



**In re Estate of Salome Gaci Isaiah (Deceased) (Family Appeal
E007 of 2024) [2025] KEHC 11162 (KLR) (23 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11162 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
FAMILY APPEAL E007 OF 2024
RM MWONGO, J
JULY 23, 2025**

BETWEEN

DAVE NATHAN NTHIGA APPELLANT

AND

RAHAB WANJIIRU ISALAH 1ST RESPONDENT

JANEROSE WANDIRI MBOGO 2ND RESPONDENT

NANCY MUTITU NJAGI 3RD RESPONDENT

RULING

1. The appellant/applicant filed a memorandum of appeal dated 14th June 2024, challenging the decision of Hon. D. Endoo delivered on 17th May 2024 in Embu CM Succession Cause No.24 of 2020. The matter was placed before the Judge who, on 18th September 2024, ordered that the appellant files a record of appeal within 14 days, failing which the appeal shall stand dismissed. The matter was scheduled to be mentioned on 15th October 2024 in the event of compliance with this order by the court.
2. On 15th October 2024, the Judge noted that the appellant had failed to comply with the order previously issued. It was noted that there was no pending appeal at that point since the order of the court was self-executing. The file was marked as closed.

Chamber Summons

3. It is against this backdrop that the applicant filed a chamber summons dated 22nd October 2024, which is premised on the grounds set out on its face and in the supporting affidavit, seeking orders that:
 - a. Spent;
 - b. That the honourable court be pleased to set aside orders dismissing the instant appeal;



- c. That the honourable court be pleased to reinstate the appeal to be heard on merit; and
 - d. That the costs of this application be provided for.
4. The applicant stated that after he filed the memorandum of appeal, he began following up with the court for certified copies of the proceedings and the judgment but the same were availed late. He also stated that he ran into technical problems when filing the record of appeal as ordered by the court. That by the time he managed to file the record of appeal, the time ordered by the court had already lapsed. He urged the court to allow the application because the appeal presents triable issues and the appellant will suffer irreparable loss if the orders are denied.

Replying Affidavit

5. The 1st respondent, in her replying affidavit, stated that no sufficient grounds have been provided by the applicant for reinstatement of the appeal. That the decision of the court to dismiss the appeal should not be reviewed. She stated that the applicant delayed in filing the record and no sufficient reason was given, nor did he apply to have the time extended. The applicant did not seek the leave of court to file the record of appeal out of time. She urged the court to dismiss the application.
6. The 2nd respondent filed a replying affidavit urging the court to dismiss the application since it amounts to abuse of the court process. She stated that the memorandum of appeal was filed on 14th June 2024 but the appellant applied for the proceedings on 26th September 2024. By the time the applicant was attempting to upload the record of appeal, the timeline given by the court had already lapsed, hence, the issue of trouble uploading the document does not hold water. She stated that the applicant was not keen in prosecuting the appeal as demonstrated as demonstrated through his conduct.
7. The 3rd respondent responded to the application stating that the ruling of the trial court is sound and it does not have to be reviewed on appeal. She stated that following distribution of the estate by the trial court, the applicant vowed to continue dragging the beneficiaries through endless litigation in order to frustrate their entitlement to the estate. She urged the court to dismiss the application since the applicant has not shown any seriousness to prosecute the appeal.

Parties' Submissions

8. The applicant submitted that the 14-day period allowed to file the record of appeal ended on 2nd October 2024 in accordance with Order 50 Rule 8 of the Civil Procedure Rules. That the last day of the period was included in the time while the first day was excluded. He relied on the cases of *Mbogo v Shah* [1968] EA 93 and *Somak Travels Ltd v Gladys Aganyo* [2016] KECA 669 (KLR) and urged the court to allow the application so that the appeal can be heard on merit.
9. He stated that he stands to lose out on his inheritance if the appeal is not heard. That the applicant is keen to prosecute the appeal and that his advocate's mistakes should not be visited upon him. He placed further reliance on the cases of *Eldodrill Holdings Limited & 2 others v Odende* [2023] KEHC 18431 (KLR) and *Hawkind Corporation (The Owner of the MV Kairo's) v African Marine & General Engineering Co. Ltd* [2024] KECA 496 (KLR).
10. In her submissions, the 1st respondent relied on section 3A of the *Civil Procedure Act* and the case of *Ma ni Utheri v Pram Company Limited* [2024] KEELC 711 (KLR) she stated that the court considered the circumstances of the case and found it prudent that to issue the order in the interest of justice. She argued that the applicant should be held as one who was indolent and slept on the orders of the court instead of complying with the order of the court.



