



REPUBLIC OF KENYA



**Sije & 2 others v Kiplagat (Civil Appeal E016 of 2021)
[2024] KEHC 1802 (KLR) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1802 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CIVIL APPEAL E016 OF 2021
RB NGETICH, J
FEBRUARY 22, 2024**

BETWEEN

FREDRICK ODHIAMBO SIJE 1ST APPLICANT

REYNOLDS CONSTRUCTION CO. (NIGERIA)LTD 2ND APPLICANT

SBI INTERNATIONAL HOLDINGS 3RD APPLICANT

AND

SUSAN KIPLAGAT RESPONDENT

RULING

1. The Appellants/Applicants have moved the court vide an application dated 10th May,2023 seeking the following orders:-
 - i. Spent.
 - ii. Spent
 - iii. Spent
 - iv. That this Honourable Court be pleased to-set aside its Dismissal Order dated 18th April 2023 dismissing the Appellants/Applicants' Appeal herein and reinstate the appeal herein for hearing and determination on its merits.
 - v. That this Honourable Court be pleased to re-admit the appeal for hearing and direct that the Appeal be disposed of via written submissions.
 - vi. That this Honourable Court be pleased to grant stay of execution of the Judgment/Decree-delivered on 22nd September 2021 in the primary suit Kabarnet CMCC NO. 14 OF 2020 ex parte in the first instance pending inter-partes hearing and determination of this Appeal.



- vii. That this Honourable Court be pleased to maintain the Security of Kshs. 1,570,677.00 deposited in the joint interest earning account in the Names of both the Appellants' and Respondent's Advocates as security pending the hearing and determination of the Appeal herein.
- viii. That the costs of this application be provided for.
2. The application is supported by sworn by Chelule C. Abigail Advocate on the 10th day of May, 2023 and a supplementary affidavit sworn on the 10th November, 2023. She avers that she is an Advocate of the High Court of Kenya practicing as such with the firm of Messrs. Murimi, Ndumia, Mbago & Muchela & Company Advocates, the advocates for the Appellants/ Applicants herein.
 3. Counsel further avers and that the instant appeal was filed vide a Memorandum of Appeal on 12th October 2021 stemming from the lower court Judgment in Kabarnet CMCC NO. 13 OF 2020 which was delivered on 22nd September 2021 and which appeal is competent and has high chances of success.
 4. That subsequently, the Appellants filed an application for stay pending appeal in the lower court which application was allowed on 12th January, 2022 giving conditions for payment of 1/3 of the Judgment sum to the Plaintiff/Respondent and the remaining 2/3 deposited in a joint interest earning account.
 5. That on 10th February, 2022 Kshs. 1,570,677.00 being the 2/3 in both Kabarnet CMCC 13 of 2020 as consolidated with Kabarnet CMCC 14 of 2020 was deposited in a joint interest earning account in Family Bank within 30 days in compliance with the Court's Orders dated 12th January, 2022.
 6. That thereafter, the Appellant paid Kshs. 320,977.65 being the 1/3 through a cheque dated 18th February, 2022 in Kabarnet CMCC 13 of 2020 and Kshs. 464,361.00 to the Plaintiff in Kabarnet CMCC 14 of 2020 through a cheque dated 9th March, 2022 and subsequent thereto, the Appellants/ Applicants embarked on preparation of the Record of Appeal.
 7. That unfortunately, the Plaintiff/Respondent filed an application in the lower court dated 26th August, 2022 seeking to release the security of Kshs. 1,570,677.00 deposited in the joint interest earning account which application was allowed vide an Order dated 27th April, 2023 and the Appellant is apprehensive that if the security is released, then the substratum of the appeal herein will be lost.
 8. That the Respondent already armed with the Order dated 27th April, 2023 could proceed to the Bank and proceed with execution pending the hearing of this application and the Appellant thus prays for orders for stay pending appeal.
 9. That in the meantime the Appellant/Applicant concluded the preparation and compilation of the record of appeal which was duly filed and served on 28th April 2023.
 10. That unbeknown to them, the Appeal had been fixed for Mention and/or Notice to Show Cause on 18th April 2023 without notice to the Appellants/Applicants and on the said date, the Appeal came up for Notice to Show Cause when the same was dismissed for want of prosecution with no attendance from parties.
 11. That the Appellants/Applicants were never served with the requisite Mention Notice /or Notice to Show Cause and this is the reason for non-attendance in court on the said date and the Appellants believe that the failure to serve such notices was an honest an unintended mistake on the part of the court administration which mistake ought not to occasion injustice upon the Appellants.
 12. That as such, neither the Appellants/Applicants nor the Respondent were aware that the matter was coming up in court on the said date and no party was in attendance for reason of failure of service of the



requisite notices and unknown to either of the parties the matter proceeded ex-parte and consequential orders being given for reasons which they have a tenable explanation.

