



**Kwinda v Kimuyu & another (Environment and Land Appeal  
27 of 2017) [2024] KEELC 797 (KLR) (14 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 797 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT AND LAND APPEAL 27 OF 2017  
TW MURIGI, J  
FEBRUARY 14, 2024**

**BETWEEN**

**ISAAH KASYULA KWINGA ..... APPELLANT**

**AND**

**ROSARIA KAVULI KIMUYU ..... 1<sup>ST</sup> RESPONDENT**

**TOM MATHEKA BERNARD ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before me for determination is the Notice of Motion dated 2<sup>nd</sup> November, 2022 brought under Sections 1A, 3, 3A and 63E of the Civil Procedure Act and Article 159 of the Constitution in which the Applicant seeks the following orders: -
  - i. That the order dismissing the appeal herein made by the Honourable Court on the 25<sup>th</sup> day of October, 2022 be set aside upon such conditions as are just.
  - ii. That the appeal be reinstated.
  - iii. That the costs of the suit and this application be in the cause.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Cosmas Ngala Stephen Advocate sworn on even date.

**The Applicant's Case**

3. The Applicant averred that he received the Notice to show cause in the month of September 2022. He further averred that he did not understand its import because he had filed the record of appeal on 7/3/2022 and a replying affidavit indicating as much.



4. He further averred that the notice to show cause was issued on the basis that there was no record of appeal in the court record despite having supplied a copy of the same to the court assistant. He further averred that when the notice to show cause came up for hearing on 25/10/2022, he was unable to log in due to some technical challenges.
5. He averred that on the material day, the Appellant was present in court but since the matter was proceeding virtually the court assistant could not assist him. He contended that the Appellant has not been indolent in any way and that the order of dismissal should be set aside in the interest of justice.

### **The 1<sup>st</sup> Respondent's Case**

6. The 1<sup>st</sup> Respondent filed a replying affidavit dated 15<sup>th</sup> December, 2022 in opposition to the application. She averred that the appeal herein is a knee-jerk reaction aimed at defeating the execution process. She contended that the Appellant did not file an appeal until the year 2017 when she commenced the execution proceedings.
7. That despite being granted leave to file the appeal out of time, the Appellant has not taken appropriate steps in setting the appeal down for admission and directions on the hearing.
8. She further averred that on the material date, Counsel for the Appellant did not appear in court either virtually or physically. She further averred that the dismissal of the appeal was justified as no plausible reason for the delay in setting the appeal down for hearing was offered. The deponent averred that the application herein is devoid of merit and the same should be dismissed with costs.
9. The application was canvassed by way of written submissions.

### **The Applicant's Submissions**

10. The Applicant filed his submissions on 25<sup>th</sup> April, 2023. On his behalf, Counsel reiterated the contents of his supporting affidavit. Counsel contended that the overriding objective of the court is to dispense substantive justice without undue regard to procedural technicalities. Counsel urged the court to allow the application as prayed.
11. To buttress his submissions, Counsel relied on the following authorities: -
  - i. *Patriotic Guards Ltd v James Kipchirchir Sambu* [2018] eKLR
  - ii. *Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints* [2018] eKLR
  - iii. *Edney Adaka Ismail v Equity Bank Limited* [2014] eKLR

### **The 1<sup>st</sup> Respondent's Submissions**

12. The 1<sup>st</sup> Respondent filed her submissions on 16<sup>th</sup> June, 2023. On her behalf, Counsel identified the following issues for the court's determination: -
  - i. Whether the application raises satisfactory grounds for the court to grant the orders sought?
  - ii. Whether the court ought to set aside orders dismissing the appeal due to the Appellant's failure to set the appeal for hearing?
  - iii. Whether the appeal should be reinstated and if it is meritorious?
  - iv. Who will bear the costs of the application?



13. Counsel submitted that the law governing dismissal of appeals for want of prosecution is set out under Order 42 Rule 35 of the Civil Procedure Rules. Counsel submitted that the Appellant failed to cause the appeal to be listed for admission and directions on hearing. Counsel further submitted that the Appellant has not complied with procedural requirements and that there has been inordinate delay on his part. Counsel argued that the delay in prosecuting this Appeal has denied the 1<sup>st</sup> Respondent the opportunity to enjoy the fruits of her judgment.
14. Counsel submitted that the Appellant has not advanced any special circumstances to warrant the court to exercise its inherent power to reinstate the appeal. Counsel urged the court to dismiss the application with costs. To buttress his submissions, Counsel relied on the case of Shadrack Cheserek v Kipserem Mengichi & another [2016] eKLR.

### **Analysis And Determination**

15. Having considered the application, the respective submissions and the rival submissions, the only issue for determination is whether the Appeal herein should be reinstated for hearing.
16. The power of the court to set aside *ex parte* orders is discretionary. In *Shah v Mbogo* [1967] EA 116 the court held as follows: -

“This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”
17. Further, in CMC Holdings Ltd v James Mumo Nzioki [2004] eKLR the Court of Appeal stated as follows: -

“Our view is that in law, the discretion that a court of law has, in deciding whether or not to set aside *ex parte* order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle.”
18. It is the Applicant’s case that he failed to attend court on 25/10/2022 because he was having challenges login to the virtual platform which consequently led to the dismissal of the Appeal. It is not in dispute that the appeal herein was dismissed on 25/10/2022 for want of prosecution. It is also not in dispute that there was no representation from counsel for the Respondents.
19. In addition, counsel argued that the Appellant should not be penalized on account of the mistake of his counsel. He insisted that the Appellant was in open court. In the case of Philip Chemowolo & another v Augustine Kubende, [1982-88] 1 KAR 103 Apaloo, J.A. (as he then was), expressed himself thus: -

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”



20. Counsel gave a plausible account of the events that led to the dismissal of the appeal herein. I find that the Applicants' explanation on failure to attend court is reasonable and plausible.

To avoid injustice to both parties and to prevent prejudice to the Applicant who will be locked from the seat of justice, this Court finds and holds that the Appeal should be heard and determined on its merits. In so finding I am persuaded by the holding in the case of *Essanji & another v Solanki* [1968] EA 218 where it was observed as follows;

“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that error and lapses should not necessarily debar a litigant from the pursuit of his rights.”

21. In light of the foregoing, I find that the Applicant dated 2<sup>nd</sup> November 2022 is merited and the same is allowed as prayed.

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 14<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**HON. T. MURIGI**

.....

**JUDGE**

**In the Presence of:**

Ngala for the Appellant

Kamolo for the Respondent

Court assistant Kwemboi.

