



**Ichungwa v Kinuthia & another (Civil Appeal 371 of 2018)
[2025] KEHC 1327 (KLR) (Civ) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1327 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 371 OF 2018

JN MULWA, J

FEBRUARY 20, 2025

BETWEEN

MARY MUMBI ICHUNGWA APPELLANT

AND

SERAH KINUTHIA 1ST RESPONDENT

KENYA POWER & LIGHTING LTD 2ND RESPONDENT

RULING

1. Before this Court for determination is the motion dated 06.03.2024 filed by Mary Mumbi Ichungwa (hereafter the Applicant) brought under Section 1A, 1B & 99 of the *Civil Procedure Act* (CPA), Order 42 Rule 21 and Order 45 Rule 1 of the Civil Procedure Rules (CPR) seeking inter alia:
 - a. That the order made on 13.02.2024 and subsequently on 28.02.2024 declaring this appeal as having stood dismissed on 07.12.2023 be reviewed and set aside.
 - b. That the orders made on 22.01.2024 be reinstated and this appeal be heard as earlier directed.
 - c. That this honorable Court be pleased to make such orders as will meet the ends of justice herein.
 - d. That the costs of this motion be in the cause.
2. The motion is anchored on grounds amplified in the supporting affidavit sworn by John Kiarie Njuguna, counsel on record for the Applicant. He deposes that pursuant to directions of this Court on 30.11.2023, he proceeded to lodge the Applicant's Record of Appeal on 06.12.2023 whereafter he received automatic directions vide the Case Tracking System (CTS) to file submissions and attend to



the matter in Court for mention on 13.02.2024; That during the intervening period he had difficulties in serving the Record of Appeal upon the Respondents advocate as he could not be traceable.

3. The applicants Advocate further stated that when he attended to the matter on the latter date, the Deputy Registrar (DR) informed him that the appeal was dismissed with directions to thereafter to seek a mention date before a Judge. He however contends that a perusal of the CTS reveals an erroneous capture that he lodged the record of appeal on 14.12.2023. In summation, he urges the Court to allow the motion on account of the Applicant being ready and willing to prosecute the appeal.
4. The 2nd Respondent opposes the motion by way of a replying affidavit deposed by Joseph Muchai, who cites being counsel on record for the 2nd Respondent. The gist of his deposition is that on 30.11.2023, this Court directed that the appeal would be heard on condition that the record of appeal would be filed within seven (7) days thereof; whereafter the appeal be prosecuted in its entirety within sixty (60) days, failure to wit, the appeal would automatically stand dismissed.
5. In addition it is stated that the Applicant filed her record of appeal on 14.12.2023 in contravention of the directions issued on 30.11.2023. He goes on to state that the Applicant has been indolent in liaising with the registry towards expeditious disposal of the appeal whereas equity aids the vigilant therefore this Court ought to dismiss the Applicant's motion with costs.
6. The 1st Respondent opted not to participate in the instant proceedings.
7. The Applicant's motion was disposed of by way of oral submissions of which this Court has duly considered alongside the rival affidavit material. In light the above this Court crystalizes the following issues for determination: -
 1. Whether the Court ought to set aside its orders issued on 28.02.2024 dismissing the appeal.
 2. Whether the orders of this Court issued on 22.01.2024 ought to be reinstated?
 3. Who ought to bear the costs of the motion?

Whether the Court ought to set aside its orders issued on 28.02.2024?

8. The Applicant's motion invokes inter alia the provisions of Section 99 of the CPA which appertains amendment of judgments, decrees or orders in respect of accidental slip or omissions, commonly known as 'slip rule'. The motion equally invokes Order 42 Rule 21 of the CPR which ought to be read alongside Rule 20 that ideally concerns re-admission of an appeal on default of attendance by an Appellant when the same is called for hearing. The Applicant has also relied on Order 45 Rule 1 of the CPR which provides that; -
 - (1) Any person considering himself aggrieved—
 - a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.



9. What this Court garners by the manner in which the motion has been presented is that the Applicant invokes this Court’s jurisdiction to review its directions issued on 28.02.2024 on the backdrop of an ex tempore ruling of this Court rendered on 30.11.2023. There are a long line of authorities on the principles applicable to a review application brought under Order 45 (1) of the CPR. See *Associated Insurance Brokers v Kenindia Assurance Co. Ltd* [2018] KECA 809 (KLR). However, in *Jason Ondabu t/a Ondabu & Company Advocates & 2 others v Shop One Hundred Limited* [2020] KECA 134 (KLR), the Court of Appeal stated that: -
- “An application for review, therefore, involves exercise of judicial discretion. The circumstances in which this Court, as an appellate court, can interfere with the exercise of judicial discretion are limited”.
10. Before addressing the nub of the Applicant’s motion, it would be apt to revisit the history of the matter in order to place some context. The appeal herein was filed on 08.09.2018. From the record before this Court, it appears that since filing of the appeal there was no activity up until the same came before Seron, J. on 01.04.2022. Upon hearing representation made by counsel for the Applicant, the court directed that the appeal be prosecuted within ninety (90) days. Despite the aforesaid, there was no activity in the matter until a Notice to Show Cause (NTSC) was issued for hearing on 30/11/2023. On the said date, upon hearing representation made by counsel for the Applicant, Meoli, J. proceeded to issue an ex tempore ruling as follows: -
- “The appeal is sustained on condition that: -
- a. The appellant shall file a ROA in 7 days failing which the appeal shall stand as automatically dismissed.
 - b. The appeal shall be fully prosecuted within 60 days failing which it shall stand dismissed for want of prosecution.” (sic)
11. On 22/01/2024 the court file was placed before this court for admission of the appeal for hearing. The court issued directions that the matter be mentioned before the Deputy Registrar on 22.02.2024. On 12.02.2024 the Deputy Registrar of this Court registered Meoli, J’s directions and proceeded to note that upon the judge’s orders, the appeal stood automatically dismissed on 30.01.2024, and marked the matter as closed.
12. The above orders prompted the instant motion, which counsel for the Applicant vide his oral submission argues that the invoice in respect of the record of appeal was generated on 06.12.2023 but the CTS captured that same as having being filed on 14.01.2024 yet the record had been lodged before 14.12.2023. As such there exists an error apparent on the face of the record. Counsel further called to aid Order 50 Rule 4 of the CPR appertaining to when time doesn’t run.
13. In response, the 2nd Respondent relied on the decision in *Ivita v Kyumbu* (1984) KLR 441 to argue that the Applicant has failed to sufficiently explain the delay. Counsel went on to argue that Meoli, J. orders had a default clause on compliance therefore this Court ought to dismiss the Applicant’s motion.
14. In a brief rejoinder, counsel for the Applicant posited that the CTS had an error that ought not be visited on the Applicant urging that the dismissed appeal ought to be reinstated for determination on its merits.



