



REPUBLIC OF KENYA



**KENYA LAW**  
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**Meme v Maroo (Civil Appeal E024 of 2020)  
[2022] KEHC 15942 (KLR) (28 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15942 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E024 OF 2020  
EM MURIITHI, J  
NOVEMBER 28, 2022**

**BETWEEN**

**HARRISON MEME ..... APPELLANT**

**AND**

**ROMANO MAROO ..... RESPONDENT**

**RULING**

1. Before the court is an application under certificate of urgency dated March 30, 2022 pursuant to sections 1A, 1B and 3A and 95 of the *Civil Procedure Act*, order 45 rule 1, order 42 rule 21, order 50 rule 1 and order 51 rule 1 of the *Civil Procedure Rules*. The appellant seeks relief as follows:
  1. Spent
  2. That pending the hearing and determination of this application there be an order of stay of execution of the orders of the honorable judge delivered/issued on October 22, 2021 and all consequential orders and proceedings hereto be and is hereby issued.
  3. That pending the hearing and determination of this application there be an order of stay of execution of the judgment delivered in Maua CMCC No 156 of 2019 on October 29, 2020.
  4. That this appeal being Meru HCCA E024 of 2020 be and is hereby reinstated for hearing and determination on merit.
  5. That this honorable court be pleased to reinstate the orders of October 22, 2021 and extend the same to allow the appellant file their record of appeal.
  6. That this honorable court do make any such further order(s) and issue any other relief it may deem just to grant in the interest of justice.
  7. That the costs of this application be in the cause.



2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Joyce Chichi, the appellant's advocate, sworn on even date. She avers that this appeal stood dismissed on November 22, 2021 for failure to file the record of appeal on time, which failure was occasioned by the inability to get the typed proceedings on time. She avers that the appellant has nonetheless compiled the record of appeal, and is requesting for 30 more days to enable them obtain the typed proceedings, judgment and decree to complete the record of appeal. She avers that the appellant is desirous of prosecuting the appeal, and unless it is reinstated, the same will be rendered nugatory and the appellant will suffer irreparably as execution will proceed. She urges the court not to visit the mistake of counsel on the appellant. According to her, no prejudice will be occasioned to the respondent or any other damage that cannot be compensated by way of costs, if the application is allowed.
3. The respondent has opposed the application vide his replying affidavit sworn on May 11, 2022. He contends that the application has no merits, is purely meant to cause him further undue injustice and deny him the fruits of his regularly obtained judgment. He faults the appellant for failing to comply with the conditions for stay issued by the court, which led to the dismissal of the appeal. He doubts whether the appellant even sought for typed proceedings from the trial court, as the letter he has exhibited does not bear a court stamp, and if so, whether he insistently followed up on the same. He accuses the appellant of failing to file a certificate of delay to cement his claim that the delay was not deliberate but was caused by the lower court's inaction to supply the typed proceedings and judgment. He contends that since the appellant was held 100% liable for the accident as no evidence was tendered by him, the appellate court is unlikely to interfere with the trial court's decision, and therefore the application ought to be dismissed.
4. In support of the application, the appellant informed the court that he had compiled his record of appeal and wanted more time to file his supplementary record of appeal. He beseeched the court not to punish him for failing to obtain copy of the proceedings which was within the purview of the court. He urged the court to reinstate the appeal, which was viable and arguable with high chances of success, in order to ensure his right to fair hearing has been considered. He expressed his willingness to abide by any conditions which the court may impose on him for the appeal to be reinstated. He further urged the court not to oust him from the seat of justice for no absolute fault of his own, and relied on *John Nabason Mwangi v Kenya Finance Bank Limited (in Liquidation)* (2015) eKLR and the Court of Appeal cases of *Richard Ncharpi Leiyagu v IEBC & 2 others* (2013) eKLR and *Phillip Chemwalo & another v Augustine Kubede* (2015) eKLR.
5. The respondent frowned upon the appellant's attempt to seek refuge in the overriding principle yet he had egregiously failed to comply with directions of the court, and urged the court to dismiss the application, so that he could enjoy the fruits of his judgment. He maintained that the appellant had been lax and indolent, and relied on *Mwangi S Kimenyi v Attorney General & another* (2014) eKLR, *Ketterman & others v Hansel Properties Ltd* (1988) 1 All ER 38, *Isiolo Stage Viewers Enterprises v Isiolo County Government & another*, Meru ELC Constitutional Petition No 14/2017 and *Tana Teachers' Cooperative and Credit Society Limited v Andriano Muchiri* (2018) eKLR.

### Determination

6. On March 9, 2021, the court heard the appellant's application dated March 1, 2021 and issued an order that, "there shall be a temporary order of stay of execution of the decree in Maua CMCC 156/2016 upon the applicant depositing ½ decretal sum in court within 14 days from today." It appears the condition for granting stay was never complied with and the appellant has not proffered any explanation for the non-compliance.



7. On October 22, 2021, the court gave directions that -

“Let the record of appeal be filed and served within 30 days from today. In filing the record of appeal, let the appellant equally and simultaneously file written submissions. Upon service with the record and submissions let the respondent have 14 days to file and serve submissions. Time shall be of essence and if there shall be a default to file the record and/or submissions within the time prescribed, the appeal shall stand dismissed with costs. For purposes of procedure, the appeal is deemed admitted and shall be canvassed by way of written submissions. ....To preserve the subject of litigation, the status quo now prevailing shall be maintained till then.”

