



**Arcon Works Limited v Muga (Civil Appeal E029 of 2023)
[2025] KEHC 1618 (KLR) (7 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1618 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL APPEAL E029 OF 2023
LW GITARI, J
FEBRUARY 7, 2025**

BETWEEN

ARCON WORKS LIMITED APPELLANT

AND

GITARI MUGA RESPONDENT

RULING

1. The matter pending before this court is a Notice of Motion dated 18/10/2024 which is seeking an order that there be stay of execution of the Judgment of trial magistrate dated 24/10/2023 and all the consequential orders arising therefrom. That the court be pleased to re-admit the Chuka High Court Civil Appeal No.E029/2023 which was dismissed for want of appearance by the appellant on 12/6/2024 and the court to order a stay of execution of the said Judgment.
2. That the court to declare the proclamation notice dated 17/10/2024 by Giant Auctioneers as defective.
3. It is based on the ground that Justice shall be administered without undue regard to procedural technicalities as the applicant has sufficient reason as to why it failed to appear and or be represented on 12/6/2024 when the matter was dismissed. That this court has powers to reinstate the appeal so that the substantive appeal may be heard and determined. That the respondent has instructed auctioneers to proclaim assets belonging to the appellant and the notice was to lapse on 23/10/2024 and that if the stay of execution is not ordered, the applicant's appeal will be rendered nugatory. The appellant is willing to deposit the balance of decretal sum which is Ksh.2,400,000/- in court as security and to illustrate that its only interest is to get substantive pronouncement on the appeal.
4. The application is supported by the affidavit of Peter Ngola Makau where he has expounded the above grounds of appeal. The respondent opposed the appeal.
5. The court issued an order of stay of execution pending the hearing and determination of this application.



6. I have considered the application. The only issue for determination is whether the court should reinstate the appeal.

1. *The Constitution* mandates courts to seek to hear and determine matters on merits other than on procedural technicalities. The Constitutional underpinnings on conclusion of matter in a timely manner is contained under Article 159 of *the Constitution* which provides as follows:-

- 1) Judicial authority is derived from the people and vest in, and shall be exercised by the courts and tribunals established by or under this Constitution.
- 2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles.
 - a) Justice shall be done to all irrespective of status;
 - b) Justice shall not be delayed;
 - c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute mechanisms shall be promoted subject to clause -3.
 - d) Justice shall be administered without undue regard to procedural technicalities; and
 - e) the purpose and principles of this Constitution shall be protected and promoted.
- 3)

7. *The Constitution* and the legislation enjoins the courts, litigants as well as advocates to ensure that matters are concluded timeously without undue delays. Section 1A & 1B of the *Civil Procedure Act* gives the overriding objectives of the Act and provides as follows:-

1A

- (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

1B.

- (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
 - (a) the just determination of the proceedings;
 - (b) the efficient disposal of the business of the Court;



- (c) the efficient use of the available judicial and administrative resources;
- (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
- (e) the use of suitable technology.”

8. The Act also enjoins the court to exercise its inherent jurisdiction to make such orders as may be necessary to meet the end of justice or to prevent abuse of the process of the court.

9. Section 3A of the *Civil Procedure Act* provides as follows:-

3A. Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

10. The courts have laid down the factors to be considered where a party seeks to have a dismissed suit reinstated. These includes, whether there was delay is prolonged, the prejudice to be occasioned to the parties and whether a party has a claim which should be heard on merits. In *Ivita-Kyumbu (1984) KLR 441*, the court stated as follows:

“The test is whether the delay is pro-longed and in-excusable and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and the 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 due to the disappearance of human memory resulting from lapse of time. The defendant must however stratify the court that it 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 case for want of prosecution. Thus, even if the delay is prolonged if the court is satisfied with the plaintiff’s excuse for the delay, the action will not be dismissed but it be set down for hearing at the earliest available time.”

11. Thus, the granting or refusal to reinstate a suit is a matter that lies in the exercise of court’s discretion. The discretion should be exercised in a just manner and is not intended to assist a party who had deliberately sought to obstruct or delay.

12. The record shows that the appellant had filed the record of appeal dated 21/3/2024 and sought to file a supplementary record. I am of the view that the failure by the applicant to attend court on 12/6/2024 was not of his own making. The delay is not demonstrated that the delay was in-ordinate the appellant had complied with the directions of this court and had filed the record of appeal. The appellant had complied with the order to provide security for costs. I find that the appellant has convinced me that I should exercise discretion in their favour as they had no intention to delay the hearing and determination of the appeal. For the aforesaid reason, I find that the application has merits. I allow the application and order as follows:-

- a. The order dismissing the appeal is set aside.
- b. The appeal is reinstated for hearing and determination on merits.
- c. There shall be stay of execution pending the hearing and determination of the appeal.
- d. I will not order security for costs as the appellant has already provided security which I find is sufficient.



e. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 7TH DAY OF FEBRUARY 2025.

L.W. GITARI

JUDGE

