



REPUBLIC OF KENYA



Ayongah v Osimbo & another (Suing as the Legal Representatives of the Estate of Richard Osimbo Nganyi) (Civil Appeal E021 of 2023) [2025] KEHC 2174 (KLR) (5 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2174 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E021 OF 2023
S MBUNGI, J
FEBRUARY 5, 2025**

BETWEEN

JAMES OPEYWAH AYONGAH APPELLANT

AND

LEAH ANYOSO OSIMBO 1ST RESPONDENT

STANLEY SAMBAYI OSIMBO 2ND RESPONDENT

SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF RICHARD OSIMBO NGANYI

RULING

1. The appellant/applicant filed a motion dated 24.06.2024 under Certificate of Urgency seeking the following orders:
 - i. Spent.
 - ii. That this honorable court be pleased to vacate, review, rescind, vary and/or set aside the proceedings and orders issued on the 16.05.2024 and 28.05.2024 and reinstate the appeal.
 - iii. That this honorable court be pleased to grant temporary stay orders pending the hearing and determination of this application inter-partes and/or further orders of the court.
2. The application was premised on the following grounds:
 - a. That being aware of the urgency of this application, the Appellant/Applicant has moved this Honorable Court without undue delay and in a timely manner.
 - b. That on 16/05/2024 and 28/05/2024, the Appellant's Appeal was dismissed for want of prosecution with no fault on the part of the Appellant.



- c. That on the fateful day, the Appellant's counsel was logged into the virtual court platform.
 - d. That right before the instant Appeal was called out, I experienced a technical hitch that led to her call dropping.
 - e. That by the time I resolved the technical hitch and logged back into the court platform, she got a message from the judiciary system that the matter had been dismissed.
 - f. That the Appeal was coming up for mention to confirm filing of submission for application for stay dated 13.2.2023 and fix the same for ruling.
 - g. That the Application for stay dated 13/2/2023 was on its final stage as both parties had filed and served their submissions.
 - h. That dismissing the Appeal condemns the Appellant unheard, to the detriment of his Appeal which ought to be heard and determined.
 - i. The Respondent will not suffer any prejudice if the Application is allowed as prayed.
3. The application was supported by an affidavit sworn by the appellant's advocate who reiterated the contents of the application.
 4. The respondent filed grounds of opposition to the application stating that the directions of the court on 08.02.2024 were given in the presence of the counsel of the appellant and consequently, the appeal was dismissed for non-compliance.
 5. The respondent stated that the applicant had not demonstrated to the court any reasonable grounds as to why the court orders were not complied with. Further, the respondent stated that even if the appellant/applicant would have made it to the virtual court session, the issue of non-compliance with the court orders would have remained the same and the outcome would be inevitably the same.
 6. The respondent further stated that court orders are not issued in vain, and non-compliance carries consequences. Moreover, the court orders were aimed at fast tracking the appeal herein and allowing the present application would defeat those efforts.
 7. The respondent told the court that the appellant has been enjoying stay of execution orders since 14.02.2023 and is attempting to delay and frustrate the conclusion of the appeal through the present application which is frivolous, misconceived and an abuse of the court process.
 8. The application was canvassed by way of written submissions.

Applicant's Submissions.

9. Vide his submissions, the applicant submitted that the matter was dismissed due to their omission to file the record of appeal within the timeframe that had been ordered by the court. He averred that the record was not filed since they were unaware of the directions given by the court on 08.02.2024. Further, he submitted that Order 42 Rule 21, which makes reference to Rule 20 provides for dismissal of the appeal for non-attendance during hearing, but does not provide for dismissal for failure to file a record of appeal.
10. The applicant submitted that they were unaware of the dismissal, since the matter was pending ruling on their application for stay of execution, which parties had filed submissions and only came to learn about it on the portal when they wanted to track what happened on 28.05.2024 when counsel for the appellant was unable to attend court virtually.



11. He further submitted that the court has the discretion to reinstate an appeal as provided for in Order 51 Rule 6 of the Civil Procedure Rules. He averred that despite the application being filed after a long period of time, the delay was not ordinate since he was unaware of the court's order for dismissal.
12. The applicant prayed that the appeal be reinstated, and that the period of time within which he was required to file the record of appeal be extended.

Respondent's Submissions.

13. The respondent submitted that on 08.02.2024, the appellant's counsel was present in court, whereas the respondent was not. The court thus ordered that the appellant to file and serve the record of appeal and submissions, extract the orders and serve them upon the respondent.
14. The respondent argues that the appellant therefore, cannot purport that they were not present in court.
15. the respondent further submitted that the appellant herein was well aware of the court's directives that failure to comply, the appeal would stand dismissed.
16. The respondent submitted that court orders are not issued in vain and any party who refuses to abide by them cannot invoke the court's discretion in his favor.
17. The respondent contended that even if they were to give the appellant the benefit of doubt as to whether they were present in court on 08.02.2024, the appellant was still required by law to have filed the record of appeal by virtue of Order 42 Rule 13(4) as read with Order 42 Rule 35 (2) of the Civil Procedure Rules.
18. It was the respondent's submission that the applicant had not indicated any steps taken by him to file the record of appeal despite one and a half years having lapsed since the appeal was filed, hence the appeal was ripe for dismissal in accordance with the provisions of Order 42 Rule 35(2) of the Civil Procedure Rules.
19. The respondent submitted that even if the appellant's counsel's call dropped off while attending court on 28.05.2024, there is no explanation as to the delay in filing since the present application was brought close to a month after the appeal was dismissed.

