



**Ndirangu v Wambui (Deceased Suing Through Fresia Wambui Muiruri & John Kiromo Muiruri) (Civil Appeal E037 of 2021) [2024] KEHC 355 (KLR) (24 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 355 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL E037 OF 2021  
HM NYAGA, J  
JANUARY 24, 2024**

**BETWEEN**

**MOSES NDIRANGU ..... APPELLANT**

**AND**

**ALLAN KIRAGU WAMBUI (DECEASED SUING THROUGH FRESIA WAMBUI MUIRURI & JOHN KIROMO MUIRURI) ..... RESPONDENT**

**RULING**

1. The Applicants through Notice of motion dated 5<sup>th</sup> August,2023 expressed to be brought under Sections 1A,1B,3A and 95 of the *Civil Procedure Act* and Order 50 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules* seek among other orders that this Honorable court stay execution of the Judgement delivered on 14<sup>th</sup> April,2021 by Hon. A. Mukenga in Molo CMCC No.274 of 2019; this Appeal be reinstated for hearing and determination on merit and this Court do grant the Appellant leave to file a supplementary Record of Appeal.
2. The Application is predicated on the grounds on its face and supported by an Affidavit sworn by Lawrence Njuguna, advocate for the Applicants wherein he deposed that the Applicant appealed against the judgement entered by Hon A. Mukenya on 14<sup>th</sup> April,2021 in Molo CMCC No.274 of 2019.
3. He averred that the instant appeal was dismissed for want of prosecution on 25<sup>th</sup> January,2023 and that the delay in prosecuting the appeal was caused by failure and or mistake by the registry at Molo to supply the Applicant with certified copies of the proceedings, decree and judgement to enable them prepare the Record of Appeal.
4. He asserted that the Applicant has filed the Record of appeal without typed proceedings, judgement and decree and that failure to reinstate the Appeal will result in execution proceedings which will cause the Applicant to suffer loss and irreparable damage and this appeal rendered nugatory.



5. He prayed that the orders sought be allowed in the interests of Justice.
6. The Respondents opposed the Application via their joint replying affidavit sworn on 24<sup>th</sup> August, 2023.
7. They deposed that the Application is misconceived, incompetent and bad in Law.
8. They averred that the Application has been overtaken by events and that the Applicant has not given cogent reasons for delay in filing this application.
9. They further contended that Applicant has not demonstrated how it will suffer irreparable loss should the court decline to grant stay orders and that it is only fair and just that they be paid the entire decretal sum in the wider interests of justice.
10. The parties thereafter took directions to dispose off the application through written submissions. The Applicant filed his submissions on 30<sup>th</sup> October 2023 whereas the Respondents submissions were filed on 9<sup>th</sup> October, 2023.

### **Applicant's Submissions**

11. The Applicant in urging this court to allow his application cited the provisions of Articles 50(1) and 159(2)(d) of the *Constitution* and the case of *Grace Njeri Theuri v John Mburu Wainaina* [2022] eKLR

### **Respondent's Submissions**

12. Citing the case of *Mbogo & another vs Shah*, EALR 1968 the Respondents submitted that the Appellate court will not interfere with the exercise of the trial Judge's discretion unless it is satisfied that the Judge in question took into account irrelevant factor(s); Failed to take into account some relevant factor(s); did not apply a correct principle to the issue e.g. misdirection on a point of law or facts; and that taking into account all the circumstances of the case the judge's decision was plainly wrong.
13. The Respondents thus argued that the Applicant has not established the above principles to warrant reinstatement of the Appeal.
14. The Respondents submitted that the applicant was unable to show cause why his appeal should not be dismissed for want of prosecution and that it is foolhardy for the Applicant to blame the Molo Law Court registry for failure to prepare a Record of Appeal.
15. The respondents contended that the Applicant failed to follow up on the status of the typed proceedings from Molo Court ever since they wrote a letter dated 7<sup>th</sup> October, 2022 and blamed the Applicant for filing the instant application 8 months after dismissal of his appeal.
16. The Respondents urged this court to dismiss the Application with costs to them.

### **Analysis & Determination**

17. The issues for determination are whether the appeal should be reinstated for hearing on merit and whether the Applicant should be granted leave to file a supplementary record of Appeal.
18. On 25<sup>th</sup> January, 2023, the parties appeared before my brother Justice D.K. Magare on a notice to show cause as to why the appeal should not be dismissed. This is as provided for under Order 42 Rule 35 of the *Civil Procedure Rules* which state as follows;

“ 35. Dismissal for want of prosecution [Order 42, rule 35.]



- (1) 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.
- (2) 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.”

