



**Gesicho v Capital Markets Authority & another (Civil Appeal 464 of 2017)
[2022] KEHC 13063 (KLR) (Civ) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13063 (KLR)

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

CIVIL

CIVIL APPEAL 464 OF 2017

JK SERGON, J

SEPTEMBER 23, 2022

BETWEEN

DAVID O GESICHO APPLICANT

AND

CAPITAL MARKETS AUTHORITY 1ST RESPONDENT

CFC FINANCIAL SERVICES LIMITED 2ND RESPONDENT

RULING

1. The appellant/applicant in this instance has brought the Notice of Motion dated May 5, 2022 supported by the grounds set out in its body and the facts deponed in the supporting affidavit. The applicant sought for the substantive order that this court sets aside its order of March 17, 2022, dismissing the appeal and reinstate the same for hearing and determination on merit.
2. The 2nd respondent opposed the motion by filing the replying affidavit sworn on July 18, 2022.
3. When the motion came up for interparties hearing the parties respective advocates chose to rely on the averments made in their respective affidavits.
4. I have considered the grounds laid out on the body of the motion; the facts deponed in the affidavits supporting and opposing it; and the brief oral arguments.
5. In his affidavit filed in support of the motion dated May 5, 2022, the applicant, stated that on April 25, 2022 while he was pursuing the certified copies of his tribunal matter, he was informed that his appeal had been dismissed and that he had not been served with the Notice show cause hence he was completely unaware of the hearing.



6. He avers that immediately after he had filed his appeal on August 31, 2017 he started pursuing the certified copies of the order, ruling and proceedings from the Capital Markets Tribunal for the purposes of preparing his record of appeal but his efforts were in vain and hindered by the tribunal registry official who indicated to him that the tribunal was not constituted hence no one with the capacity to certify the said documents.
7. He further avers that he wrote a letter to the commission of Administrative Justice about his predicament relating the obtaining of certified copies of the tribunal proceedings which he copied to this court and the tribunal registry, that as April 28, 2022 the registry had contacted the applicant and asked him to pick the certified proceedings on May 4, 2022.
8. He contends that the delay in prosecuting his appeal was occasioned by circumstances that were beyond his control and that he is keen on prosecuting his appeal on the ruling by the tribunal on his application for among other orders, the production of purchase and sale orders in respect to his CDS account number 2168073/li, the said information is extremely crucial for the purpose of prosecuting his case at the tribunal.
9. In response, the respondent stated that prior to the appeal being dismissed, the appellant had made no effort to settle the matter down for hearing since the appeal was filed on August 31, 2017.
10. The respondent avers that it is incorrect that the appellant was pursuing copies of proceedings from the tribunal as the correspondences attached to the supporting affidavit following up on the proceedings were sent after the dismissal of the suit.
11. The respondent further avers that there is no evidence to show that the appellant had followed up with this appeal since 2017 when the appeal was filed to have it set down for hearing and that the appeal is interlocutory and that the appellant written proceedings are not required to file an interlocutory appeal.
12. The respondent contends that the appellant has no interest in prosecuting his appeal and that the court should consider the prejudice against the respondent in having to defend this matter for many years.
13. I have given due consideration to the parties' respective positions as deposed. Order 12 rule 7 of the [Civil Procedure Rules](#) under which the application is brought provides:

“Where under this order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just”.
14. The orders sought are discretionary. I am inclined to accept applicant's explanation that indeed he does need the certified copies of the order, ruling and proceedings but was unable to do so, reason being that his efforts were in vain and hindered by the tribunal registry whose officials always indicated to him orally that the tribunal was not constituted hence no one had the capacity to certify the copies of the order, ruling and proceedings that he needed.
15. In an application for reinstatement of a dismissed suit or appeal, an applicant appeals to the discretion of the court. The court must caution itself not to exercise its discretion in a manner that will result in an injustice. This position is fortified in the case of [Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others](#) [2013] eKLR, where the Court of Appeal stated:

“We agree with those noble principles which go further to establish that the court's discretion to set aside an *ex parte* judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not



to assist a person who deliberately seeks to obstruct or delay the course of justice. I have considered the reasons that were offered by the appellant regarding their failure to attend court on April 1, 2022 with anxious minds. I have asked myself whether failure to attend court on April 1, 2022, constituted an excusable mistake, an error of judgment or was it meant to deliberately delay the cause of justice.

16. The circumstances of this case are sufficient to persuade the court to grant the orders, since it was not a deliberate attempt to obstruct or delay justice as the same was occasioned by circumstances that were beyond him. Accordingly, he should not be denied a hearing.
17. Perusing the memorandum of appeal, triable issues arise. These include the issue as to whether *Capital Markets Act* gives the tribunal powers to summon witnesses, take evidence upon oath or affirmation and orders given that the production of purchase and sale orders in respect to his CDS account number 2168073/Li . However, it does not mean to say that the appeal will succeed and it is not the duty of this court at this stage to go into the merits of the intended appeal.
18. Dismissing the application would be a draconian order and I'm of the opinion that justice will be served if the appeal is reinstated. In the case of *John Nabashon Mwangi v Kenya Finance Bank Limited (in liquidation)* [2015] eKLR it was held:

“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.”

19. In the premises, I find merit in the application dated May 5, 2022 which I hereby allow and set aside the orders of March 17, 2022 dismissing the appeal and reinstate the same to hearing on merit. Costs shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2022.

.....

J K SERGON

JUDGE

In the presence of:

..... for the appellant

..... for the 1st respondent



..... for the 2nd respondent

