Ng'ang'a & another (Suing on their own behalf & as the Administrators of the Estate of the Late Samuel Kamau Gitiria) v Shah & another (Civil Appeal E504 of 2023) [2025] KEHC 8900 (KLR) (Civ) (23 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8900 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E504 OF 2023

LP KASSAN, J

JUNE 23, 2025

BETWEEN

ESTHER WAMAITHA NG'ANG'A & JOSEPH GITIRIA KAMAU (SUING ON THEIR OWN BEHALF & AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE SAMUEL KAMAU GITIRIA) ..... APPELLANT

AND

MANOJ SHAH ..... 1ST RESPONDENT

OSHO CHEMICALS INDUSTRIES LTD ..... 2ND RESPONDENT

RULING

1. Before this court is a Notice of Motion dated 27.09.2024 brought under Order 12 Rules 3 & 7, Order 51 of the Civil Procedure Rules 2010, Sections 1A, 1B, and 3A, of the *Civil Procedure Act* and Article 159 (2) of the *Constitution* of Kenya 2010 wherein the Applicants seeks orders to wit:

    a. That the Order given by this Honourable Court on 23rd September 2024 by Lady Justice H. Namisi dismissing this appeal for want of prosecution.

    b. That the appeal be reinstated for hearing and determination on merit.

    c. That once the appeal is reinstated and we have a mention date for directions.

    d. That the costs of this application be in the cause.

2. The grounds for the Applicants contend that this dismissal was not due to any fault or wrongdoing on their part, but rather occurred through the fault of their Advocates on record. Specifically, they state that while the appeal was listed for mention on 18th September 2024 before Justice B. Mwamuye,

who was not sitting, their advocates were informed by the court assistant that all matters would be mentioned before Justice B. Mwamuye on 25th September 2024. However, upon attending court on 25th September 2024, they were informed that the matter had been before Lady Justice H. Namisi and had been dismissed on 23rd September 2024.

3. The Applicants assert that there was no notification that the matter would be mentioned on 25th September 2024 or that it was slated for mention on 23rd September 2024 before another court. They maintain that they are still keen on prosecuting the appeal, and having learned of the dismissal, they prepared the application without delay. They argue that it is only fair and just that the orders for reinstatement be granted, as it would be fair and just to reinstate the matter in order to safeguard and promote the interests, rights and welfare of all parties involved. Furthermore, they submit that granting the application is in the best interest of justice, and that the Respondents shall suffer no prejudice if the application is allowed.

4. In the Replying Affidavit, the 1st Respondent's affidavit, sworn by Manoj Keshavlal Shah on behalf of himself and the 2nd Respondent, strongly contends that the Applicants' Notice of Motion dated 27th September 2024 is brought in bad faith, is a non-starter, devoid of merit, and an abuse of court process. The Respondents highlight that the original suit was dismissed by the trial court on 29th October 2021 because the Applicants failed to prove the Respondents were liable for the accident, with the police abstract actually blaming the deceased. This forms the basis for their assertion that the appeal is a "flimsy suit" and that the Applicants do not have an arguable appeal.

5. The Respondents detail the Applicants' history of non-compliance with court orders as a key reason for opposing the application. They state that after the Applicants filed a previous application for leave to file the appeal out of time, parties consented on 26th May 2023 to dismiss that application on the condition that the Applicants pay Kshs. 5,000 in costs and serve the Record of Appeal within 14 days, by 9th June 2023. The Applicants failed to comply with this consent order. Despite numerous court mentions since February 2024 where directions were given and the Appellant was noted as not attending court, the Applicants have still not filed the Record of Appeal after nearly 17 months since the deadline and have offered no substantial reason for the delay. This persistent failure demonstrates a lack of seriousness and suggests the Applicants have lost interest in the appeal. The Respondents are apprehensive that allowing the application would unfairly prejudice them by prolonging a "meaningless frolic" almost a decade after the trial court ruled in their favour, and they pray for the application to be dismissed with costs, allowing the appeal to continue resting.

