



REPUBLIC OF KENYA



KENYA LAW
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**Kitale Industries Limited v Yakuti & another (Civil Appeal
269 of 2018) [2025] KEHC 12155 (KLR) (9 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 12155 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 269 OF 2018**

F WANGARI, J

JUNE 9, 2025

BETWEEN

KITALE INDUSTRIES LIMITED APPELLANT

AND

EMMAH FADHILI YAKUTI 1ST RESPONDENT

RAMADHAN ALI RANGA 2ND RESPONDENT

RULING

1. This is a Ruling in respect to a Notice of Motion Application brought under Certificate of Urgency dated 10th March, 2025. It is brought under the provisions of sections 1A, 1B and 3A of the [Civil Procedure Act](#) and Orders 12 Rule 7 and 51 Rule 1 of the Civil Procedure Rules, 2010. It seeks the following prayers: -
 - a. Spent
 - b. That pending the inter parte hearing of the application, there be stay of execution and or release of funds deposited in the joint account of the Advocates in the primary suit being Mombasa SRMCC No. 2839 of 2010, Emmah Fadhili Yakuti v Kitale Industries Limited & Another;
 - c. That the Honourable Court be pleased to set aside and or vacate the order issued on 29th March, 2023 dismissing the appeal herein for want of prosecution and the appeal herein be reinstated for hearing forthwith; and
 - d. That costs of the application be in the cause.
2. The grounds upon which the Application is made upon are briefly that the Applicant learnt on 6th March, 2025 that the appeal herein had been dismissed on 29th March, 2023 when it was served with the 1st Respondent's Advocates' letter dated 6th March, 2025 seeking to have the funds deposited as security withdrawn. It is averred that on 10th March, 2025, it noticed from the court record that the



matter came up on 1st March, 2023 and 29th March, 2023 and the same was dealt with in the absence of parties.

3. It contends that it was not aware that the matter came up in the two (2) aforementioned dates and that no notice was served. The Applicant's position is that through letters dated 1st February, 2023 and 18th May, 2023, it sought for certified copies of the proceedings, judgment and decree and has been waiting to be supplied of the same in order to enable it prepare a Record of Appeal.
4. It contends that stay of execution was granted in the primary suit and which the 1st Respondent's Advocates have sought to have the funds in the fixed deposit account released and has threatened to proceed with execution. Its position is that it stands to suffer substantial loss, prejudice and harm if the appeal is not reinstated and heard on merits. Conversely, it avers that the 1st Respondent stands to suffer no prejudice since it has already deposited security.
5. It concludes that it is only fair and just for the order dismissing the appeal to be set aside and or vacated since the same was issued in its absence without notice in breach of natural justice and that it is in the interest of justice for it to be given a chance to be heard on merits.
6. The application is supported by the two (2) affidavits, one sworn by Mr. William Mogaka, its Counsel and Ms. Esther Wanjiku Ndungu, its Insurer's Legal Officer both of even date. Save for the annexures, they restate more or less the grounds in support of the application and I see no use in rehashing the same.
7. The application is resisted through a replying affidavit dated 24th March, 2025 sworn by one Victoria Mamka Kitao who is said to be the administrator of the 1st Respondent's estate. She contends that the appeal has been pending for six (6) years and no Record of Appeal has been filed to date and that no action has been taken in the appeal since it was filed. She avers that in any event, the suit automatically stood dismissed on 26th February, 2022 under Order 17 Rule 2 (5) of the Civil Procedure Rules when no further action had been taken.
8. She states that what the court did in dismissing the suit on 29th March, 2023 was a formality to confirm what had automatically taken place. She adds that even from the time the suit was dismissed formally, the Appellant has not taken any action to pursue the appeal and that it took her Advocates to notify it what had happened. Further, she avers that her Counsel has not been served with letter requesting for proceedings and she states that the Appellant has been indolent.
9. She adds that the Appellant was found 80% liable and there is appeal no liability. She avers that the estate has been deprived of funds and she continues to suffer prejudice by being kept away from funds. She contends that she has the ability to refund the decretal sum should the appeal succeed since she would invest the decretal sum together with part of her salary. She concludes that the Applicant has no arguable appeal as it was held 80% liable.
10. The Applicant filed a further supporting affidavit dated 28th April, 2025. Its legal officer avers that the primary suit being Mombasa SRMCC No. 2839 of 2010 is listed for mention on 20th April, 2025 for directions on the release of funds held in court. She urges the court to maintain status quo since should the funds be released; the application shall be rendered a mere academic exercise rendering the whole process nugatory.
11. It is further averred that the amount in issue is colossal and the 1st Respondent will not be able to refund the same from her pleaded net salary. On the issue of refund, it is the Applicant's position that the 1st Respondent cannot pre-empt refunding from a business which she is yet to start and the prospects remain unknown. It is thus urged that the application be allowed as prayed.



