Mbithi v Dedan Kimathi University of Technology (Civil Appeal E035 of 2022) [2025] KEHC 11355 (KLR) (23 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11355 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E035 OF 2022

DKN MAGARE, J

JULY 23, 2025

BETWEEN

BENSON KILONZO MBITHI ..... APPELLANT

AND

DEDAN KIMATHI UNIVERSITY OF TECHNOLOGY ..... RESPONDENT

RULING

1. Plus ça change, plus c'est la même chose, the more it changes, the more it's the same thing. It has been an age old tradition that when things go wrong, the counsel have a duty to inform the court. A lawyer's primary duty is to the court and the administration of justice, which means they must act with honesty and integrity, and cannot mislead the court. This duty often involves informing the court of relevant facts, even if those facts are detrimental to their client's case. This matter brings out what is best and worst in human relations. This appeal was filed by O.N. Makau & Mulei Advocates on 06.07.2022. From the nature of the dispute, it appears to be an employment dispute.

2. The case arose as a result of a bond for study at the Respondent's cost. On 03.08.2022, the applicant through Moris M. Mulei Advocate filed an application for stay of execution. There was no action after this, until 15.01.2024 when the respondent filed submissions. On 5.02.2024 a mention notice was served upon the respondent's advocates via email. I cannot trace the certificate of electronic delivery. The matter was coming up for hearing of the application when submissions were ordered to be filed. However, finally on 21.05.2024, the court, Muya J gave a date for judgment. The matter was taken over by Justice Mwanyale, during RRI.

3. The judgment was delivered on 20.06.2024 striking out the suit for failure to file the record of appeal. Subsequently, the applicant filed an application dated 20.03.2025, seeking the following orders:

    a. Spent.

b. That this Honourable court be pleased to grant leave to the firm of Messrs. W.M. Kithuka & Company Advocates to come on record for the Appellant/Applicant.

c. That this Honourable court be pleased to set aside its judgment delivered on 20.06.2024 and all other consequential orders emanating therein.

d. That this Honourable court be pleased to reinstate the appeal herein and set down for hearing in the normal manner.

e. That this Honourable court be pleased to issue an order of stay of execution of the judgment of the trial court delivered on 24.06.2022 in Nyeri Civil Suit No. 135 of 2020 and all other consequential order emanating therein pending the hearing and determination of this application.

f. That this Honourable court be pleased to issue an order of stay of execution of the judgment of the trial court delivered on 24.06.2022 in Nyeri Civil Suit No. 135 of 2020 and all other consequential order emanating therein pending the hearing and determination of this appeal.

g. That this Honourable Court be pleased to grant leave to the Appellant/Applicant herein to file record of appeal out of time.

h. That this Honourable court do make any such further order(s) and issue any other relief it may deem just to grant in the interest of justice.

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

4. The main ground for the application was that the main partner Morris Mulei died and as a result, the firm was closed. The same was supported by an affidavit of the applicant. The respondent filed grounds of opposition stating that the application was vexatious, fatally and incurably defective, misconceived and incompetent.

5. A replying affidavit was filed on 20.05.20. There was no factual disputations on the death. The issues raised are as to why the applicant did not follow up on the appeal for 3 years. To be fair, it was less than 2 years. It was his case that the current advocate handled the matter in the lower court.

6. The applicant filed submissions dated 21.05.2025. They relied on Order 51 Rule 5 and Order 42 Rule 1 of the *Civil Procedure Rules*. Though, the later rule is irrelevant. The rule quoted is Rule 21. In this regard, reliance was placed on the case of *John Nahashon Mwangi v Kenya Finance Bank Limited (In Liquidation)* [2020] KEHC 5823 (KLR).

7. The respondent filed submissions dated 28.05.2025. It was their case that there was inordinate and substantive delay that was inexcusable, i.e. from 20.06.2024 when the judgment was delivered to 20.03.2025 when the application was made. They stated that equity helps the vigilant and not the indolent. They relied on the case of *Glory Driving School v Formax Insurance Brokers Limited* [2024] KEHC 14360 (KLR)

Analysis

8. The court, for reasons that will become apparent shortly, will deal with grounds 3 and 4 of the application. The prayer for stay will be dealt with as per the order herein.

9. The first question is whether to set aside. To be able to do so, there has to be a basis both in law and in fact. The concept of equity aids the vigilant, not the indolent means that courts of equity will generally only help those who diligently pursue their legal rights, and not those who sleep on their rights and

delay unreasonably in taking action. However, this works only, if the proceedings are themselves valid. The proceedings related to an application dated 2.08.2022. At no time did the court admit the appeal for hearing or give directions for hearing.

