



**Sije & 2 others v Kipchumba (Civil Appeal E017 of 2021)
[2025] KEHC 8364 (KLR) (12 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8364 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CIVIL APPEAL E017 OF 2021
RB NGETICH, J
JUNE 12, 2025**

BETWEEN

FREDRICK ODHIAMBO SIJE 1ST APPELLANT

REYNOLDS CONSTRUCTION COMPANY (NIGERIA) LTD .. 2ND APPELLANT

SBI INTERNATIONAL HOLDINGS 3RD APPELLANT

AND

VALARY JEPYEGON KIPCHUMBA RESPONDENT

RULING

1. The Appellants have moved this court vide an application dated 18th September, 2024 brought under the provisions of Sections 1A, 1B, 3A, and 796 of the *Civil Procedure Act*, Cap 21, Laws of Kenya; Order 42 Rule 6 (1) (2) & (7) and Order 51 Rule 1 of the Civil Procedure Rules, 2010) seeking for orders that:
 - i. Spent.
 - ii. Spent.
 - iii. This Honourable Court be pleased to issue orders to stay any release of the deposited sums in the Joint interest account in the name of the firm of M/S Ngaywa & Kibet Partners LLP and Murimi, Ndumia, Mbago & Muchela Company Advocates pending the hearing and determination of this Application interparties.
 - iv. This Honourable Court be pleased to set aside the Dismissal order made on 25th July, 2024 dismissing the Appellants/Applicants' Appeal and reinstate the Appeal herein for hearing and determination on merits.



- v. This Honourable court to stay the sums in the joint interest account in the name of the firm of M/S Ngaywa & Kibet Partners LLP and Murimi, Ndumia, Mbago & Muchela Company Advocates to act as security in the Appeal.
 - vi. That this Honourable Court be pleased to re-admit the Appeal for hearing and direct that the Appeal be disposed by way of written submissions.
 - vii. This Honourable Court be pleased to issue any other Order as it may deem just, appropriate and expedient in the interest of justice.
 - viii. Costs of this application be provided for.
2. The Appellants/Applicants filed the Appeal on the 12th October, 2021 through their Advocates on record the firm of M/S Murimi, Ndumia, Mbago & Muchela Company Advocates. A Notice to Show Cause was issued on the 18th April, 2023 and the appeal was dismissed for want of prosecution.
 3. Thereafter, on 04th May, 2023 the said firm filed an Application under Certificate of Urgency to reinstate the Appeal which was heard and determined on 22nd February, 2024 at Eldama ravine sub registry on 22nd April, 2024 in their absence and the Court issued conditions to be met by the Appellants for reinstatement of suit which the Advocates on record did not inform the Client hence noncompliance with the conditions.
 4. The Appellants instructed the Firm of M/S G & G Advocates LLP to take over the matter from their former Advocates on record and upon requesting for mapping in the matter via the E-filing portal, came to the realization that the matter was already dismissed on the 25th July, 2024 for want of prosecution.
 5. That the Appellants' Advocates, the firm of M/S G & G Advocates LLP were not issued with a Notice to Show Cause as to why the Appeal should not be dismissed for want of Prosecution and the Appellants had already secured the Appeal by Depositing the Decretal sum in a joint interest earning account thereby complying with the stay conditions in this case. That there was no proper communication to the client in regards to the terms of the ruling delivered on 22nd February, 2024 hence reasons for non-compliance of the Ruling of the Honourable Court.
 6. The Appellants argue that they are desirous to prosecute the Appeal to its logical conclusion as it raises cogent triable issues thus it has high chances of success and the mistake on the part of the Appellants' former Advocate should not be meted on Appellants who are just but innocent litigants whose Appeal is meritorious with high chances of success.
 7. That Appellants/Applicants are apprehensive that the Respondent will commence execution proceedings against them to their detriment and it is only proper that following the reinstatement, this Honourable Court be pleased to direct that the Appeal herein be disposed of via written submissions.
 8. That the Appellants/Applicants stand to suffer substantial loss and damage if this Honourable Court does not set aside the order of 25th July, 2024 and reinstate the same for hearing and determination on merit.
 9. The application is supported by the annexed affidavit of Elijah M. Ombeo who avers that he is an Advocate of the High Court practicing in the firm of M/s G&G Advocates LLP who are in conduct of this matter on behalf of the appellants/Applicants. He averred that the Appellants/Applicants being dissatisfied with the Judgement in the lower court file KABARNET PMCC NO E014 OF 2020 preferred this instant appeal in the limb of quantum. He restated grounds of appeal.