13. That the proceedings and consequential dismissal Order of 18th April 2023 only became known to the Appellants on 28th April 2023 when the Appellants/Applicants filed and served their Record of Appeal and when the Appellants were in the process of fixing a Mention date for taking directions on the Appeal, they were informed that the matter came up in court where the same was dismissed ex-parte. That the fact that no party attended court on the said date is further proof that no notice was ever served and none of the parties were ever aware of the matter coming up in court.
14. That the failure by the Appellants/Applicants' Counsel to attend Court on 18th April 2023 was thus inadvertent, for which they humbly plead ought not to be visited upon the innocent Appellants/Applicants whose dismissed Appeal is meritorious with high chances of success and the appeal ought to be heard and determined on its merits.
15. That within the well-established principles of fairness, justice shall be administered without undue regard to procedural technicalities and therefore no injustice should be visited upon the Appellants/Applicants on account of the unfortunate but inadvertent error.
16. That dismissing the said Appeal on a technicality does not settle the substantive issues between the parties and further renders the appeal a mere academic exercise and in the circumstances, it is only fair and just that this Honorable Court be pleased to stay execution of Judgment in the primary suit, Kabarnet CMCC No. 14 of 2020 as well as the Orders of the Lower court dated 27th April, 2023 pending inter-partes hearing and determination of this Application as well as set aside its dismissal Order of 18th April 2023 and reinstate the same for hearing and determination on its merits.
17. That further, the Appellants/Applicants duly filed and served the Record of Appeal on 28th April 2023 and it is their prayer that the instant Appeal be reinstated and heard on its merit.
18. That it is only proper that following the reinstatement of appeal this Honourable Court be pleased to admit the appeal and direct that the Appeal herein be disposed of via written submissions.
19. That the Appellants/Applicants pray that the security deposited in a joint interest earning account of Kshs. 1,570,677.00 be maintained as security pending re-instated appeal.

Respondent's Response

20. The Respondent filed replying affidavit sworn by one Moses Ngaywa Advocate on the 18th July, 2023. He avers that Appellants/Applicants' application is fatally defective, incompetent, full of malafides and an abuse of court process.
21. He further avers that Appellants/Applicants' herein have not approached the court with clean hands, are economical with the truth and have misrepresented facts to this Honourable court purely to obtain orders so as to deprive the Respondent from enjoying the fruits of litigation for the following reasons: -
Bullets
 - a. The Appellants/Applicants being dissatisfied with the lower court's decision lodged an appeal being Kabarnet HCCA No. E016 of 2021 and Kabarnet HCCA No. E017 of 2021.
 - b. Subsequently, the Applicants filed an application dated 4th October, 2021 seeking stay of execution pending hearing and determination of the appeal.



- c. The Honourable Court issued its ruling on the 12th January 2022, which Order gave the Applicants 30 days to deposit a sum of Kshs. 808, 850/= and Kshs.1,208,550/= in Kabarnet CMCC NO. 13 and 14 of 2020 respectively, failure of which the order lapses.
 - d. The Applicants failed to comply with this Honourable Court's orders of 12th January, 2022 which prompted the Plaintiff/ Respondent to file an application dated 26th August 2022 seeking that this Honourable Court be pleased to release the decretal sum of Kshs. 1,570,677/= that was being held in Family Bank account no. 0180xxxxxxx to the Plaintiff/ Respondent.
 - e. Having failed to comply with the court orders, the Applicants sought leave of the court to extend time within which to comply with the court order vide application dated 9th November, 2022, which application was dismissed with costs to the Respondent in a ruling that was delivered on the 24th day of March, 2023.
 - f. The Honourable Court issued its ruling on 24th March, 2023 and made an Order releasing the decretal sum of Kshs. 1, 570, 677/= together with the interest held in Family Bank Account No. 0180xxxxxxx to the Respondents' counsel.
 - g. Despite filing an appeal in this matter, the Appellants/ Applicants failed to prosecute the said appeal and this Honourable Court on its own motion proceeded to dismiss the appeal for want of prosecution on the 18th April, 2023.
 - h. The Appellants/Applicants filed an application to reinstate the appeal and sought orders for stay of execution pending the hearing of the application dated 2nd May, 2023.
 - i. That this Honourable court declined to grant them stay of execution and the application before the high court was scheduled for mention for directions on the 25th July, 2023.
22. Counsel aver that it is clear demonstration of indolence on the part of the Appellants/ Applicants and this court should not encourage the same which is inexcusable on the part of a party which ought to prosecute its matter conclusively and without delay.
23. Counsel further state that in their response, the respondent stand to suffer great prejudice and continues to be prejudiced by the actions of the Appellants/Applicants which had clearly demonstrated lack of seriousness in prosecuting this mater and using this application to drag the Respondent in court without any justifiable cause.
24. That although the Appellants/Applicants have invited the Honourable court to exercise discretion, such discretion must be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.
25. That, the Appellant/ Applicants actions are merely a delay tactic meant to deny the respondent the fruits of her judgment. That, it is trite law that litigation must come to an end, 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 and should be dismissed with costs.
26. The Respondent further avers that Appellants/Applicants are on a mission to forum shop as they have since filed another application dated 2nd May, 2023 before the High Court being HCA No. E016 OF 2021, seeking among other orders, stay of execution and reinstatement of the dismissed appeal, which stay they had previously been granted but failed to comply.