8. On March 30, 2022, the record of appeal had not been filed and the court ordered that, “I read the court file and found that the orders of October 22, 2021 have taken effect and this appeal stands dismissed with costs. Counsel will now take the course deemed fit or else the file be closed.”

9. It is against that backdrop that the appellant has filed the instant application seeking stay and reinstatement of the appeal.

### **Stay of Execution**

10. Order 42 rule 6(2) of the *Civil Procedure Rules* empowers a court to stay execution, either of its judgment or that of a court whose decision is being appealed from, pending appeal as follows:

“No order for stay of execution shall be made under subrule (1) unless–

- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

11. The appellant was granted conditional stay of execution pending appeal on March 1, 2021, but he failed to comply with the conditions set by the court. That notwithstanding, he was directed to file the record of appeal within 30 days from October 22, 2021, and the court gave an order for the preservation of the subject of litigation by having the prevailing status quo maintained. When the matter was mentioned on March 30, 2022, the record of appeal had not been filed, therefore the orders of October 22, 2021 dismissing the appeal had taken effect.

12. This court finds that the prayer for stay of execution is untenable in the same terms that the applicant has failed to comply with. The court shall grant stay upon a condition that the appellant pays to the respondent ½ the decretal sum.

### **Reinstatement of the Appeal**

13. Order 42 rule 21 of the *Civil Procedure Rules* provides for re-admission of appeal dismissed for default as follows:

“Where an appeal is dismissed under rule 20, the appellant may apply to the court to which such appeal is preferred for the re-admission of the appeal; and, where it is proved that he was



prevented by any sufficient cause from appearing when the appeal was called on for hearing, the court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.”

14. I respectfully agree with the principles governing reinstatement of suits restated in the case of *John Nabashon Mwangi v Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR (Gikonyo J) 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.”

15. The reason advanced here why the record of appeal was not filed within the set timelines is the delay in obtaining the typed lower court proceedings, together with the judgment and the decree therein. In *Bernard Muthce & another v Anita Kamba Mwiti* [2021] eKLR, this court observed thus, “Concerning the reasons advanced 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, 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.”
16. The appellant has annexed 3 letters dated October 25, 2021, December 2, 2021 and February 8, 2022 addressed to the Executive Officer of Maua Law Courts requesting for typed court proceedings, certified copies of judgment and decree. There is, however, no proof whether the said letters were filed in court, as they do not bear the court stamp.
17. The considerations to be made in determining whether or not to dismiss matters for want of prosecution and whether to order reinstatement were considered in the case of *Ivita v Kyumbu*, Civil Suit No 340 of 1971 (1975) EA 441, 449, where Chesoni J held as follows:

“...So the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay.....The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced...”



18. The court is alive to the fact that re-instatement of an appeal is a matter of discretion, which ought to be exercised judiciously. Order 51 rule 6 of the *Civil Procedure Rules* empowers the court to enlarge the time as follows:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

19. The appellant cannot be said to be undesirous of prosecuting the appeal as he has already filed his record of appeal, albeit late. This court notes that the delay in filing the record of appeal is not solely attributable to the appellant, and in the interest of justice, it deems it fit to reinstate the appeal.

20. Order 42 rule 2 of the *Civil Procedure Rules* provides as follows:-

“Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such a time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of Act until a copy is filed.”

21. Order 42, rule 13 (4) (f) of the Civil Procedure Rules provides that:

Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say — (a) the memorandum of appeal; (b) the pleadings; (c) the notes of the trial magistrate made at the hearing; (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing; (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate; (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal: Provided that— (i) a translation into English shall be provided of any document not in that language; (ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).”

22. As at April 13, 2022, when the record of appeal was filed, the appellant had not obtained the typed lower court proceedings, the judgment and the decree. He now urges the court to reinstate the appeal and grant him more time to file a supplementary record of appeal with the missing documents. He contends that the delay in filing the record of appeal was not deliberate but inadvertent, as he was unable to obtain the proceedings on time.

23. In the spirit of article 159 (2) (d) of the *Constitution* and the overriding objectives stated under section 1A and 1B of the *Civil Procedure Act*, this considers it just to grant the extension of time sought.



## Orders

24. Accordingly, for the reasons set out hereinabove, the application dated March 30, 2022 is allowed in the following terms:
1. The appeal is hereby reinstated.
  2. The appellant is hereby directed to file and serve a supplementary record of appeal annexing all the missing documentation within thirty (30) days from the date hereof, in line with the provisions of order 42 rule 2 of the [Civil Procedure Rules](#), in default of which, the appeal shall stand dismissed with costs to the respondent.
  3. The appellant is granted a stay of execution subject to payment of ½ of the decretal sum to the respondent with 14 days and in default of which the stay of execution shall lapse and be of no effect.
  4. In terms of order 51 rule 6 of the [Civil Procedure Rules](#) that “the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application,” the costs of the application shall be paid by the applicant to the respondent.

Order accordingly.

**DATED AND DELIVERED ON THIS 28<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**EDWARD M. MURIITHI**

**JUDGE**

### **Appearances**

Ms. Chichi Advocate for the Appellant/Applicant.

Mr. Mutembei Advocate for the Respondent.