10. He avers that the Appellants/Applicants stand to suffer substantial loss and damage if the dismissal order of 25th July, 2024 is not set aside and the Respondent will not be prejudiced in any way if the orders sought herein are granted as prayed and the Appellants/Applicants are willing to abide by the terms and conditions for allowing this application and of the ruling delivered on the 22nd February, 2024.
11. That the Appellants having deposited the entire decretal sums in the joint interest account held in the name of the firm of M/S Ngaywa & Kibet Partners LLP and Murimi, Ndumia, Mbago & Muchela Company Advocates, it will be in the interest of justice that the release of the said funds be stayed and the court pleased to maintain the funds as security for performance of the decree herein pending hearing and determination of the Appeal.
12. That this Honourable Court has jurisdiction to grant the orders sought herein and urged this court to exercise its discretion and allow the instant application to allow the applicant pursue his right of appeal.

Response

13. In response, the applicant filed a replying affidavit sworn by Sylvia Musanzu who avers that she is an Advocate of the High Court of Kenya on record for the Plaintiff herein and is well versed with the facts and circumstances of the matter.
14. She avers that the Notice of Motion dated 18th September, 2024 and the Supporting Affidavit sworn by Elijah M. Ombeo dated 18th September, 2024 is fatally defective, incompetent, malafides and an abuse of court process as demonstrated as the court issued a judgment in favour of the Respondent against the Applicants in the primary suit on 22nd September, 2021 as the Applicants being dissatisfied with the court's decision, lodged an appeal being Kabarnet HCCA No. E16 of 2021 and Kabarnet HCCA No. E017 of 2021 and despite filing an appeal in this matter, the Applicants failed to prosecute the said appeal and this court proceeded to dismiss the appeal for want of prosecution on the 18th April, 2023.
15. Thereafter, the Appellants filed an application to reinstate the appeal and a ruling was delivered on 22nd February, 2024 allowing the reinstatement of the appeal on the following conditionals:-
 - i. Money deposited as security to remain in the account till hearing and determination of the appeal.
 - ii. The Applicant to pay thrown away costs of Kshs. 50,000/= in each file within 30 days.
 - iii. The appeal is admitted and the same to proceed by way of written submissions.
 - iv. The court further directed the Applicant to file and serve their submissions within 21 days and the Respondent to file and serve submissions in response within 21 days from the date of service of submissions by the appellant and the matter was to be mentioned on 22nd April, 2024 to confirm compliance and take a judgment date but the conditions were not met.
16. She avers that the advocates on record for the Appellants were served with the courts directions but did not comply within the stipulated time. That the conditional stay was a two-legged stool and the Applicants were duty bound to comply with the two limbs, failure of which it automatically lapsed.
17. She further avers that the Applicants failed to prosecute the said appeal and this court proceeded to dismiss the appeal for the second time for want of prosecution on 25th July, 2024. She avers that court orders are not made in vain and must be obeyed, unless varied, set aside or stayed and the applicant did not comply with the orders issued on the 22nd February, 2024 but chose to blatantly disregard or disobey.



18. Counsel avers that the present application is purely an academic exercise aimed at achieving no goal other than wastage of precious judicial time; that the Appellants have not been keen on prosecuting the appeal as the matter has been dismissed twice for want of prosecution by the court. Further that the Appellant's Advocate did not file an application to cease acting and as such is deemed to be on record.
19. She further avers that they were not served with a Notice of Change of advocates by the Applicant and the Notice of Change of Advocates annexed by the applicants' dated 6th June, 2023 was filed on 15th August, 2023 yet the applicants in their application state that upon requesting mapping is when they realized that the matter had been dismissed on 25th July, 2024.
20. She avers that the application has been overtaken by events as the money has been released to the Respondent and the Applicants are misleading the court and the Affidavit in support of the Application is full of falsehood and should be expunged from record.
21. Counsel avers that a successful litigant should be allowed to enjoy the fruits of litigation and it is trite law that litigation must come to an end and litigants should not be allowed to continue litigating matters for eternity, and as such, the instant application is bad in law, an abuse of the court process, is not made in good faith and should be dismissed with costs.