Applicant's Submissions

27. The Appellants/applicants filed their submissions on the 15th November, 2023. In their submissions, they argue that the Appellants' Application dated 10th May, 2023 raises two issues for the determination of this Honourable Court being;
- i. Whether the Court ought to review and/or set aside its orders of 18th April, 2023 dismissing the instant appeal for want of prosecution.
 - ii. Whether the Court ought to grant stay of execution of judgment in Kabamet CMCC No. E014 of 2021 pending the hearing and determination of the appeal herein.
28. The Appellants/applicants in submitting on whether the Court ought to review and/or set aside its orders of 18th April, 2023 dismissing the instant appeal for want of prosecution argues that the considerations that a Court ought to make in dismissing matters for want of prosecution have been highlighted in the case of *ivita vs Kvumbu [1975] eKLR Civil Suit No. 340 of 1971* where the Court stated as follows;
- “The test to be applied in application for dismissal for want of prosecution is whether the delay is prolonged and inexcusable, and if it is whether justice can still be done despite the delay.
- Thus, even the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of the discretion of the court.”
29. The Appellant restated grounds of appeal and averments captured above and added that a certified copy of a Decree is a pertinent document that ought to be filed before the appeal can be admitted under the provisions of Order 42 Rule 2 of the Civil Procedure Rules and Section 79B of the [Civil Procedure Act](#). That the importance of the Decree was restated in the case of *Ndegwa Kamau t/a Sideview Garage v Fredrick Isika Kalumbo 120161 eKLR Civil Appeal No. 51 of 2013* where the signing of the decree was underscored and submit that failure to have a signed Decree in the Record of Appeal is fatal and akin to having no appeal at all and for that reason, an appeal can only be admitted if there is a valid Decree as part of the Record of Appeal; and failure to have a signed decree was the reason for delay in filing of their record of appeal; that they filed the record of appeal a day after the decree was signed.
30. The Appellants/applicants further places reliance in the Court of Appeal's holding in the case of *Gaudensia Atieno Amimo v Akamba Public Road Services Limited & 2 others [2006] eKLR Civil Appeal (APPLI) 26 of 2006* where the Court stated that;
- “We have examined the original record of the superior court and it is conceded by Mr. Menezes for the appellant/respondent, that the original decree is not signed and is in fact blank and unsigned. The Deputy Registrar's Certification of it in that form is therefore of no consequence. On this ground alone, we think Mr. Otieno's submission is valid and we grant the application as sought.”
31. The appellants further submit that they are desirous of prosecuting the appeal to completion and their willingness was demonstrated when they deposited the entire decretal amount in a joint fixed deposit account in the name of the advocates for the parties and as such, the Respondent's fruits of Judgment



are secured and the Respondent has not been exposed to any prejudice and cited the case of *vita vs Kvumbu* [1975 eKLR Civil Suit No.340 of 1971 where the Court stated as follows;

“The test to be applied in application for dismissal for want of prosecution is whether the delay is prolonged and inexcusable, and if it is whether justice can still be done despite the delay.

Thus, even the delay is prolonged, if the court is satisfied with the plaintiff’s excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of the discretion of the court.

