



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kamau & 7 others v Kamau (Civil Appeal E097 of 2022)  
[2025] KEHC 2116 (KLR) (7 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2116 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E097 OF 2022**

**A MSHILA, J**

**FEBRUARY 7, 2025**

**BETWEEN**

**GEOFFREY MBUGUA KAMAU ..... 1<sup>ST</sup> APPELLANT**  
**PETER MBIYU KOINANGE ..... 2<sup>ND</sup> APPELLANT**  
**JANE WAMBUI KOINANGE ..... 3<sup>RD</sup> APPELLANT**  
**PATRICK KINYANJUI NJUGUNA ..... 4<sup>TH</sup> APPELLANT**  
**NJOROGE O. KIMANI ..... 5<sup>TH</sup> APPELLANT**  
**MARY NJOKI KARUGA ..... 6<sup>TH</sup> APPELLANT**  
**WILLOWPARK LIMITED ..... 7<sup>TH</sup> APPELLANT**  
**ROBSON HARRIS CO. ADVOCATES ..... 8<sup>TH</sup> APPELLANT**

**AND**

**JOSEPH MAKUMI KAMAU ..... RESPONDENT**

**RULING**

1. Before court are two applications by way of Notice of Motion dated 28<sup>th</sup> May, 2024 and 14<sup>th</sup> June, 2024 respectively.
2. The first application by the Appellants is dated 28<sup>th</sup> May, 2024, and is brought under the provisions of Article 159 of *the Constitution*, Section 63(e) of the *Civil Procedure Act*, Order 12 Rule 7, Order 51 rule 15 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. The Appellants/Applicants sought for orders that:-
  - a. Spent
  - b. That there be a stay of execution pending the hearing and determination of this application.



- c. That the orders of this Honourable Court dated 23/05/2024 striking out the Appellants' appeal be set aside and the appeal be reinstated for hearing and determination on merit.
  - d. That this Honourable Court invokes its inherent power in this case in the interest of substantive justice and re-instate the appeal which was struck out on 23<sup>rd</sup> May, 2024.
3. The application is premised on the grounds that the Respondent intentionally misled the court so as to dismiss the appeal as the matter was scheduled for a mention on 20<sup>th</sup> June, 2024 and not 28<sup>th</sup> March, 2024 as such the Applicant's advocates non-attendance was not willful.
  4. The application is supported by the affidavit of Ashford Muriuki Mugwuku. He deposed that the matter was scheduled for court on 28<sup>th</sup> March, 2024, which date was given on 15/2/2024 in the presence of the Respondent. Due to a notice by the Deputy Registrar indicating that the Hon. Judge would be away on 28/3/2024 he did not attend court as the matter was now slated for 20<sup>th</sup> June, 2024. He deposed that he filed his Record of Appeal on 22<sup>nd</sup> May, 2024 as such the Respondent was aware that the Appellants had duly filed their Record of Appeal. Further he stated that he was shocked when he was informed that the matter had come up for Notice to Show Cause on 22/5/2024 which had been deferred to 23/5/2024 when it was struck out for non-attendance. He stated that upon perusal of the file, he found out that on 29/4/2024 the matter had proceeded before Hon. D.O Chepkwony who directed that the Appellants file their Record of Appeal within twenty-one (21) days. The said proceedings were said to be foreign as they never participated and the same amounts to violation of the basic right of fair trial as such the order striking out the appeal ought to be set aside and the appeal reinstated as the Appellants have been condemned unheard. The conduct of the Respondent was said to be in bad faith as he misled the court. Lastly, that the Respondent will not suffer prejudice if the appeal is reinstated.
  5. Joseph Makumi Kamau filed his replying affidavit dated 19<sup>th</sup> June, 2024 where he deposed that the Ruling subject of this appeal is dated 13<sup>th</sup> April, 2022 and not the judgment of 27/11/2020 which has never been appealed against. The Applicants' were said to have sought to abandon their appeal on objection proceedings so as to forcefully appeal against the judgment of 27/11/2020 without first obtaining leave and extension of time. On 28/9/2023 the Appellants were directed to file a Record of Appeal against the Ruling of 13/4/2022 or file an affidavit showing cause why their appeal should not be struck out. The matter was deferred to 2/11/2023 then to 15/2/2024 when the court did not sit. The matter was then rescheduled to 28/3/2024 for Notice to Show Cause and further to 22/5/2024 and then to 23/5/2024 which date was served upon the Applicants. He deposed that the Applicants failed to comply with the orders issued on 15/2/2024 as they sought to abandon their appeal on objection proceedings so as to forcefully appeal against the judgment of 27/11/2020 without first obtaining leave and enlargement of time. The Record of Appeal as filed against the judgment of 27/11/2020 is incompetent whereas existing appeal before the court is against the ruling of 13/4/2022. When the matter came up on 23/5/2024, he informed the court that the Applicants had not complied with the orders of the court issued 15/2/2024 as such the court proceeded to strike out the appeal. The Applicants were asked to supply the proceedings of the court for 20/6/2024. The Applicants were urged to first comply with the orders of 15/2/2024 before the court could consider re-instating their appeal. The court was urged to dismiss the Applicants' application dated 28/5/2024 with costs to the Respondent.
  6. The second application by the Respondent dated 14<sup>th</sup> June, 2024 is brought under Section 1A, 1B, 3A, 63 (b) & (e) and 91 of the *Civil Procedure Act*, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. The Respondent sought for orders that:-