Respondent's Submissions

22. The Respondents listed the following as issues for determination:-
 - i. Whether the prayer for reinstatement is merited?
 - ii. Whether the court ought to stay the release of sum held in the joint interest earning account?
23. The Respondent submits that the appeal is not meritorious and ought not be reinstated as the Respondent is prejudiced by the continued pendency of the suit which the Appellants have refused to prosecute since filing the Memorandum of Appeal in 2021 and that courts' main mandate is to do justice to parties and must exercise the discretion judiciously to avoid injustice resulting from accident, inadvertence or excusable mistake and relied on the case of John Nahashon Mwangi -vs- Kenya Finance Bank Limited (in Liquidation) [2015 eKLR.
24. That the question herein is whether the appellant has demonstrated reasonable grounds for the reinstatement of the appeal and whether the respondent will suffer prejudice if the application is reinstated.
25. The Respondent submits that the Appellant filed the appeal through a Memorandum of Appeal dated 4th October, 2021 which was first dismissed on 18th April, 2023. That they filed an application to reinstate the dismissed appeal which was heard and a ruling delivered on 22nd February, 2024 and argue that the appellants have not demonstrated any reasonable ground for reinstatement of the suit. The Respondent restated averments in replying affidavit.
26. That the court is vested with a wide discretion to reinstate an appeal dismissed for want of prosecution. In exercise of such discretion, the Court must caution itself not to exercise its discretion in a manner that will result in an injustice. That this position is fortified in the case of Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others [2013] eKLR.
27. That in this matter it was the primary duty of the Appellants to take steps and prosecute the appeal zealously which was not the case and 17 months down the line no steps were taken to prosecute the appeal thereby resulting to dismissal of appeal for want of prosecution.



28. They submit that it is the duty of the appellant to take all the reasonable steps to prosecute the appeal and no reasons have been provided to demonstrate any steps taken to prosecute the appeal and the appellant therefore failed on its duty which it owed to the client, the court and the respondent. That in coming to this conclusion they are guided by the case of Utalii Transport Co. Ltd and 3 Others - vs- N.I.C. Bank and Another (2014) eKLR, and in Gideon Sitelu Konchella vs Daima Bank Limited (2013) eKLR.
29. Further that this court ought to find that the order for dismissal was indeed sound and justifiable and cited the decision of Court of Appeal in the case of Njue Njagi v. Ephantus Njiru & Another [2016] eKLR where the court stated that dismissal of a suit for none attendance by the plaintiff or for want of prosecution amounts to a judgment in that suit.
30. And under Order 42 Rule 35 (1) of the Civil Procedure Rules, dismissal of the appeal for want of prosecution is based on meritorious facts which have not been explained away by the Applicant in this application and the Applicant's approach for orders to reinstate the appeal is not only procedurally wrong but is also deceptive. They argue that the Applicant should have sought to reinstate the appeal for reasons which would explain away the long delay in fixing the appeal for directions and for a hearing but they instead tried to hide under a procedural approach with a view to avoid explaining the failure to prosecute for a long time.
31. Counsel submit that the Appellant's advocate did not file an application to cease acting and as such is deemed to be on record as they were not served with a Notice of Change of advocates by the Applicant and further the Notice of Change of Advocates annexed by the applicants' dated 6th June, 2023 was filed on 15th August, 2023 yet the applicants in their application state that upon requesting mapping is when they realized that the matter had been dismissed on 25th July, 2024. They are as misleading this court with intention of dragging this matter and therefore prejudicial to the Respondent.
32. In conclusion, the Respondent submits that the application has been bypassed by events as the money that was held as security for the appeal has been released to the Respondent and as such the prayer for stay of release of the sum held in the joint interest earning account cannot be realized.

Analysis And Determination

33. I have considered averments and submissions herein and consider the following as issues for determination:-
 - a. Whether applicant has demonstrated reasons to reinstate this appeal.
 - b. Whether stay of money deposited in joint interest account should issue.
 - i. Whether applicant has demonstrated reasons to reinstate this appeal
34. On the first issue, it is the Applicant's case that after the suit was reinstated, the Appellants instructed the Firm of M/S G & G Advocates LLP to take over the matter who upon requesting for mapping in the matter via the E-filing portal, came to the realization that the matter was already dismissed on the 25th July, 2024 for want of prosecution and the said firm of M/S G & G Advocates LLP were not issued with notice of dismissal for want of prosecution as all correspondences were addressed to the Appellants' former Advocates and further that the Appellants had already secured the Appeal by depositing the decretal sum in a joint interest earning account thereby complying with the stay conditions in this case and the ruling delivered on 22nd February, 2024 was not therefore communicated to the appellant.



