Mwangi & 2 others v Mwangi (Civil Appeal 26 of 2021) [2025] KEHC 5730 (KLR) (8 May 2025) (Ruling)

Neutral citation: [2025] KEHC 5730 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CIVIL APPEAL 26 OF 2021

EM MURIITHI, J

MAY 8, 2025

BETWEEN

VINCENT MIGWI MWANGI ..... 1ST APPELLANT

GRACE WAKUTHI GICHOBI ..... 2ND APPELLANT

ERICK GICHOBI WAKUTHII ..... 3RD APPELLANT

AND

FLORENCE WANGITHI MWANGI ..... RESPONDENT

RULING

1. The applicant filed a notice of motion dated 9th October, 2024 seeking the following orders:
    1. Spent.
    2. Spent.
    3. That the honourable court be pleased to review and set aside the orders of dismissal of the appeal 20th May 2024 and reinstate the appeal herein for hearing and determination.
    4. That the Honourable Court be pleased to stay execution of the Judgment made on 16th June, 2021 in Kerugoya Succession Cause 390 of 2016 pending the hearing and determination of the appeal.
    5. That the Court be pleased to give such further reliefs as it may deem fit and jus to.
    6. That the costs of this application be in cause.
2. The application is based on the grounds in the application and the supporting affidavit of Vincent Migwi Mwangi setting out the facts relied on. The applicants aver that they are aggrieved by the judgment in Kerugoya Succession Cause 390 of 2016 delivered on 16th June, 2021 and filed their appeal

on 14th July, 2021. However, as they waited for directions on the appeal, the matter before the lower court was still pending.

3. The Respondent had an application for execution dated 26th July, 2021 seeking for execution of the judgement of the court. The same was dismissed on 31st March, 2022 on account of dismissal of the appeal they had filed. That the applicant had filed an application dated 19th August, 2021 seeking stay of execution pending the hearing and determination of the application dated 19th August, 2021. The said application was delivered vide a ruling dated 20th September, 2024 which was supplied to them on 27th September, 2024. That it is in the said ruling that he learnt that the appeal had been dismissed.

4. Further, the Deputy Registrar of the High Court wrote a letter dated 15th July, 2021 to the Chief Magistrates Court asking for supply of original record, proceedings and judgment, pleadings and exhibits and a certified Copy of the Decree. That the chief magistrate had not complied with the directions since the Lower Court file was still active. The matter was therefore fixed for Notice to Show Cause before the Honourable Judge on 20th May, 2024 on which date the appeal was dismissed for abandonment since they did not appear. They never received the notices served via the email address we had noted in the Memorandum of appeal; xxxx.com. He had lost the password to the above stated email and have no access to it. | opened a new one xxxx.com,

5. Lastly, they are desirous of pursuing our appeal as is evident in the proceedings before the Lower Court which we have diligently followed even as the appeal file was mentioned in our absence. They seek that the Court to issue an order for stay of execution of the judgment of the lower Court so that the status quo be maintained; and our appeal be not rendered nugatory.

6. The Respondents on 21st February, 2025 opposed by a replying Affidavit urging that since the filing of the Appeal on 14th July 2021, the Appellants herein never followed up on the progress of the same and neither did they attend Court. As a consequence, having mentioned the matter severally before Court in their absentia, the Court therefore fixed the matter for Notice to Show Cause on 20th May 2024 and on the aforementioned date, the appellants were still absent thereby the Appeal was dismissed.

7. The Appellants assert that their failure to appear in Court and prosecute their Appeal was a consequence of the 1st Appellant's inability to access the email address, xxxx.com, which was furnished to the Court during the filing of the Appeal as the Appellants' official contact information. The Appellants therefore maintain that they did not receive any notices transmitted via the said email. The 1st Appellant's explanation that he lost the password to the designated email address and subsequently opened a new email account is unconvincing and lacks credibility particularly considering the fact that the appellant failed to promptly notify the Court and the opposing party of any change in his contact information.

8. Further, should the Appellants have changed their contact information at any time, it was their responsibility to formally notify the Court and all other parties involved in these proceedings. Their failure to do so constitutes a serious lapse in their duty as litigants. The claim that co-appellants failed to attend Court due to the 1st Appellant's inability to access his emails is equally unconvincing as each litigant bears the responsibility to monitor the progress of their case.

9. Lastly, the matter has been in Court since 2021 when Judgment was delivered, and the Respondents together with other beneficiaries are yet to enjoy the fruits of their judgment.

Issue

10. The sole issue for determination is whether the court should review and set aside the orders of dismissal of the appeal

Analysis.

11. The applicant seeks for the honourable court to review and set aside the orders of dismissal of the appeal made on 16th June, 2021 in Kerugoya Succession Cause 390 of 2016 pending the hearing and determination of the appeal.

12. The application is asking for reinstatement of the appeal for hearing on merit.

13. The principles governing reinstatement of suit were admirably reiterated by F. Gikonyo J. in John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation) [2015] eKLR as follows:

> "The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of *the Constitution*. Article 50 coupled with article 159 of *the Constitution* on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the court. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such act are comparable only to the proverbial ''Sword of the Damocles'' which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated."

14. The applicants' case is that the matter was fixed for Notice to Show Cause before the Honourable Judge on 20th May, 2024 on which date the appeal was dismissed for abandonment since they did not appear. They never received the notices served via the email address they had noted in the Memorandum of appeal - xxxx.com. He had lost the password to the above stated email and have no access to it. He opened a new one xxxx.com.

15. The appellant is desirous to pursue the appeal and have it determined on merit.

16. The respondent deposed that the claim that co-appellants failed to attend Court due to the 1st Appellant's inability to access his emails is equally unconvincing as each litigant bears the responsibility to monitor the progress of their case. Further, the respondents together with other beneficiaries are yet to enjoy the fruits of their judgment.

17. The inherent jurisdiction of the Court under Section 3A of the *Civil Procedure Act* requires the Court to do justice in every case by providing that 'Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.'

18. I respectfully agree with the Court in Wachira Karani v Bildad Wachira [2016] KEHC 6334 (KLR) (Mativo J. as he then was) that -

> "The fundamental duty of the court is to do justice between the parties. It is, in turn, fundamental to that duty that parties should each be allowed a proper opportunity to put their cases upon the merits of the matter. It is fundamental principle of natural justice, applicable to all courts whether superior or inferior, that a person against whom a claim or

charge is made must be given a reasonable opportunity of appearing and presenting his case. If this principle be not observed, the person affected is entitled, ex debito justiciae, to have any determination which affects him set aside."

19. The Court considers that although there are gaps in the applicant's explanation leading to the dismissal of the appeal, it would serve justice to reinstate the appeal for hearing on the merits. There will be no prejudice that the respondents will suffer in reinstating the appeal, which cannot be remedied by an award of costs, as the parties will be heard before any judgment is rendered in the matter on the merit, or otherwise of the appeal.

Orders.

20. Accordingly, for the reasons set out above, and in the interests of Justice, the Court finds merit in the application for reinstatement of the Appeal and directs that shall be the appeal shall be reinstated and stay of execution granted pending the hearing of the appeal as prayed in prayers Nos.3 and 4 of the Notice of Motion dated 9/10/2024.

21. The Applicant shall pay the costs of the application to the Respondent.

Order Accordingly.

DATED AND DELIVERED THIS 8TH DAY OF MAY 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Magee for the Appellant.

Mr. Mwangi for the Respondent.