



**Mugo & 2 others (Suing as the legal representatives of the Estate of Samuel Kageni Irungu) v Kariuki (Suing on behalf of SW (Incapacitated by Ailments) (Environment & Land Case 90 of 2021) [2023] KEELC 16770 (KLR) (13 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16770 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 90 OF 2021  
BM EBOSO, J  
MARCH 13, 2023**

**BETWEEN**

**PETER IRUNGU MUGO ..... 1<sup>ST</sup> PLAINTIFF  
DANIEL KAMOCHU WARUGURU ..... 2<sup>ND</sup> PLAINTIFF  
LAWRENCE NDUNGU KAMAU ..... 3<sup>RD</sup> PLAINTIFF  
SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF SAMUEL  
KAGENI IRUNGU**

**AND**

**JOSEPHAT MUCHIRI KARIUKI (SUING ON BEHALF OF SW  
(INCAPACITATED BY AILMENTS) ..... RESPONDENT**

**RULING**

1. On May 18, 2022, this court ordered the appellants to file and serve the record of appeal together with written submissions in this appeal within 30 days. In default, the appeal was to stand dismissed. The court record bears a record of appeal dated June 7, 2022 but the court stamp on it is dated June 6, 2022. The record similarly bears written submissions dated June 17, 2022 but the court stamp on it is dated July 15, 2022.
2. Against the above background, the appellants brought a notice of motion dated October 7, 2023, seeking an order reinstating the appeal. The application is the subject of this ruling.
3. The application is supported by an affidavit sworn on October 7, 2022 by Peter Odhiambo. The appellants case is that the order requiring them to file and serve the record of appeal together with written submissions was served on their advocates on May 26, 2022. Their Advocate proceeded to file



and serve the record of appeal within the prescribed time. They did not, however, file and serve written submissions relating to the appeal.

4. The application was canvassed through written submissions dated December 28, 2022, filed by M/s Mutisya & Company Advocates. Counsel for the appellants/applicants argues in the written submissions that the appellant's appeal is arguable and should be considered on merits. He adds that although there was default, the appellants subsequently filed and served written submissions. It is the case of the appellants that no prejudice would be suffered by the respondent if the appeal is reinstated. Counsel relies on the High Court decision in [\*David Bundi v Timothy Mwenda Muthee \[2022\]eKLR\*](#) in urging the court to grant the plea.
5. The respondent opposes the appeal through grounds of opposition dated December 1, 2022 and written submissions dated December 2, 2022, filed by M/s P. M Kamaara & Associates Advocates. The respondent contends that the appellant has failed to offer a reasonable explanation as to why there was no compliance with the order of the court. The respondent adds that the appellant has failed to demonstrate any loss/damage/prejudice that he would suffer if the plea for reinstatement is rejected. He adds that the appellant has failed to demonstrate that his appeal is arguable, to warrant reinstatement.
6. In his written submissions dated December 2, 2022, counsel for the respondent identifies the following as the three issues that fall for determination in the application: (i) Whether the appeal should be reinstated; (ii) Whether the appellant/applicant will suffer prejudice; and (iii) Does the appeal have arguable grounds or what is the probability of success of the appeal?
7. Counsel for the respondent cites the decision of the High Court in [\*Catherine Kisigai Kivai v Ernest Ogesi Kivai & 4 others\[2021\] eKLR\*](#) and submits that the appellants have failed to furnish the court with sufficient cause or reasons why they failed to comply with the order of the court, hence there is no basis for reinstating the appeal. Counsel for the respondent adds that the appellants have failed to demonstrate the prejudice that they would suffer in the event that the appeal is not reinstated. Counsel further contends that the appellants have failed to demonstrate the probability of success of the appeal.
8. I have considered the application; the grounds of opposition to the application; the parties' respective submissions; and the relevant legal framework and jurisprudence. The key issue to be answered in this ruling is whether the applicants have satisfied the criteria upon which our courts exercise jurisdiction to reinstate a dismissed suit.
9. Jurisdiction to reinstate a suit that has been dismissed for non-compliance with orders of the court is a discretionary one. Exercise of the discretionary jurisdiction is guided by a well-established approach. The Court of Appeal [Madan JA] outlined the approach in the case of [\*Belinda Murai & others v Amos Wainaina \[1979\]eKLR\*](#) in the following words:

“The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which Courts of Appeal sometimes overrule.”
10. The present appeal stood dismissed on account of the appellants non-compliance with the order of the court requiring the appellants to file and serve the record of appeal together with written submissions. Although the record of appeal and the written submissions were subsequently filed and served, filing and services of written submissions was done outside the prescribed time. The applicants plead that the appeal be re-admitted/ reinstated and be disposed on merits.



11. The court has considered the explanation tendered by the appellants/applicants to explain their default. It is clear from the court records and from the materials placed before the court that the appellants' advocates did not take seriously the order made by the court requiring the appellants to file and serve the record of appeal together with their written submissions on the appeal. However, taking into account the fact that both the record of appeal and the written submissions were subsequently filed and served, and purely for the purpose of facilitating disposal of the appeal on merits, the court will reluctantly and conditionally re-admit the dismissed appeal. The court will reluctantly reinstate the appeal on condition that the appellants pay the respondent throw-away costs of the application, assessed at Kshs 25,000. The said sum is to be paid within 30 days. In default, the order reinstating the appeal shall stand vacated and the appeal shall stand dismissed.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 13TH DAY OF MARCH 2023**

**B M EBOSO**

**JUDGE**

**Mr Kamara for the Respondent**

**Court Assistant: Hinga**

