



Kiilu v (Suing as the Legal Representative of the Estate of Deborah Shisiah Osolo) & another; Milele Car Rental Services Limited (Third party) (Civil Appeal E001 of 2021) [2025] KEHC 2698 (KLR) (6 March 2025) (Ruling)

Neutral citation: [2025] KEHC 2698 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E001 OF 2021
RC RUTTO, J
MARCH 6, 2025**

BETWEEN

STANLEY MUTHAMA KIILU APPLICANT

AND

JOHN WEBO ASAKHULU DAVID A OSORO (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF DEBORAH SHISIAH OSOLO) 1ST RESPONDENT

GRACE WARUIRU 2ND RESPONDENT

AND

MILELE CAR RENTAL SERVICES LIMITED THIRD PARTY

RULING

1. The Appellant/Applicant herein has moved this court by way of a Notice of Motion Application under the provisions of Sections 1A, 1B & 3A of the *Civil Procedure Act*, and Order 51 rule 1 & 15 of the Civil Procedure Rules. The applicant seeks that the order for dismissal made on 23rd September 2024 be set aside, and the appeal be reinstated.
2. The application is supported by the affidavit of Musya Noel Musee sworn on 27th September 2024 and is premised on the following summarized grounds; the matter was to be mentioned on 23/9/24 before the judge for directions, on 20/9/2024 it was indicated on both the Court Tracking System (CTS) and the cause list that the matter had been rescheduled to 26/9/24 before Hon Ochanda; unfortunately on 23rd September 2024 the appeal was mentioned before the judge and dismissed; the advocate honestly but mistakenly thought that matter will be on 26/9/24; that the failure to attend court was not deliberate as it was caused by confusion in the CTS; the mistake of the counsel should



not be visited on the appellant. The respondents will not be prejudiced if the appeal is reinstated as it will allow the matter to be heard on merit.

3. The 2nd respondent opposed the Application by filing a replying Affidavit dated 22nd January 2025 in which it deponed that the application was frivolous, vexatious and fatally defective; that the judgment subject of the appeal was delivered on 18th November 2021 where judgment was entered in favour of the 1st respondent against the applicant and 3rd party jointly and severally; the Applicant never complied with the stay orders granted; that the matter was fixed for mention on 29/4/2024 before the Deputy Registrar for issuance of fresh dates as the court was not sitting; he only learnt of the progress upon being notified of the application to reinstate the appeal; Applicant demonstrated considerable indolence in prosecuting the appeal as the appeal has been pending since 2021 without the Applicant or his advocates filing and serving a record of appeal.
4. It was also deposed that the Applicant has not demonstrated any efforts made to have the appeal heard and determined since 2021, nearly four years after and no explanation has been provided for the delay in so doing there was no notice or communication from the Court indicating that the matter was rescheduled from 23rd September 2024 to 26th September 2024, as alleged has been supplied; the Court Tracking System (CTS) records show that the only notice issued was the one informing that the presiding judge of Court Number 2 would be away on 25th and 26th September 2024. attending a training.
5. It was further deposed that the Applicant has not offered a reasonable explanation for the delay in prosecuting the appeal hence the Application should be dismissed in its entirety.
6. The Applicant herein did not file any submissions but instead filed an Affidavit of Service sworn on 30th January 2025 by their Counsel on Record, Musya Noel Musee. At paragraph 3 and 4 of the affidavit of service, counsel deponed that the 1st Respondent had emailed indicating no objection to the reinstatement of the appeal. He further deponed that the 2nd respondent had filed a response.
7. This court notes that from the CTS records, the 1st respondent did not file any response to this application. Additionally, the Applicant did not file any submissions and the only submissions on record are those of the 2nd Respondent, dated 5th February 2025.
8. The 2nd respondent set out the facts of the case and set out two issues for determination namely; whether the application is merited and who should bear the cost of the application.
9. On the first issue, the 2nd respondent urged the court to consider the principles for reinstatement as set out in the case of James Yanga Yeswa v Bob Morgan Services Limited [2019] KEELRC 2366 (KLR) and the case of Muturi v Kenya National Highways Authority & another [2024] KEELC 13714 (KLR).
10. The 2nd Respondent submitted that at the time of dismissal of the appeal, the same had been in court for close to 3 years and no significant progress had been made in prosecuting the same. They urged the court to consider that equity aids the vigilant and not the indolent. To support this argument, reference was made to the case of Muturi v Kenya National Highways Authority & Another [2024] KEELC 13714 (KLR).
11. The 2nd respondent stated that it has always been kept in the dark in regard to the progress of this case despite being dragged to court. In addition, that the appellant has never filed and served a complete record of appeal since 2021 and the delay in filing has not been attributed to court.
12. Reliance was placed on the case of Kathuri v Muchira [2023] KECA 677 (KLR) that reiterated that it is not enough for a party in litigation to simply blame the advocates on record for all manner of lapses



in the conduct of the litigation and that parties have responsibility to show interest in cases despite being represented by advocates and follow up on the same timeously.