10. The matter was to be fixed for ruling on the application dated 2.08.2022, unfortunately the Respondent misled the court to issue a judgment date. The proceedings are as follows:

    a. On 21.09.2022, a date for the application dated 2.08.2022 was fixed for mention on 16.11.2022.

    b. The application was fixed for mention on 23.03.2023 for submissions. On the said date, the respondent sought 30 days.

    c. The matter was then fixed for mention on 17.07.2023.

11. Though the record indicates that Makau was present, the record cannot be correct as the court was dealing with service. On 25.09.2023, the Respondent sought to file submissions since the applicant had lost interest in the application. Dates were taken for judgment instead of ruling on 21.05.2024. When the matter proceeded before the new court, the court was not aware of the lapses in procedure.

12. Before a matter is listed for hearing, two things must happen, that is:

    a. Admission of the appeal and

    b. Directions on hearing

13. The Respondent complains that the Applicant was guilty of laches. It does not appear to be so since, the file was fixed for judgment on 21.05.2024. The advocate had died way back in 2022. I take judicial notice that, Morris Mulei advocate died through a road traffic accident on 24.09.2022, along Machakos-Kangundo road. This fact could not have escaped the Respondent's advocate. It is thus not proper to purport to serve a deceased advocate. Such service is improper. The proceedings which have no regard to procedure are a nullity and could not be a basis for a judgment. In *Macfoy vs. United Africa Co. Ltd* [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

14. At no time was the appeal fixed for hearing. It was fixed for an application. If there was any dismissal, then it could only be of the application dated 2.08.2022. In the case of *Mureithi Charles & another v Jacob Atina Nyagesuka* [2022] KEHC 1805 (KLR), the Court held:

> In considering whether or not to set aside a judgement, a judge has to consider the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgement, if necessary, upon terms to be imposed.

15. Well-established principles of setting aside interlocutory judgments were laid out in the case of *Patel v East Africa Cargo Handling Services Ltd*(1974) EA 75 where Duffus P. posited as follows:

> " The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J, put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication.

16. It is of course different, when it is an irregular judgment. There is a distinction between a default judgment that is regularly entered and one which is irregularly entered. The difference between the two was set out by the Court of Appeal in *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] KECA 470 (KLR) stated as hereunder:

> In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 Rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his Memorandum of appearance or defence, as the case may be, the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer, whether in the whole it is in the interest of justice to set aside the default judgement, among others.

17. Where the judgment is irregular, then the court must set it aside as a matter of right. The court does not even have to be moved by a party. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.

18. In the case of *Chelule & another v Kuria & another* (Appeal E001 of 2022) [2024] KEELC 88 (KLR) (24 January 2024) (Ruling), the court stated 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, this court takes the view that an appeal cannot be dismissed before directions have been given or before the appeal has been admitted. As there was no indication that directions had been given, the appeal herein could not be dismissed under Order 42 Rule 35 (1) of the Civil Procedure Rules.
>
> 23. Notably, every person is entitled as envisaged under Article 50 of the *Constitution* of Kenya to have a fair hearing as follows:
>
> > "Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

19. The proceedings were thus erroneous having noted that directions had not been given. In this regard, the respondent misled the court. This was compounded by the fact that the Applicant's advocate was deceased. There was no magic to save the judgment having been issued erroneously. Having found that the appeal was erroneously listed for judgment, before Muya J and subsequently before Mwanyale J, I have no option other than set aside the same. Therefore, the judgment dated 20.04.2024 is hereby set aside. The matter is reinstated for hearing afresh.

20. The second question, is issuance of directions and stay of execution. There are two applications on record. The court can only issue temporary orders pending inter partes hearing in a proper court. This matter is substantially an employment matter. The appeal is therefore transferred to the Employment and Labour Relations Court.

21. The next issue is costs. Costs are governed by section 27 of the *Civil Procedure Act*, which provides as follows:

    (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

    (2) The court or judge may give interest on costs at any rate not exceeding fourteen percent per annum, and such interest shall be added to the costs and shall be recoverable as such.

22. The Court of Appeal in the case of *Farah Awad Gullet v CMC Motors Group Limited* [2018] KECA 158 (KLR) had this to say:

> It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

23. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or Respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award

of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

24. The applicant suffered from lack of diligence. The win is due to a technicality. In the circumstances, each party to bear their own costs.

Determination

25. In the upshot, I make the following orders:

    a. The application dated 21.05.2024 is allowed to the extent that the judgment delivered on 20.06.2024 is set aside. The appeal is reinstated for hearing.

    b. Given that the dispute is substantially an employment dispute, the matter is transferred to the Employment and Labour Relations Court for hearing and final disposal.

    c. Directions on the application for stay shall be on 8.10.2025 in the Employment and Labour Relations Court. Notices to issue.

    d. To protect the substratum of the appeal, there shall be stay pending interpartes hearing of the stay applications.

    e. Each party to bear their own costs.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 23RD DAY OF JULY, 2025.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for parties

Court Assistant – Michael