11. She relied on the cases of Wangari v APA Insurance [2025] KEHC 110 (KLR). Further reliance was placed on section 79G and the cases of Dilpack Kenya Limited v William Muthama Kitonyi [2018] KEHC 4858 (KLR), Alibhahi Musajee v Shariff Mohammed Al-Bet Civil Appeal No. 283 of 1998 and Major Joseph Mweteri Igweta v Mukira M'ethare) Attorney General [1999] KECA 36 (KLR) and argued that the onus is on the applicant to convince the court to apply its discretion in his favour, but he has failed to do so.
12. The 2nd respondent submitted that in accordance with section 3A of the *Civil Procedure Act*, the court made the necessary order to serve the ends of justice by imposing the self-executing order. That the memorandum of appeal was filed on 19th June 2024 and directions to file the record of appeal (to the effect that it be filed and served within 21 days) were given on 15th July 2024.
13. By August, the record of appeal had not been filed and the court accommodated the applicant again, giving a further 14-day period to comply. By 18th September 2024, the applicant had still not complied. It was her submission that the court should not allow the application because, in any event, the appeal does not disclose overwhelming chances of success.

Issue for Determination

14. The issue for determination is whether the order dismissing the appeal should be reviewed.

Analysis and Determination

15. The applicant is seeking reinstatement of an appeal which stood dismissed through a self-executing order of the court issued in the event that the period for filing is not complied with. This means that the applicant's own actions led to the appeal standing dismissed. The applicant was ordered by the court to file his record of appeal within 14 days, failing which the appeal would stand dismissed. He did not comply and the appeal thus stood dismissed.
16. In the application, the applicant stated that the reason why he failed to comply with the order of the court is that he had applied for certified copies of the proceedings and judgment of the trial court but the documents were not timeously issued. The 14-day period ended on 2nd October, 2024, excluding the 1st day and including the 14th day according to Order 50 Rule 8 of the Civil Procedure Rules.
17. It is on this last day, 2nd October 2024 that the proceedings were certified and issued for purposes of the appeal. The applicant stated that he quickly moved to upload the documents on the e-filing portal, only to find that there were technical challenges on that day, hindering successful filing of the record of appeal on time. He managed to file the record of appeal on the next day, 3rd October 2024, outside the period ordered by the court. by this time, the appeal had already stood dismissed.
18. In their replies, the respondents vehemently opposed the application, terming it as a waste of the court's time. They stated that the reasons given by the applicant for failing to comply with the court's order do not hold water. They urged the court not to allow the application since the applicant has failed to demonstrate seriousness in prosecuting the appeal.
19. Equity aids the vigilant and not the indolent, and in this case, there is a great deal of indolence on the part of the applicant. This is shown by the speed with which the applicant applied for certified copies of proceedings and judgment of the trial court. It was several days after filing of the memorandum of appeal. It is trite that court orders are not made in vain, lest the court be the subject of ridicule (see the case of B v Attorney General [2004] 1 KLR 431).



20. As it turned out, there was an institutional delay in procuring copies of the proceedings and judgment for purposes of appeal. The said documents were issued to the applicant at the 11th hour. He said that when he went to upload them onto the court's e-filing system, it failed on that day. The following day, he managed to file the record of appeal but he was one (1) day too late!
21. The wording of Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules makes it mandatory that the court sitting on review, be moved by the aggrieved party who will make his case accordingly to appeal to the court's discretionary power of review therein. Section 80 of the Civil Procedure Rules Provides:
- “ Any person who considers himself aggrieved-
- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this Act, May apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”
22. Order 45 Rule 1 of the Civil Procedure Rules provides:
- “(1) Any person considering himself aggrieved—
- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.” [Emphasis added]
23. The circumstances under which the order of the court may be reviewed are as stated in the above cited provisions. It is noted that the application herein was filed promptly after the self-executing order dismissing the appeal had already come into effect. The court confirmed dismissal of the appeal on 15th October 2024 and the application herein was filed on 22nd October 2024, seven days later.
24. In as much as there may not be any error apparent on the face of the record, the law applies for review “for any other sufficient reason.” The applicant was one (1) day late in filing his record of appeal. His reason is that he encountered a technical challenge when uploading the document on the e-filing portal. This online system issue resolved the following day and he still filed his record of appeal, albeit one (1) day late.



Conclusions and Disposition

- 25. The Court has taken into account the fact that the typed and certified record of proceedings was delayed and obtained by the Applicant just one day before the lapse of the time allowed for filing the appeal. The certification is shown to have been effected on 2nd October, 2024. This resulted in the applicant having to rush the filing which occurred on 3rd October, 2024.
- 26. The system failure at the Court’s end is not an unusual event. It is bound to happen with any online system every once in a while. This is why it may be considered as any other sufficient reason for review. In the interest of justice and in accordance with Articles 48 and 159(2)(a) of *the Constitution* which guarantee access to justice for all, it is befitting to let the applicant prosecute his appeal for consideration on its merits.
- 27. In the result, and in exercise of the Court’s discretion, the application is hereby allowed.
- 28. No order as to costs is made.
- 29. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 23RD DAY OF JULY, 2025.

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R. MWONGO

JUDGE

Delivered in the presence of:

- Ms. Wanjiku holding brief for Njiru Mbogo for 1st Respondent.
- Ms. Njagi holding brief for J. Kathungu for 2nd Respondent.
- No Representation for Mukami for Appellant/Applicant.
- Nancy Mutitu – Present in Person (3rd Respondent).
- Francis Munyao - Court Assistant.