35. Grant of prayer sought herein is discretionary. Section 1A(1) of the *Civil Procedure Act* provide for the overriding objective to facilitate the just, expeditious, proportionate and affordable resolution of disputes in court. A party in civil proceedings or his Advocate is obligated to assist the court to further the overriding objective by participating in the processes of the court and to complying with the directions and orders of the court as directed. This is in tandem with the spirit under Article 159 of *the Constitution*, which guides the courts in exercise of its judicial authority to administer substantive justice without undue regard to procedural technicalities.
36. Further in the case of Esther Wamaitha –vs- Safaricom the court held as follows:-
- “...The discretion is free and the main concern of the courts is to do justice to the parties before it (See Patel Versus EA Cargo Handling Services Ltd) the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (See shah Versus Mbogo). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration Versus Gasyali). It also goes without saying that the reason for failure to attend should be considered”. (Emphasis mine)
37. And in the case of Philip & another –vs- Augustine Kibede 1982-88 KLR 103, the court expressed itself thus;
- “Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having this case heard on merit. I mind the broad equity approach to this matter is that unless there is fraud or intention to overreact, there is no error or default that cannot be put right by payment of costs. The court as is often said else for the people of deciding the rights of the parties and not the people imposing discipline”.
38. Whereas it is the true parties to a litigation are bound to make mistakes and sometimes the mistake is on the part of the legal counsel retained by those parties. I am however of the view that a litigant who is not guilty of dilatory conduct should not be debarred from pursuing his/her rights in court because of the negligence of his/her Counsel.
39. Record show that applicant was represented by the firm of M/S Murimi, Ndumia, Mbago & Muchela Company Advocates and note that when the said firm was on record on behalf of the Applicant, this suit was dismissed on two occasions and now the firm of M/S M/S G & G Advocates LLP, Advocates expresses the desire and commitment to diligently prosecute the matter on behalf of the Applicant. The appellant having now appointed a different law firm to prosecuted this matter, I believe thy will diligently prosecute this matter which has been pending for about 4 years without further delay. I will however allow reinstatement of suit on condition that the earlier thrown away costs plus additional cost of Kshs 30,000 be paid to the respondents within 30 days from the date of this ruling.
40. On whether the court should order stay of execution pending hearing and determination of the intended Appeal, Order 42 Rule 6(1) of the Civil Procedure Rules is the applicable law and it stipulates the conditions under which a stay may be granted. It provides that an Applicant in an application for stay must satisfy the court that he/she stands to suffer substantial loss if stay is not granted and that



the application had been filed without unreasonable delay. The applicant must also show that he was willing to offer such security as may be ordered by the court.

41. The applicants have argued that the Appellants having deposited the entire decretal sums in the joint interest account held in the name of the firm of M/S Ngaywa & Kibet Partners LLP and Murimi, Ndumia, Mbago & Muchela Company Advocates, it will be in the interest of justice that the release of the said funds be stayed and the court pleased to maintain the funds as security for performance of the decree herein pending hearing and determination of the Appeal. The application was made after the decretal sum has already been released, as submitted by respondent.

Final Orders:-

- a. This appeal is reinstated on condition that thrown away costs of Kshs 30,000 plus previous costs of Kshs 50,000 is paid to the Respondent within 30 days from today's date.
- b. Costs of this application to abide by the outcome of this appeal.
- c. Prayer for stay of release of money deposited to the Respondent has been overtaken by events.
- d. Failure to comply with prayer 1 above, the appeal to stand dismissed.
- e. Similar orders in HCA NO.17 of 2021.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT ELDAMA RAVINE HIGH COURT (SUB-REGISTRY) THIS 12TH DAY OF JUNE 2025.

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RACHEL NGETICH

JUDGE

In the presence of:

Mr. Kariu holding brief for Mr. Ombeo for Appellant/Applicant.

Mr. Musanzu for Respondent.

CA, Karanja.