- a. The Court does order the release of Kshs. 2,238,590/= to the Respondent which was cumulatively deposited by the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants as security for this appeal which was on 23<sup>rd</sup> May, 2024 struck out.
  - b. The said sum of Kshs. 2,238,590/= be released to the Respondent through Ms. J. Makumi & Co. Advocates who have always acted for him.
7. The application is premised on the grounds that the court struck out the judgment debtor's appeal for failing to comply with the orders of the court of 15/2/2024. The Appellants' had deposited Kshs. 2,238,590/= as security for their appeal which appeal has since been struck out as such the security should be released to the Respondent in partial satisfaction of the decree of Kshs. 2,824,198.97.
8. The application is supported by the affidavit of Joseph Makumi Kamau the Respondent decree holder who deposed that the Applicants deposited Kshs. 2,238,590/= as security for their appeal against the ruling delivered on 13/4/2022. He stated that the Appellants have since refused to file the Record of Appeal in regard to this appeal but instead sought to appeal against the judgment of 27<sup>th</sup> November 2020 without obtaining leave and enlargement of time. On 28/9/2023 the Appellants were directed to file their appeal within 21 days or an affidavit showing cause why their appeal should not be struck out. On 15/2/2024 the court ordered the Appellants to file a supplementary affidavit which they failed to file as such the appeal was struck out on 23/5/2024. The Respondent had obtained warrants of attachment for Kshs. 2,824,198.97 and the Appellants had accused him of executing against them the entire sum whereas there was Kshs. 2,238,590/= held in court which can be used to settle part of the decree hence the instant application seeking that the monies be released to him so that the remaining amount to be executed amounts to Kshs. 585,608.97.
9. Parties opted to rely on their affidavits and court record vis-a-vis filing of submissions.

### **Issues for Determination**

10. Having considered both applications and their respective responses, the issues arising for determination are:-
- a. Whether the court order dated 23/05/2024 striking out the appellants' appeal should be set aside and the appeal be reinstated.
  - b. Whether the Court should order the release of Kshs. 2,238,590/= deposited by the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants.