15. This Court's directions rendered on 28.02.2024 are at the heart of Applicant's motion. They are as hereunder;

“I have perused the ruling dated 30.11.2023. The Appellant did not file the record of appeal within the 7 days allowed by Meoli, J. hence the appeal stood dismissed on 07.12.2023.

The directions I gave on 22.01.2024 are hereby vacated and this appeal marked as dismissed.”

16. The Applicant's review motion is premised on the ground of error or mistake apparent on the face of the record. Augmented on the twin argument that the record of appeal was filed within time and Order 50 Rule 4 of the CPR was applicable to the directions issued by this Court on 30.11.2023. The Court of Appeal in *Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited, Communications Commission of Kenya & Kenya Broadcasting Corporation* [2020] KECA 633 (KLR) observed that: -

“It bears emphasizing that the phrase "mistake or error apparent" by its very connotation conveys the fact that the error envisaged is one which is evident per se from the record and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. It is prima-facie visible. It must relate to an error of inadvertence, one which strikes one on merely looking at record.

17. Thus, of concern is whether the Applicant has demonstrated an error or mistake apparent on the face of the record by its present motion. Firstly, drawing guidance from the dicta in *National Bank of Kenya Ltd v Ndungu Njau* [1997] eKLR on the error or omission having to be self-evident and not having to require an elaborate argument. It is undisputed that this Court's orders issued on 30.11.2023 were two-pronged. The first limb required of the Applicant to file her record of appeal within seven (7) days from 30.11.2023. The second limb required her to prosecute the appeal within sixty (60) days of the latter date, failure to which the appeal would stand automatically dismissed.

18. A perusal of the record before this Court and CTS reveals that as at 06.12.2023 the Applicant had complied with the first limb of this Court's directive by filing her record of appeal on or before the 07.12.2023 as directed by the Court on 30.11.2023. This Court inadvertently was not alive to the fact as at when it rendered its directions on 28.02.2024. Therefore, the resultant order emanating therefrom was occasioned by an apparent error on the face of the record, hence warrants this Court to review its orders issued on 28.02.2024.

19. Secondly, concerning the twin limb on prosecution of the appeal within sixty (60) days from 30.11.2023, the Applicant has urged the Court to apply its mind to the provisions of Order 50 Rule 4 of the CPR which provides that: -

Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act:

Provided that this rule shall not apply to any application in respect of a temporary injunction.

20. The purport of the above order was discoursed by the Court of Appeal in *Maersk Kenya Limited v Murabu Chaka Tsuma* [2017] KECA 204 (KLR) wherein it was stated that-

“.....Order 50 rule 4 makes it clear that the rule applies specifically to computing time under the Civil Procedure Rules, or in accordance with an order of the court”. Thus, the



court applying its mind to the above dicta, and Court's orders issued on 30.11.2024, and by the Deputy Registrar on 12.02.2024, the court ought to have factored, the duration between 21.12.2023 and 13.01.2024. Computing these Court directions, sixty (60) days from 30.11.2023 would have lapsed on 29.01.2024.

21. However, factoring in the duration captured in Order 50 Rule 4 of the CPR, the appeal would have been considered prosecuted within the sixty (60) days from 30.11.2023 and thus would have lapsed on 13/2/2024.

Therefore, on the second limb, there exists an error apparent on the face of the record similarly warranting a review of this Court orders issued on 28.02.2024.

Whether the orders of this Court issued on 22.01.2024 ought to be re-instated?

21. In light of the above, the court finds the applicants motion dated 6.3.2024 merited. Section 1A and 1B of the CPA. It is equally not lost on the Court that the right of the Applicant to be heard on the merits of his appeal is a constitutional right that ought to be given its full tenor, as much as possible. Corollary to that, it is the 2nd Respondent's right to have the appeal to which it was dragged into determined expeditiously. See: - Richard Ncharpi Leiyagu v Independent Electoral and Boundaries Commission & 2 Others [2013] eKLR.
22. On account of the identifiable and apparent errors caused by different court orders by the various judicial officers as well as the delay towards prosecution of the appeal, the court directs that each party to the motion under review bears own costs.
23. In respect to the appeal, now re admitted for hearing, parties shall attend court on 27.2.2025 to take directions on the hearing of the appeal.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 20TH DAY OF FEBRUARY 2025.

JANET MULWA

JUDGE

