



**Nyamu & another v Okumu & another (Suing as the Administrators
of the Estate of Walter Onyango Oloo) (Civil Appeal E530 of 2021)
[2024] KEHC 144 (KLR) (Civ) (19 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 144 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E530 OF 2021

AN ONGERI, J

JANUARY 19, 2024

BETWEEN

MARY MUTHONI NYAMU 1ST APPELLANT

CHARLES OKOTH ONYANGO 2ND APPELLANT

AND

**MAURINE AKINYI OKUMU & SAMSON ONDONGO ALOO (SUING
AS THE ADMINISTRATORS OF THE ESTATE OF WALTER ONYANGO
OLOO) RESPONDENT**

RULING

1. The application coming for consideration in this ruling is the one dated 10/8/2023 seeking the following orders;
 - i. That this application be and is hereby certified urgent and heard ex-parte on priority basis in view of its urgent nature and service of the same be dispensed with in the first instance.
 - ii. That pending the hearing and determination of this application inter-partes, a stay of execution of the judgment and/or decree is issued on 4th December 2020 in Milimani CMCC 6605 of 2019 and all consequential orders and proceedings thereto be and is hereby issued and/or granted.
 - iii. That pending the hearing and determination of this appeal inter-partes, a stay of execution of the judgment and/or decree issued on 4th December 2020 in Milimani CMCC 6605 of 2019 and all consequential orders and proceedings thereto be and is hereby issued and/or granted.



- iv. That this honourable court reinstate and readmit this appeal being Milimani HCCA E530 of 2021.
 - v. That the auctioneers in the warrants of attachment herein do tax their costs.
 - vi. That this honourable court do make any such further and/or other orders and issue any other relief it may deem just to grant in the interest of justice.
 - vii. That the costs of this application abide the outcome of the appeal.
2. It is supported by the affidavit of Lawrence Njuguna in which it is deponed that the appellants' appeal is against the judgement and decree issued on 4/12/2020 in Milimani CMCC 6605 of 2019. Being aggrieved by the said judgment the applicant filed an appeal vide a memorandum of appeal dated 12/8/2021. The applicants deposited Kshs. 3,024,397 in court on 21/2/2022 as security, pending the hearing and determination of the appeal.
 3. He deponed that the applicant proceeded to request for certified copies of the proceedings, judgment and decree but the registry at Milimani refused and/ or failed to supply us with the certified copies of the proceedings, judgment and decree. The applicants had not obtained copies of the proceedings, judgement and decree when the matter was dismissed through a notice to show cause.
 4. He deponed that the respondents have now proceeded to execute through chador auctioneers yet the decretal amount was deposited in court as security. The applicant will suffer irreparable harm and loss and their appeal and application will be rendered nugatory if an order staying the warrants of attachment are not granted.
 5. The respondent filed a replying affidavit dated 3/11/2023 and averred that the timing of the current application is very suspect and mockery to the principle that justice delayed is justice denied since the applicants have resorted to seemingly endless streams of legal maneuvers by making numerous applications before this court in a bid to delay the conclusion of this matter. There has been inordinate delay in prosecuting the appeal which was never explained when the notice to show cause was served by this court's registry. It is evident that the applicant went to sleep after filing the appeal and never took any steps for 3 years in prosecuting the same and have as such approached this court with unclean hands. From their conduct in these proceedings, they are undoubtedly undeserving of the discretionary powers of this court.
 6. The parties filed written submissions as follows; the applicant submitted that the appeal herein raised triable issues which need to be determined on merit rather than on procedural technicalities pursuant to Article 159 (2) (d) of the *constitution* which states that "justice shall be administered without undue regard to technicalities." In support the applicant relied on the case of *Grace Nieri Theuri v John Mburu Wainaina* [2022] eKLR

“ 37. In the Civil Division Milimani Law Courts, the Registrar issues the notice for admission and directions of appeal after the High Court receives the file and lower court proceedings.

38. The appellant does not seem to have any role in fixing the appeal for directions as contemplated under Order 42 Rule 11 of *Civil Procedure Rules* and Order 42 Rule 13 (1) of the *Civil Procedure Rules*. It is important to point out that under Order 42 Rule 13 (4) of the *Civil Procedure Rules*, the judge shall not allow a matter to proceed for hearing unless the record of Appeal is duly filed.



39. Once directions are given under Order 42 Rule 13 of *Civil Procedure Rules* and the appellant fails to fix the appeal for hearing, the respondent may fix the same for hearing and/or seek dismissal of the same for want of prosecution under Order 42 Rule 35 (1) of the *Civil Procedure Rules* or the registrar lists the appeal before a judge for dismissal under Order 42 Rule 35 (2) of *Civil Procedure Rules*.

40. Order 42 Rule 35 (1) of the *Civil Procedure Rules* stipulates as follows:

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”.

41. Order 42 Rule 35 (2) of the *Civil Procedure Rules* stipulates as follows:

“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”.

7. The respondent submitted that reinstatement of an appeal is a discretionary remedy of the court. it can only be granted to a deserving litigant who lays a sufficient basis for it and not on mere allegations. The respondent contended that the matter herein was filed on or about August 2021 and the appellants went to slumber. No evidence has been tendered on any steps taken in prosecuting the same.

8. The respondent submitted that it is a principle of law that delay defeats justice and the delay in prosecuting the appeal has not been satisfactorily explained and it is clear that even the threat of having their appeal being dismissed did not jolt the appellants into speedy action since they failed to attend court on 16/6/2023 to show cause why the appeal should not be dismissed. the respondent argued that equity helps the vigilant but not the indolent and the law encourages a speedy resolution for every dispute.

9. The issues for determination are as follows;

- i. Whether the appeals should be reinstated.
- ii. Whether the applicant should be granted stay pending appeal.
- iii. Whether the auctioneers fees should be taxed.

10. The appeal was dismissed on 16/6/2023 for want of prosecution.

11. The court has the discretion to reinstate the appeal under certain conditions.

12. I find that the record of appeal has been filed.

13. The appeal is reinstated on the following conditions.

- i. That the appellant pays thrown away costs of Ksh.20,000 before the appeal is heard.
- ii. That the same be and is hereby admitted for hearing before a single Judge.
- iii. That the appellant files and serves written submissions within 21 days of this date.



- iv. That the respondent to file and serve written submissions within 21 days thereafter.
- v. That the applicant pays costs of the Auctioneer to be agreed upon taxed by the Taxing Master.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 19TH DAY OF JANUARY, 2024.

A. N. ONGERI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

