



REPUBLIC OF KENYA



KENYA LAW
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**Chebelyon & another v Matasi (Civil Appeal E032 of 2023)
[2025] KEHC 2943 (KLR) (10 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2943 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E032 OF 2023
PJO OTIENO, J
MARCH 10, 2025**

BETWEEN

BEATRICE CHEBELYON 1ST APPELLANT

ALLAN KOSKE TOWET 2ND APPELLANT

AND

HAMISI WESONGA MATASI RESPONDENT

RULING

1. On 15.06.2023, Ms. Mungasia for the appellants indicated to the court that they had not filed their record of appeal and the court directed that they regularize the appeal by filing and serving the record of appeal and submissions within 90 days failure to which the appeal would stand dismissed. The 90 days lapsed on 15.09.2023 before the appellants could file the record of appeal on 06.10.2023 out of time. By the orders made on the 15.09.2023 the appeal stood dismissed on the date the default occurred.
2. It is the dismissal that gave rise to the appellants notice of motion application dated 31st October, 2023 brought pursuant to the provisions of article 50 of the *Constitution* of Kenya, 2010, sections 1A,1B,3A & 62 (c) of the *Civil Procedure Act*, order 51 rule 1 and order 50 rule 5 of the *Civil Procedure Rules*. The motion seeks orders that;
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That the Honourable court be pleased to set aside and/or review and/or vary its decision and order made on 15.06.2023 dismissing the appeal as at 15.09.2023 by default of failure by the appellants to file and serve the record of appeal and submissions within 90days from



15.06.2023 and the Honourable court be pleased to set aside the order made on 19.10.2023 closing the file.

- e. That the Honourable court be pleased to reinstate this appeal for hearing and admit the record of appeal and submissions already filed as properly on record.
 - f. That upon the grant of prayer (5) above the security of kshs. 318,455/-deposited in a joint interest earning account no. 100xxxxxxx at the Prime Bank Limited, Kisumu, be preserved pending the hearing and determination of this appeal.
 - g. That the costs of this application to abide the outcome of the appeal.
3. The application is supported by the grounds on the face of it and the affidavit of Annette Mukiza Miheso, the appellants advocate. It was sworn on 31st October, 2023 and assigns the reason for delay and failure to comply with the orders made by this court on 15.06.2023 to a delay by the registry in supplying them with certified proceedings, judgment and decree. Ms. Miheso then reiterated the court orders to be that the appeal would stand dismissed on 15.09.2023 if the appellants failed to comply with the court's order to file and serve the record of appeal and submissions within 90 days from 15.06.2023.
 4. The application is resisted by the respondent on the strength of the affidavit sworn by Ms. Okwaro Winnie Anono on the 10.01.2024. The deponent introduces herself as the advocate having conduct of the matter on behalf of the respondent. It is her deposition that though the letter by the appellants' advocate requesting for proceedings is dated 19.06.2023, the same was received by the trial court sometime in August which was three weeks from the time the orders of 15.06.2023 were made. She adds that the appellants have not demonstrated that they made payments towards obtaining the proceedings as neither an invoice nor a receipt for payment has been annexed to their application.
 5. The deponent avows that delaying this matter further will greatly prejudice the respondent as he is yet to enjoy the fruits of a judgment delivered on 03.03.2023 and prays that the application be dismissed to bring litigation to a close.

Analysis And Determination

6. Section 3A of the *Civil Procedure Act* has vested this court with inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.
7. These powers are to be exercised judiciously and not capriciously as was reiterated by the Court of Appeal in *Patriotic Guards Ltd v James Kipchirchir Sambu* [2018] KECA 799 (KLR). In that decision the court observed as follows;

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”

8. From that decision, it follows that for the court to exercise its discretion, the appellants have a duty to give a sufficient cause why they failed to file and serve the record of appeal and submissions within the ninety-day period as directed by the court. What constitutes sufficient cause was discussed by Musinga,



J.A in *The Hon. Attorney General-vs-The Law Society of Kenya & Another* Civil Appeal (Application) No. 133 of 2011 in the following words: -

“Sufficient cause” or “good cause” in law means: -

“...the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused...”

Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a Judge’s mind. The explanation should not leave unexplained gaps in the sequence of events”.

9. The appellants excused their non-compliance with the court’s order to the delay by the trial court to supply them with certified copy of proceedings and judgment. In support thereto, they annexed two letters. The first is addressed to the Senior Principal Magistrate, Mumias Law Courts and is dated 19.06.2023 and has a receiving stamp of 04.08.2023. This is the first letter addressed to Mumias Law Court’s requesting for proceedings. The request letter even when evidently written timeously, some four days after the court order setting timelines, was never delivered to court for a period of more than 45 days.
10. To the court it means that even after the appellants lodged their memorandum of appeal at the high court registry in Kakamega on 08.03.2023, they made no attempt to request for the certified copy of proceedings or the judgment which documents are a prerequisite for an appeal until they were triggered by the court to do so. And even then, they drafted the letter on 19.06.2023 and presented it to court for action on 04.08.2023. The court computes the delay between the date of lodging the appeal and the date the letter was delivered to court to aggregate five months of inactivity. This, in the court’s view, demonstrates indolence and disinterest in pursuing the appeal.
11. Having considered all the facts presented, the court finds that there has not been proffered a plausible reason to explain the delay in complying with the court order. The court finds that the delay in preparation of the proceeding was not on the court but upon the appellants. Even though there is no period cast in stone to constitute inordinate delay, in the circumstances of this case a delay of five month is unjustifiable and thus inordinate. When inordinate and unexplained, the court is left with no room to justify its direction.
12. That conclusion is sufficient to dispose the application by dismissal but the court has the duty to interrogate what injustice if at all would visit the appellant if the appeal is not reinstated. That goes to the question of how arguable the appeal appears to be.
13. The judgment of the trial court against which the appeal is preferred only assessed and awarded damages because the liability was determined with the consent of the parties. It follows that the appeal is only against the assessment of damages. The general damages so awarded was Kshs 700,000 besides the special damages.
14. The court reminds itself that assessment of damages is a discretionary issue vested upon the trial court and that it takes a very strong case for an appellate court to interfere in that sphere. The court takes guidance from the Court of Appeal in *Kenya Bus Services Limited vs. Jane Karambu Gituma* Civil Appeal Case No. 241 of 2000 where the court stated:

“...in this regard, both the East African Court of Appeal (the predecessor of this Court) and this court itself have consistently maintained that an appellate court will not interfere with the quantum of damages awarded by a trial court unless it is satisfied either that the trial



court acted on a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account of some relevant one or adopting the wrong approach), or it has misapprehended the facts, or for those or any other reasons the award was so inordinately high or low so as to represent a wholly erroneous estimate of the damages.”

15. The court has read the record of appeal and noted that the trial court did consider and relied on decided cases that were of authoritative value upon it. The court thus takes the view that the appeal challenging assessment of damages portends no injustice to the appellant even if the appeal is not reinstated because the award was within limits of reasonable and commensurate with the damage caused.
16. For the reason that the inordinate delay has not been explained and that the appeal challenges the exercise of discretion, the court finds no merit in the application dated 31.10.2023 and the same is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT VIRTUALLY, THIS 10TH DAY OF MARCH, 2025

PATRICK J O OTIENO

JUDGE

