



Sammy Traders Limited & another v Barasa and Shoto (Suing as the legal representatives of the Estate of the Late Simon Shoto Barasa) & another (Civil Appeal E040 of 2024) [2025] KEHC 4394 (KLR) (3 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4394 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E040 OF 2024**

**AC BETT, J
APRIL 3, 2025**

BETWEEN

SAMMY TRADERS LIMITED 1ST APPELLANT

JOSEPH KOECH 2ND APPELLANT

AND

HENRY BARASA AND VIOLET RUTH SHOTO (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE SIMON SHOTO BARASA) 1ST RESPONDENT

CAR & GENERAL TRADING LIMITED 2ND RESPONDENT

RULING

1. On 27th March 2023, the Appellants filed an appeal against the Judgment and decree of the Senior Principal Magistrate in Butali SPMCC. No. 29 of 2017. The appeal was filed within time.
2. The appeal came up for mention several times wherein the court was informed that the proceedings in the lower court file had not been typed. On 11th December 2023, the court directed the Appellant to file the Record of Appeal within 60 days and in default the appeal would stand dismissed.
3. On 5th February 2024 when the matter came up for mention to confirm compliance with the court order, the court noted that its orders had not been complied with and in view of the orders dated 11th December 2023, the appeal stood dismissed.
4. Following the dismissal of the appeal, the Appellants filed an application dated 8th February 2024 in which they urged the court to set aside the orders of dismissal, to grant them extension of time to file the Record of Appeal, and to issue an order staying the execution of the Judgment and decree of the lower court.



5. The Appellants wholly attributed the delay in filing the Record of Appeal to the failure by the trial court to furnish them with typed proceedings. The Appellants relied on an affidavit sworn by the 2nd Appellant who attached a copy of the receipt showing that they paid for proceedings on 4th April 2023, a letter requesting for the said proceedings filed on even date, and a further letter dated 26th October 2023 and received by the court on 15th November 2023 asking for the proceedings to enable them file the Record of Appeal within the stipulated period.
6. The application is opposed. The Respondents aver that the Appellants are guilty of laches having brought the application after an unreasonable time and as an afterthought. According to the Respondents, the Appellants failed to file a Record of Appeal by the time their appeal which was filed on 27th March 2023 was dismissed on 5th February 2024. The Respondents contend that the failure by the Appellants to file the Record of Appeal within the time given by court is a clear indication that they are not desirous or willing to prosecute the appeal. They further argue that the suit has been pending since 2017 and the Appellants' inaction has denied the Respondents the fruit of their Judgment.
7. The application was canvassed by written submissions.
8. The Appellants rely on Article 50 (1) of *the Constitution* which guarantees every person a right to a fair hearing. They further rely on the case of Grace Njeri Theuri v. John Mburu Wainaina [2022] KEHC 2020 (KLR) and submit that the failure to obtain certified copies of the proceedings and judgement was as a result of mistakes by the court registry which should not be visited upon them.
9. On their part, the Respondents argue that the delay of eleven (11) months from the date of filing the appeal to the date of dismissal was inordinate and has occasioned them prejudice. They rely on Article 159 (2) (b) of *the Constitution* and Section 1A of the *Civil Procedure Act* which enjoin the court to facilitate the just, expeditious proportionate and affordable resolution of the disputes and obligates parties to co-operate with the court in furthering the objectives by complying with the directions and orders of the court. They place reliance on the case of Caltex Oil Limited v. Evanson Wanjihia [2009] eKLR and urge the court to dismiss the application.
10. I have perused the court record and considered the parties' respective submissions.
11. The appeal herein was admitted on 27th September 2023. At the time of admission, the lower court file had not been forwarded to court. The Appellants were granted sixty (60) days to file their Record of Appeal which period was extended by a further fourteen (14) days on 11th December 2023. From the annexure to the Appellant's affidavit in support of the application, it is clear that the Appellants had not been supplied with the typed copies of proceedings and judgement by 26th October 2023, which prompted them to write a letter in follow up. It is clear that the Appellants had paid for the proceedings on time and could only follow up by way of correspondence to ensure they were furnished with the documents.
12. It is clear that the Appellants had discharged their duty and considering the fact that the appeal was not yet a year old after filing, the Appellant had a legitimate expectation that the court would grant them more time to pursue the typed proceedings. The court records indicate that the lower court file was forwarded to this court on 2nd February 2024. This can only mean that the typed proceedings were completed shortly before the file was forwarded to the High Court. Before the Appellants could receive the necessary documents, they could not be reasonably expected to comply with the court's directive to file their Record of Appeal.