### **Analysis**

11. The relevant law governing setting aside of judgments or dismissals is Order 12 Rule 7 of the Civil Procedure Rules. It provides as follows:
- “Where under this order judgment has been entered or a suit dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just”
12. The court is vested with wide discretion which must be exercised judiciously when it comes to deciding on an application to set aside dismissal orders of an application by the court. Refer to the case of



Racheal Njango Mwangi (Suing as Personal Representative of the Estate of Mwangi Kabaiku) v Hannah Wanjiru Kiniti & another (2021) eKLR where the court held thus:-

“For the Court to exercise its discretion in favour of the Applicant, he or she has satisfy it that there is sufficient cause or reason to warrant it to be put into use in setting aside the order of dismissal and subsequently reinstate the suit.”

13. Having perused the record herein it shows that on 30<sup>th</sup> March, 2023 vide a ruling by Ngetich J. the Appellants were granted stay of execution orders on condition that they deposit the balance of the decretal amount in court within Thirty (30) days. When the matter came up in court on 13/7/2023 the Appellants indicated that they had deposited the entire decretal sum into court as directed by Ngetich J. They were then directed to file their rRecord of Appeal. On 28/9/2023 the Appellants indicated that they had not filed the Record of Appeal as the lower court record was missing. The Respondent’s advocate informed the court that no monies had been deposited in court and that the proceedings were ready and available for collection. The court directed the Appellants to file a Record of Appeal and/or file an affidavit demonstrating why their appeal should not be dismissed. On 15/2/2024 the Appellants informed the court that they had received the proceedings on 8/2/2024 and were in the process of compiling the Record of Appeal. The court then ordered the Appellants to file a supporting affidavit, the order by Ngetich J granting them leave to file appeal out of time against the judgment dated 27/11/2020, a certificate of delay of the proceedings and a receipt for Notice of Change of Advocate dated 10/5/2022. On 23/5/2024 the Appellants were absent. The Respondent informed the court that nothing had been availed pursuant to the court’s directions of 15/2/2024. Subsequently, the court proceeded to strike out the appeal for non-compliance and for being incompetent.
14. The Appellant avers that failure to attend court was not wilful and that the Respondent misled the court into dismissing the appeal.
15. Be that as it may, the Appellant has failed to address the reasons as to why the orders of the court dated 15/2/2024 had not been complied with. This court has on several occasions, directed the Appellants to file their Record of Appeal to no avail. The lower court proceedings have been ready as such he Appellants have no excuse as to why they had not filed the Record of Appeal.
16. Litigation must at some point come to an end. The Appellants are under the mistaken impression that the appeal was struck out for non-attendance on the contrary, the court was clear that the appeal was struck out for non-compliance. This goes to say that even if the Appellants were present in court to argue the applications the appeal would still have been struck out as the Appellants had been given many chances to file their Record of Appeal among other documents to no avail. It seems that the Appellants are not interested in the appeal and are only bent on wasting precious judicial time.
17. Refer to the Court of Appeal case of M/S Portreitz Maternity V James Karanga Kabia, Civil Appeal No. 63 of 1997 where it was held that:

“...litigation must come to an end. It is a rule to counter the all-too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.”
18. In the circumstances, and bearing in mind the fact that the Appellants have not demonstrated sufficient cause and /or reasons to warrant the court to set-aside its orders striking out the appeal and re-instating their appeal, the court grants the prayer for release of Kshs. 2,238,590/= which was deposited as security by the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants to the Respondent through Ms. J. Makumi & Co. Advocates..



## **Findings and Determinations**

19. For the forgoing reasons this court makes the following findings and determinations;
- i. This court finds the application dated 28/05/2024 seeking to set aside the Orders of this Honourable Court dated 23/05/2024 and the re-instatement of the appeal is found to be devoid of merit and it is hereby dismissed with costs to the Respondents;
  - ii. The application dated 14/06/2024 is found to be with merit and it is hereby allowed; the sum of Kshs. 2,238,590/= deposited as security by the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants be released to the Respondent through Ms. J. Makumi & Co. Advocates.

Orders Accordingly

**DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 7<sup>TH</sup> DAY OF FEBRUARY, 2025**

**A. MSHILA**

**JUDGE**

In the presence of;

Sanja – Court Assistant

Mugwuku – for the Applicants

Makumi – for the Respondents

