



Rutere (Suing as the Legal Representative and on Behalf of the Estate of Erastus Phares Rutere) v Kisoï (Civil Appeal E136 of 2024) [2025] KEHC 4762 (KLR) (8 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4762 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E136 OF 2024
SM GITHINJI, J
APRIL 8, 2025**

BETWEEN

**JOHN MWENDA RUTERE APPELLANT
SUING AS THE LEGAL REPRESENTATIVE AND ON BEHALF OF THE
ESTATE OF ERASTUS PHARES RUTERE**

AND

JUSTUS MASILI KISOI RESPONDENT

(Being an Appeal from the Judgment and decree of the Small Claims Court at Meru, before Hon. Habrovinah Nyamweya delivered on 8th of August, 2024 in Meru SCC E315 of 2024)

RULING

1. For determination is the Notice of Motion dated 4/11/2024 brought under Order 12 Rule 7, Order 51 Rule 15, Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the [Civil Procedure Act](#), seeking the following orders:
 1. Spent
 2. Spent
 3. The Honorable Court be pleased to set aside the orders of 4th November 2024 discharging the order of stay of execution issued on 18th September 2024 and stay of proceedings in the trial Court.
 4. The stay orders issued on 18th September 2024 be reinstated pending hearing and determination of the appeal herein.
 5. Costs of this application be in the cause.



2. The application is supported by the affidavit sworn by Newton K. Kamwana, the Appellant's Advocate. The Appellant filed an application dated 3/9/2024 seeking stay of execution of the trial court's judgment delivered on 8/8/2024. The court heard that application on 18/9/2024 and granted conditional stay of execution upon deposit of Ksh. 76,500 in court within 30 days. In compliance with the orders of 18/9/2024, the Appellant deposited Ksh. 76,500 in court on 17/10/2024 and he has been following up on the typing of the proceedings in the lower court in preparation of the record of appeal. When the matter came up for hearing on 4/11/2024, he promptly logged into the Court session as Newton Kariuki, but after the matter was called out, he unsuccessfully tried to address the court due to network issues and/or technical challenges. Upon enquiry, he was informed that the court had discharged the orders of stay of execution and stay of proceedings. In discharging the said orders, the court unknowingly failed to consider that the Appellant had already complied with the orders of 18/9/2024. Further, the online portal indicated that the application was dismissed for want of prosecution yet the application had been determined by the court on 18/9/2024. The Appellant is apprehensive that unless the orders of 4/11/2024 are set aside, the Respondent will levy execution which will occasion him substantial loss since the decretal sum has already been deposited in court. The failure to be present in court was occasioned by inadvertent failure on his device and thus it was not intentional, as the court also noted that many people were experiencing challenges. The Appellant is desirous of prosecuting the appeal and the application has been brought without undue delay.
3. In opposing the application, the Respondent swore a Replying Affidavit on 11/11/2024 in which he deposed that on 18/9/2024, the parties compromised the application dated 3/9/2024 by consent. Pursuant to the consent, the Appellant was to deposit Ksh. 76,500 in court and file the Record of Appeal within 30 days. On the date of the hearing of the appeal on 4/11/2024, the Appellant and his counsel failed to attend court, despite the date having been taken by consent. There is no plausible justification for the Appellant and/or his counsel's failure to attend court on 4/11/2024 or why the Record of Appeal was not filed within the stipulated time or at all. The reasons advanced are mere excuses that cannot be substantiated, and it is trite law that equity does not favour the indolent.
4. The Appellant's Advocate, Newton K. Kamwana swore a supplementary affidavit on 20/11/2024 in support of the application. He denied the contention that the orders of 18/9/2024 were made as a result of a consent between the parties, and reiterated that the decretal sum had already been deposited in court.
5. The application was canvassed by written submissions which only the Applicant filed.

Determination

6. I have considered the application, the affidavits, the submissions and the authorities relied on.
7. Review is provided for under Order 45 Rule 1 of the Civil Procedure Rules as follows: "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."
8. Order 12 Rule 7 of the Civil Procedure Rules provides that; "Where under this Order, judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."



9. Order 51 Rule 15 of the Civil Procedure Rules provides that; “The court may set aside an order made ex parte.”
10. There is no doubt that the application was filed without unreasonable delay on 5/11/2024 as the order sought to be reviewed and/or set aside was made on 4/11/2024. The Appellant’s counsel attributes his absence from court on 4/11/2024 to a technical hitch on his device, which reason I consider plausible and sufficient.
11. On 18/9/2024, the court gave orders that; “1. Record of Appeal to be filed within 30 days. 2. The sum of Ksh. 75,600/- to be deposited with court within 30 days. 3. Hearing on 4/11/2024. 4. Stay of execution is granted.”
12. It has been deposed that the decretal sum has already been deposited in court in compliance with the orders of 18/9/2024 and the Appellant is in process of compiling the Record of Appeal. He has exhibited 2 letters dated 6/9/2024 and 15/10/2024 requesting for typed proceedings and the decree for purposes of preparing the Record of Appeal, and therefore he cannot be said to have been an indolent litigant, undesirous of prosecuting his appeal. I am of the considered view that the Appellant will suffer substantial loss unless his appeal is heard on its merits, because the prejudice, if any, which may be suffered by the Respondent, can be compensated by an award of costs. In any event, the appeal will be rendered nugatory if the decretal sum is released to the Respondent.
13. In *Shah v Mbogo and Another* [1967] EA 116 the Court held that: “Applying the principle that the court’s discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise), to obstruct or delay the course of justice, the motion should be refused.”
14. In the circumstances of this case, I will allow the application dated 4/11/2024 in terms of prayers 3 and 4 thereof. The Record of Appeal to be filed within 30 days from the date hereof, in default of which the appeal shall stand dismissed.
15. The cost of the application shall be in the cause.

DATED AND DELIVERED THIS 8TH DAY OF APRIL, 2025.

S. M. GITHINJI

JUDGE

Appearances:

Mr. Kitheka for Respondent

Mr. Newton for Appellant