12. Directions were taken to have the application argued orally. Based on the directions, parties filed the authorities they intended to rely on. The Applicant's authorities are dated 6th May, 2025. The 1st Respondent filed two (2) sets of authorities. The first set is dated 4th May, 2025 and the second set is dated 6th May, 2025.
13. On 7th May, 2025, parties proceeded to argue the application. The Applicant's position is that the dismissal on 29th March, 2023 was erroneous since no directions had been taken in terms of section 79 (b) of the *Civil Procedure Act* and Order 42 Rules 11 and 13 of the Civil Procedure Rules. The court was referred to the Court of Appeal decision in *Chumo Arap Songok v David Kibiego Rotich* [2006] eKLR. It urged that the application be allowed.
14. On the 1st Respondent's part, she begins by posing a question as to whether the court can sit on appeal of a judge's misdirection. Making reference to the case of *Songok* (above), the 1st Respondent argued that the Court of Appeal was dealing with a matter which was before the High Court. According to the 1st Respondent, the court cannot find that the Judge misdirected himself since this is not an application for review of the Judge's orders.
15. The 1st Respondent further urged the court to consider the period of delay since the appeal was filed in December, 2018. Making reference to Order 17 Rule 2 (5) of the Civil Procedure Rules, the 1st Respondent contended that the appeal stood automatically dismissed since no step had been taken for over two (2) years. She added that the Applicant had only written two (2) letters between 2018 and 2025. Therefore, she urged that the application be dismissed and the funds be released.
16. In a rejoinder, the Applicant submitted that the provisions of section 79 (b) of the *Civil Procedure Act* and Order 17 Rule 2 of the Civil Procedure Rules had been misinterpreted. In the Applicant's position, several letters had been written requesting for proceedings but the same had not been responded to date. It reiterated that there is nothing a party could do with the appeal before the same is admitted. It further contended that the court was not sitting on its own appeal. It prayed that the application be allowed and that the status quo be maintained.
17. This court upon considering the application, response and the parties' oral submissions and the fact that the issue of the Applicant having been found 80% liable had not been controverted, it proceeded to render an interlocutory ruling on the issue of the amount in the escrow account. The court directed that from the amount in the escrow account, a sum of Kshs. 700,000/= be released to the 1st Respondent within fourteen (14) days.

Analysis and Determination

18. I have carefully considered the application, the response, the oral submissions, the authorities filed and the law and in my respectful view, the following are the issues for determination: -
 - a. Whether the application is merited;
 - b. If the answer to (a) above is in the affirmative, what orders ought to issue? and
 - c. What is the order as to costs?
19. Though prayer (b) of the application is seeking stay of execution, the Trial Court already dealt with the same application and it would be res judicata to consider the issue of stay once again. Therefore, the issue squarely before this court is whether the appeal dismissed on 29th March, 2023 ought to be reinstated.



20. It is not in dispute that when the matter came up on 29th March, 2023, none of the parties were present. Similarly, no notices had been served listing the matter for dismissal. The 1st Respondent in her response cited Order 17 Rule 2 of the Civil Procedure Rules to justify the dismissal of 29th March, 2023. However, Order 17 of the Civil Procedure Rules addresses itself to dismissal of suits for want of prosecution. Therefore, the said provision has no application in the present matter.
21. Dismissal of appeals for want of prosecution is grounded upon Order 42 Rule 35 of the Civil Procedure Rules. Sub-rule 1 provides as follows: -
- “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.”
22. Sub-rule 2 on its part states as follows: -
- “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.”
23. These are the only mechanisms within which an appeal can be dismissed for want of prosecution. Rules 11 and 13 of Order 42 of the Civil Procedure Rules places the issue of directions at the centre of admission of an appeal. Before directions are taken, an appeal cannot be liable for dismissal. In *Pinpoint Solutions Limited & Another vs Lucy Waithegeni Wanderi* (as the legal administrator of the Estate of James Nyanga Muchangi) [2020] eKLR, the court addressing this issue observed as follows: -
- “...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 Rule 13 of the Civil Procedure Rules, 2010. 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 the 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...”
24. The above decision is in all fours the position obtaining herein. There is no evidence that the two (2) scenarios as required by law was complied with prior to the dismissal order made on 29th March, 2023. This being the case, the court has no hesitation but to set aside the order made on 29th March, 2023 dismissing the appeal *ex debito justitiae*.
25. Having found the application merited, it is only fair that directions be taken to have the appeal fast tracked.
26. On costs, the same is at the court’s discretion. Being an interlocutory application, I direct that costs shall abide the outcome of the appeal.
27. The upshot of the foregoing is that I allow the Notice of Motion dated 10th March, 2025 as follows:



- a. That the orders made on 29th March, 2023 dismissing the appeal herein for want of prosecution is hereby set aside ex debito justitiae;
- b. That the balance in the escrow account after deducting a sum of Kshs. 700,000/= as ordered on 7th May, 2025 do continue being held as security;
- c. The orders of stay of execution issued by the Trial Court are hereby confirmed pending hearing and determination of the appeal herein;
- d. The Record of Appeal to be filed and served within the next sixty (60) days;
- e. In default of (d) above, the stay herein shall stand lapsed and the 1st Respondent shall be at liberty to execute; and
- f. Costs to abide the outcome of the Appeal.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 9TH DAY OF JUNE, 2025.

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F. WANGARI

JUDGE

In the presence of:-

N/A by the Appellant/ Applicant

Ms. Osino Advocate for the Respondent.

Ms. Getrude, Court Assistant