Analysis and Determination.

20. I have looked at the application, and submissions filed by the parties.
21. The main issue for determination is whether the applicant has warranted a case to make this court exercise its discretion and reinstate the appeal following its dismissal.
22. The dismissal of an appeal is a discretionary act by the court, intended to prevent undue delays in the administration of justice. However, this discretion must be exercised judiciously, balancing the need for efficiency with the fundamental right of parties to be heard.
23. The appellant avers that he was unaware of the court orders of 08.02.2024. However, the respondent asserts that the appellant was present when these directions were given, and was ordered by the court to serve the orders upon the respondent.
24. I have looked at the record. It clearly shows that on 08.02.2024, one Mr. Muyuki appeared for Mr. Omeya for the appellant. There was no appearance for the respondent. Counsel told court he was yet to get the file and sought for an adjournment. The matter was stood over to 28.05.2024. The court further ordered the appellant to file and serve the record of appeal and submissions within 60 days,



- and that the orders be served upon the respondent by the appellant. In default, the appeal would stand dismissed. It is therefore surprising for the appellant to contend that they did not attend court and were unaware of the court orders.
25. The appellant's counsel contends that technical difficulties during the virtual court session on 28.05.2024 led to their non-attendance, resulting in the dismissal of the appeal. While technical issues can occur, it is incumbent upon counsel to ensure alternative means of communication with the court or to promptly inform the court of such challenges as properly submitted by the respondent.
 26. The appeal was dismissed on 28.05.2024, and the current application was filed on 24.06.2024 approximately one month after dismissal. There is no convincing explanation by the appellant regarding the delay.
 27. In resolving the question of delay occasioned by parties in prosecuting their cases, the court in the case of *Ivita vs. Kyumbu* [1984] KLR 441 held that:

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and 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 is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff 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 favor and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”
 28. Based on the aforesaid, it is clear that even in the face of delay, justice can still be done. Courts are bound to do justice even in the event of a procedural technicality. The court in the case of *Khadar Developers Limited v Diamond Trust Bank Limited* [2020] eKLR supported this position and held that: -

“The court agrees with Mr. Kaveke's submission that the court should not uphold a technicality and sacrifice substance or justice. Further that, where necessary, the court should bend backwards to accommodate a litigant rather than displace him from the seat of justice for want of form. This is what Article 159 of *the Constitution* and Sections 1A, 1B and 3B seek to buttress, the famous Oxygen principle.”
 29. Further, the court in *Philip Chemowolo & another -vs- Augustine Kubede* (1982-88) KAR 103 at 1040 held as follows: -

“Blunder 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 parties and not the purpose of imposing discipline.”
 30. The respondent argues that reinstating the appeal would undermine efforts to expedite the matter and that the appellant has been enjoying stay orders since 14th February 2023. While these concerns are valid, this court has a duty to dispense justice to all parties and dismissal of a suit or appeal is tantamount



to permanently taking away a party's right to be heard. Thus, ought only to be done in cases where it is absolutely clear that the continued pendency of the suit or appeal does not serve any interest of justice, but pure prejudice to the other party and the process.

31. In Civ App 30 of 95 [1995] eKLR, the Court of Appeal while reinstating an appeal emphasized that the right to a hearing is a fundamental principle that should not be lightly denied. The court held that unless there is evidence of intentional delay or contumelious conduct by the appellant, reinstatement should be considered favorably.
32. Therefore, in spite of the gaps in transparency noted, I still think that justice would be served in reinstating the appeal but with strict condition so as to accord the appellant his right to be heard, while ensuring that the respondents are not prejudiced. Time is of essence.
33. Consequently, the appellant's/applicant's motion dated 24.06.2024 is hereby allowed.
34. The orders issued on 28.05.2024 dismissing the appeal are set aside, and the appeal is reinstated. The appellant is directed to file and serve the record of appeal and written submissions within thirty (30) days from the date of this ruling.
35. The respondent to file submissions thirty (30) days after service of the submissions by the appellant.
36. The appellant to pay the respondent a throw away cost of Kshs. 10,000/-.
37. Mention on 09.04.2025 to confirm compliance and for further court orders.
38. It is so ordered.
39. Right of appeal 30 days explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 5TH DAY OF FEBRUARY, 2025.

S.N MBUNGI

JUDGE

In the presence of :

Appellant/applicant – Absent

Appellant/applicant's advocate – Absent

Respondent- Absent

Ms. Karani Advocate for the respondent present online

Court Assistant –Elizabeth Angong'a

