Ngonyo Isaac vs Kembu Farm Limited & Another* [2018]eKLR and Article 159 (2) (b) of the *Constitution* it was submitted that delay defeats justice and that the opposition by the Respondents were not “mere technicalities.” It was the Respondents contention that the cumulative impact of the Appellants unexplained and unreasonable delay in this matter go well beyond the distress and dejection caused to the family of the deceased herein. It erodes public trust and confidence in the judiciary and the rules of law and negatively impacts the exercise of judicial authority itself. The court is urged to dismiss the Application with costs.



## Determination

27. I have considered the Application, the Replying affidavit in opposition and the submissions by the parties on record and I find that the issue for determination is whether the Appeal should be reinstated.
28. Order 42 Rule 35 of the [Civil Procedure Rules, 2010](#) provides that;  
Dismissal for want of prosecution
- (1) Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.
  - (2) 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.
29. In the case of [Ivita v Kyumbu](#) [1984] KLR 441), where the court observed that :
- “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 it 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, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”
30. A perusal of the lower court file indicates that there is a letter dated February 23, 2015 and received on February 25, 2015 from the Appellants advocates requesting for typed proceedings, thereafter is a letter dated November 26, 2018 and received on November 27, 2018.
31. The matter was mention before the Registrar on September 24, 2020 , October 29, 2020, November 26, 2020 and February 25, 2021 where the order was that the matter would be placed before the judge for direction.
32. There are copies of typed proceedings in the file certified on July 13, 2021.
33. The Deputy Registrar issued a mention notice to both law firms on record asking them to attend court on November 9, 2021 for directions before the Honourable Judge. A letter was sent to Kinyanjui Njuguna & Co Advocates via EMS and the firm of Anne M Kiusya & Co Advocates were served physically and received on September 14, 2021.
34. On November 9, 2021, The Appellant did not attend court either virtually or physically and did not send a representative. The court noted that the Deputy Registrar's direction had not been complied with. Further, no progress had been made since 2016 when the Appeal was admitted. The Appeal was dismissed for want of prosecution. Further orders were given that the Decretal sum be released to the Respondent through the Deputy Registrar.



35. It is not in contention that the Appellant's advocate has written two letters to the Court requesting for the typed proceedings. It is however not true that the file has been missing and was only traced on February 25, 2021 as indicated by the Appellant. If that were true, the Appellant would have attached correspondence to the Deputy Registrar on the missing Court file who would place the matter before the Court for reconstruction of the Court file and/or compile a skeleton file with pleadings from parties. Even if this were true, where has the Appellant been since that time? How comes this Application is only filed almost a year after the supposed discovery of the file?
36. The Memorandum of Appeal was filed on February 20, 2015 and since then the Appellant appears to have followed up only twice and even after a mention for directions was given, he did not take any action. The Deputy Registrar is required to list appeals over which a date for the hearing thereof has not been set down within one year of the filing of the memorandum of appeal before a judge for dismissal on notice to the parties.
37. I find that no record of appeal has been filed to date. There is no evidence that the Appellant is desirous to prosecute this appeal.
38. I am not entirely convinced by the arguments put forward by the Appellant to explain his non-attendance in court as and when required and their failure to prosecute the Appeal. Attendance/ Appearance/Representation /Holding brief are all modes of being in Court physically or virtually to explain the predicament or challenge. That was not the case here. However, I note that there have been delays on the preparation of proceedings by the Registry and that cannot be the Appellant's fault.

### **Disposition**

39. In the circumstances, I issue the following orders;
  - a. The Appeal is reinstated on condition that the Appellant pay throwaway costs of Kshs 50,000/- be paid to the Respondent, before the Appeal is reinstated and directions taken for disposal of the appeal within 60 days.
  - b. The Appellant to pursue and file the record of Appeal
  - c. Further Mention for Directions will be on October 7, 2022
  - d. It is so ordered.

**DELIVERED SIGNED DATED IN OPEN COURT IN MACHAKOS ON 3RD AUGUST 2022.  
(VIRTUAL CONFERENCE)**

**M.W. MUIGAI**

**JUDGE**