13. It was submitted that the delay exhibited is an abuse of the Court process. Further that they have been greatly prejudiced by the delay as it has been over 10 years since the cause of action arose, over 8 years since the suit subject of this appeal was filed. Consequently, that it would suffer significant prejudice if this appeal is reinstated as she is a senior citizen who is already retired. In addition, that she devoted significant time and has incurred considerable costs.
14. They urged that Appellant/Applicant is not deserving the exercise of the courts discretion and it is in the interest of justice; considering that they even failed to comply with the orders granted for stay of execution of the judgment and decree and has never filed and served a complete record of appeal, that this application be dismissed with costs.

Analysis and Determination

15. This court takes note that re-instatement of an appeal is a matter of discretion, which ought to be exercised judiciously. Thus, the question is whether the applicant has merited the exercise of this discretion. In the classical case of *Shah v Mbogo* [1967]EA 116 the court held that;

“discretion is intended to be exercised to avoid injustice or hardship resulting from accident inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought whether by evasion or otherwise, to obstruct or delay the cause of justice.
16. The applicant explained that the dismissal of the appeal resulted from confusion in the Case Tracking System regarding the dates. This confusion led to the counsel’s failure to attend the proceedings. The applicant emphasized that the failure to attend court was not deliberate. The alleged confusion is that the CTS indicated that the matter was rescheduled from 23rd September 2024 to 26th September 2024.
17. This position was highly contested by the 2nd respondent who pointed that the applicant has never been keen to prosecute the appeal, that the appeal has been pending for close to 3 years, yet no significant progress had been made in prosecuting the same. They urged that they will continue to suffer significant prejudice if this appeal is reinstated as she is a senior citizen who is already retired.
18. The 2nd respondent also submitted that the applicant had not given a reasonable explanation for the delay and had not given any evidence to show that he made reasonable steps to timely follow up on his case.
19. This court takes note that the applicant did not prosecute his application by filing of submissions. Instead, he filed an Affidavit of Service in which he confirmed that the 1st respondent had no objection to the reinstatement of the appeal. This indeed was expected given that the judgment had been entered jointly and severally against the appellant/applicant, the 1st respondent and third party. Thus, reinstating the appeal would benefit all of them, which explains why the only opposing party was the 2nd respondent.
20. Furthermore, this court notes that the applicant has not provided any evidence to support the claim of confusion or that the matter was rescheduled from 23rd September 2024 to 26th September 2024. The court acknowledges that the CTS is an automated system managing registry operations, facilitating communication between the courts and the parties, and tracking case details from the initiation to the final resolution. Therefore, if confusion and date rescheduling did occur, the applicant would have a reasonable basis to seek reinstatement of his appeal on the ground of an administrative error.



- 21. Following this, I have taken the liberty to examine the CTS records and noted the following sequence of activities: The matter was initially listed for mention on 29th April 2024 but adjourned on grounds that the court was not sitting. The matter was subsequently mentioned on 11th June 2024 before Hon Victoria Ochanda and later on 23rd September 2024 when it was placed before the Judge and dismissed for want of prosecution. This sequence of activities aligns with the records in the court’s physical file.
- 22. Having established that the applicant’s claims and assertions lack merit and are unsubstantiated, I find that no sufficient grounds have been established to justify the exercise of discretion to reinstate the appeal. There is no compelling reason to grant the application. Furthermore, upon reviewing the applicant conduct in this matter, the court notes that the appeal was filed in 2021 and only minimum efforts have been made to prosecute it. The record indicates that since filing no attempts have been made to ensure the timely submission of the record of appeal nor has any explanation been provided for the delay. This conduct reflects the appellant indifference and lack of interest in prosecuting the appeal.
- 23. The upshot of the above is that the Application dated September 27, 2024 is hereby dismissed with costs.

RHODA RUTTO

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 6TH DAY OF MARCH, 2025.

In the presence of;

-Applicant
-Respondent
-Court Assistant