Applicant's submissions

6. The Appellants/Applicants submitted that the court review the order made on 23rd September 2024 dismissing their appeal and to reinstate the appeal for directions and hearing. They contend that the dismissal for want of prosecution was attributable to the fault of their advocates on record, not their own doing. They explain that their advocates were misinformed by a court assistant regarding the correct judge and the mention date, causing them to miss the actual dismissal hearing. The Applicants state there was no notification that the matter would be mentioned on 23rd September 2024 before Lady Justice H. Namisi.

7. The Applicants submit that they are diligent and keen on prosecuting the appeal and prepared the application promptly upon learning of the dismissal. They argue that it is only fair and just and in the best interest of justice to reinstate the appeal to safeguard the rights of all parties. They assert that their counsel's mistake was excusable and should not prejudice them, citing case law that blunders by counsel should not necessarily penalise the client. Furthermore, they contend that the Respondents

will suffer no prejudice if the application is allowed and the appeal is reinstated for hearing on its merits. They emphasize the court's wide discretion to reinstate suits dismissed for non-attendance, particularly where justice requires it and there is a sufficient explanation.

Respondents' submissions

8. The Respondents strongly oppose the Applicants' Notice of Motion dated 27th September 2024 seeking the reinstatement of their dismissed appeal. They contend that the application is brought in bad faith, is devoid of merit, and constitutes an abuse of court process. The Respondents highlight that the original suit was dismissed by the trial court in October 2021, having found the Applicants failed to prove their case, with the police abstract blaming the deceased. They maintain that the appeal is a "flimsy suit" and that the Applicants lack an arguable appeal. Furthermore, they point out that after filing an application for leave to file the appeal out of time, the parties consented in May 2023 to dismiss that application on condition the Applicants pay Kshs. 5,000 in costs and file the Record of Appeal within 14 days, which the Applicants failed to comply with.

9. The Respondents submit that the Applicants have demonstrated a persistent lack of diligence and non-compliance with court orders and directions. They detail instances where the Applicants and their counsel failed to attend court mentions and disobeyed directions to file the Record of Appeal. The Respondents argue that reinstatement of a suit is a discretionary remedy, but this discretion should not be exercised in favour of a party who has deliberately sought to obstruct or delay the cause of justice. They contend that the Applicants' prolonged and inexcusable delay, coupled with their history of non-compliance and failure to pay previously ordered costs, means they have failed to meet the principles for reinstatement. Granting the application would prejudice the Respondents by prolonging a matter that has been ongoing for over 10 years and rewarding indolence, as they have incurred significant costs and emotional distress. They pray for the application to be dismissed, allowing the appeal to remain dismissed.

10. The issues for determination herein are

    i. Whether the application has merits and the appeal be reinstated?

    ii. Who should bear the costs?

11. The principles governing reinstatement of a suit was discussed by Gikonyo J. in the case of *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 acts 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."

12. In this case, the Applicants assert that the dismissal of the appeal arose not from their own conduct, but from a mistake by their counsel, who was misinformed by a court assistant about the correct date and court before which the matter would be mentioned. This led to their absence on 23rd September 2024 when the matter was called out and dismissed. They further aver that they acted promptly to file the instant application upon learning of the dismissal and are still keen to prosecute the appeal on its merits.

13. The law recognizes that mistakes by counsel should not, in appropriate cases, be visited upon a litigant. In *Belinda Murai & 9 Others v Amos Wainaina* [1979] eKLR, the Court of Appeal famously stated:

> "A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate."

14. I note the matter herein was initially listed before Justice Mwamuye on the 25th September 2024. However, the same was placed before Lady Justice Namisi on 23rd September 2024. This breakdown in communication can only be resolved in favour of the parties, and a benefit of doubt that the same caused a confusion and parties should not be punished for the same.

15. Taking into account the competing interests, the constitutional imperative to do substantive justice, and the judicial responsibility to prevent abuse of process:

    a. The Appellant is directed to take steps to set down the appeal for hearing within sixty (60) days from the date hereof.

    b. Failure to comply with this directive shall result in the appeal standing dismissed without the necessity of any further application.

    c. The costs of this Application will be in the cause.

16. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 23RD DAY OF JUNE 2025.

LINUS P. KASSAN

JUDGE

In the presence of: -

Gichuhi holding brief Ndungu for Appellant

Alloo for Respondent

Carol – Court Assistant