19. From the court record, only the Advocate for the Appellant/Applicant was present. The learned Judge after hearing her, dismissed the Appeal with costs assessed at Kshs. 55,000/-.
20. I have looked at the application. It is basically providing reasons that the applicant ought to have presented at the time the matter was fixed for the notice to show cause.
21. In bringing this application, the applicant is asking me to litigate over an issue already dealt with by the court, albeit differently constituted.
22. It is uncontroverted that the Appeal herein was listed for Notice to show cause why the same should not be dismissed on 25<sup>th</sup> January, 2023. The Counsel for the Appellant only prayed for 30 days to file the Record of Appeal without explaining the reasons for delay. The court was not satisfied and proceeded to dismiss the Appeal.
23. The Applicant now claims that the reason for delay is that the Court Registry never supplied him with copies of the typed and certified proceedings and Judgment for purposes of preparation of the Record of Appeal.
24. It is not clear why the aforesaid ground was not earlier raised when the matter was heard on 25<sup>th</sup> January, 2023. I believe this was an issue which was within the knowledge of the Appellant then and if it was backed by concrete evidence the court would have considered it. Therefore, there is no justifiable ground to set aside and or stay the orders of the court issued on 25<sup>th</sup> January, 2023.
25. Re-instatement of an appeal/suit is a matter of discretion, which must be exercised judiciously and if this Court is to exercise its discretion in favour of a party, the party is obliged to place before it some material to justify the exercise of that discretion.
26. I respectfully agree with the principles governing reinstatement of suits restated in the case of *John Nabashon Mwangi vs Kenya Finance Bank Limited (In Liquidation)* [2015] eKLR (Gikonyo J) 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 act 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.”

27. In *Bernard Muthee & another vs Anita Kamba Mwiti* [2021] eKLR, the court observed thus;

“Concerning the reasons advanced of difficulties in obtaining the record of typed proceedings from the court registry, this court recognizes that there is an avenue to file an initial record of appeal and thereafter file a supplementary record once the proceedings are obtained. This would have been the best course to take and would be more convincing bearing in mind that it was over a period of 8 months between the date when the appellants were ordered to file their record of appeal on December 5, 2019 and when the order confirming the dismissal was made on July 27, 2020. The appellants have also failed to annex evidence in form of correspondence or otherwise to confirm what efforts, if any, they made to secure the said typed proceedings. It is not enough to make mere averments devoid of supporting evidence.”

28. The appellant has attached a letter dated 7<sup>th</sup> October, 2021 addressed to Molo executive officer requesting for typed proceedings, certified copy of the Judgement and Decree. This was 6 months and 17 days after the appeal was filed.

29. I note the Record of Appeal bears a date stamp of 24<sup>th</sup> March, 2022. However, it is unascertainable that the same was filed on the said date considering the Applicant did not annex a receipt to prove filing of the Record on that date. Further when the matter came up for notice to show cause why appeal should not be dismissed on 25<sup>th</sup> January, 2023 the Applicant’s Counsel sought for more time to file the Record of Appeal.

30. On 25<sup>th</sup> January, 2023 when the matter was dismissed, the appellant did nothing to show the court of the progress taken to prosecute the appeal. The appellant had a chance to show the court that he had delivered reminders to the court requesting for typed and certified proceedings but failed to do so. The total inactivity between the aforesaid periods demonstrates lack of seriousness on the part of the Appellant.

31. I am alive to Article 159 of the *Constitution* and the overriding objective which decries undue regard to technicalities. However, it is equally an important principle of the Constitution that justice must be dispensed without undue delay. As the Supreme Court emphasized in *Raila Odinga and 5 Others vs IEBC & 3 Others* [2013] eKLR and in *Nicholas Kiptoo arap Korir Salat vs IEBC & 7 Others* [2014] eKLR, Article 159 is not a panacea in each and every instance of breach of procedure. It avails only in deserving cases.

32. As can be seen, the Appellant after filing his appeal failed without any sufficient cause to follow up on the same for close to 7 months before it was dismissed on 25<sup>th</sup> January, 2023. This was plain indolence and dilatoriness, which is not excusable.

33. From the foregoing, it is my opinion that applicants slept on his rights and cannot blame anyone else but himself.

34. An appellate court must be wary of appellants who file appeals and never take steps to prosecute them, placing successful parties in the lower court in a state of anxiety, not knowing what to do next. Litigation must surely, at some point, come to an end.

35. In conclusion, I find no merit in the application and proceed to dismiss it with costs to the respondents.



**DATED, SIGNED AND DELIVERED AT NAKURU THIS 24<sup>TH</sup> DAY OF JANUARY, 2024.**

**H. M. NYAGA,**

**JUDGE.**

In the presence of;

C/A Jeniffer

Ms Mugo for Njuguna – Applicant

N/A for Respondent