13. Order 42 Rule 35 (1) and (2) of the Civil Procedure Rules provides:-

“(1) Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.

(2) If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.”

14. In my view, the indirect import of the foregoing provisions of Order 42 Rule 35 (1) and (2) is that the Appellant should be given some room to prepare for the appeal and the appeal should not be dismissed unless one year has expired since its filing.

15. Looking at the Appellant’s explanation for failure to file the Record of Appeal and considering that the appeal was eleven (11) months old, I am persuaded that the Appellants ought to be given another opportunity.

16. In the case of *Mwangi S. Kimenyi v. Attorney General & Another* [2014] KEHC 4220 (KLR) the court held as follows:-

“1) When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the Defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.

2) Invariably, what should matter to the court, is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues;

- 1) whether the delay has been intentional and contumelious;
- 2) whether the delay or the conduct of the plaintiff amounts to an abuse of the court;
- 3) whether the delay is inordinate and inexcusable;
- 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and
- 5) what prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.”

17. Contrary to what the Respondents have submitted, the Appellants in this case are not guilty of inordinate delay. The delay was occasioned in the lower court and not in the High Court where the appeal was filed. Moreover, on 26th February 2024, after filing the present application, the Appellants



- filed their Record of Appeal. This demonstrates their commitment to the expeditious disposal of the appeal.
18. The overriding objective that the Respondent seeks to rely upon enjoins the court to strike a balance while exercising its powers. Whereas it is desirable that proceedings are heard and determined expeditiously, the court is also obligated to ensure the just and proportionate resolution of the dispute. A just resolution of a dispute calls to mind substantive justice.
 19. I have perused the appeal and find that it raises triable issues. Justice demands that the Appellant be given their day in court. The Respondents did not demonstrate any prejudice that they stand to suffer that cannot be compensated by costs.
 20. In the case of *Njeri Theuri v. John Mburu Wainaina* (supra) which bears a close resemblance to the present case, the court reinstated the appeal and in doing so, held as follows:-
 - “ 42. The provisions of the law relating to dismissal cannot be read in isolation. The bottom line is that directions must have been given before an appeal can be dismissed for want of prosecution. Indeed, there does not appear to be any penalty where an appellant fail to proceed as per Order 42 Rule 11 and Order 42 Rule 13 of the Civil Procedure Rules, 2010.
 43. This court took the view that an appeal cannot be dismissed before directions had been given. As there was no indication that directions had been given herein, the Appeal herein could not be dismissed under Order 42 Rule 35 (1) of the Civil Procedure Rules. In any event, there was also no evidence that the Registrar had issued a notice under Order 42 Rule 12 of Civil Procedure Rules. There was also no indication that the lower court file and proceedings had been forwarded to the High Court for the Registrar to proceed as aforesaid.”
 21. Having said all that, I find that the appeal should be heard and determined on merit and in accordance with the dictates of justice. The application is therefore allowed as prayed.
 22. Since the Appellants have filed a Record of Appeal, they are directed to file and serve their written submissions within thirty (30) days. The Respondents shall have 30 days upon service to file their written submissions.
 23. Those are the orders of the court.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 3RD DAY OF APRIL 2025.

A. C. BETT

JUDGE

In the presence of:

No appearance for the Appellants

Mr. Ndungu holding brief for Mr. Kabiru for 2nd Respondent

Court Assistant: Polycap