32. That furthermore, should the appeal herein fail, the Respondent shall be compensated by way of costs in addition to the decretal sum already deposited in the joint fixed deposit account in the name of the advocates for the parties and cited the case of *Someni Industries Limited & another v Frank Japheth Njagi* [20171 eKLR Civil Appeal No. 183 of 2008.
33. That to further demonstrate the Appellants’ willingness to prosecute the appeal herein, the Appellants are willing to pay thrown away costs if the Court deems it just.
34. On prayer for stay of execution of judgment pending the hearing and determination of the appeal herein, the appellants argue that the grounds to be satisfied for stay of execution pending appeal are well espoused under Order 42 Rule 6 (2) of the Civil Procedure Rules. The provision states that the court should be satisfied that;
 - a. Substantial loss shall be occasioned on the Applicant.
 - b. The application has been made without unreasonable delay.
 - c. The Applicant has given adequate security for due performance of the decree as ordered by the court.
35. That in *Kiambu Transporters v Kenya Breweries* [2000] eKLR, it was stated that the court looks at certain conditions before granting a stay of execution. The following conditions must be satisfied before the court can grant a stay.
 - a. That the Application has been made without unreasonable delay.
 - b. That substantial loss will result to the Applicant unless such order is made.
 - c. Security for due performance of the decree has been given by the Applicant.
36. On whether the application was filed without unreasonable delay, the appellant submitted that Judgment in *Kabarnet CMCC No. 13 of 2020* was delivered on 22nd September,2021 and application dated 4th October, 2021 for stay pending appeal was filed, heard and allowed on 12th Janury,2022, on condition that a third of the decretal amount be paid to the Plaintiff and two thirds be deposited in a joint interest earning account within 30 days. The matter was consolidated with *Kabarnet CMCC No.14 of 2020 (Kabarnet Civil Appeal 17 of 2021)*.That they complied with the court’s conditions; and 6 months after the applicant complied with the said conditions for stay, the Respondent filed an application dated 26th August,2022 to lift the stay orders which application was allowed on 27th April, 2023 and Coupled with the fact that the Appeal was dismissed on 18th April, 2023, the conditions for stay pending appeal was automatically extinguished.



37. That the instant application was made on 10th May, 2023 a period of 10 days upon the Appellant realizing that the Appeal had been dismissed on 28th April, 2023 while filing the record of appeal and the application was therefore made without delay.
38. Further that the respondent has not demonstrated ability to refund the decretal amount in the event the appeal is successful the Appellants shall suffer substantial loss if orders sought are not granted. In support of the argument, the applicant cited the case of *Aihyder Trading Company Limited v Lucy Jepngetich Mibei* [2016] eKLR the court in addressing the issue of substantial loss rendered itself:
- “In the instant application, through her alleged incapacity to refund the decretal sums was deponed to in paragraph 5 of the supporting affidavit, the respondent in her replying affidavit did not respond to the claim. She did not in fact make any mention of her financial capacity. In the circumstances, I find that that the respondent has failed to demonstrate that she was in a position to refund the decretal amount in the event the pending appeal was successful.”
39. On the issue of security, the applicant submit that they have complied with the Lower Court's directions and the deposited security is still held in a joint interest earning account in the names of the advocates for the parties and the security should be maintained pending the hearing and determination of the appeal herein.

Respondent's Submissions

40. The respondent submit that the orders issued by the court on the 12th January, 2022 were conditional and the Appellants were under a duty to abide by the terms as follows: -
- a. Pay one third of the decretal sum to the Respondent.
 - b. Deposit two thirds of the decretal sum in an interest earning account in the names of both counsels.
 - c. The above terms were to be met within 30 days, failure of which the stay of execution automatically lapsed.
41. That the 30 days lapsed on the 13th February, 2022 by which time the Appellants had not released one third of the decretal sum as ordered by court. They submit that the Appellant released the cheque for the decretal sum through a letter dated 10th March, 2022 forwarding a cheque dated 9th March, 2022, by which time the conditional stay had lapsed. That the conditional stay was a two-legged stool and the Appellants were bound to comply with the two limbs, failure of which it automatically lapsed. That the Appellants did none of these actions to the orders issued on the 12th January, 2022 but just chose to blatantly disregard or disobey.
42. The Respondent submit that court orders are not to be disregarded or disrespected by litigants and are not made in vain and must be obeyed, unless set aside or stayed.
43. Among the cases cited include *Central Bank of Kenya & Another v Ratilal Automobiles Limited & Others* Civil Application No, Nai. 247 of 20, where the Court of Appeal held that judicial power in Kenya vests in the Courts and other tribunals established under *the Constitution* and that it is fundamental tenet of the rule of law that court orders must be obeyed and it not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of law.



44. Further that the application so far as it seeks stay orders is res-judicata the issue having been determined by the order dated 12th January,2022 and it is trite law that if any court in the exercise of its jurisdiction delivers a judgment or a ruling which is in its nature final and conclusive, the judgment or ruling is res judicata. That the injunctive and stay of execution of the judgment issued. On 22nd September, 2021 prayers sought in the present application were also sought in the earlier application dated 24th September, 2021, which was allowed by a court order dated 12th January, 2022; that a litigant should not be allowed to litigate a matter all over again once a final determination has been made. Generally, a party will estopped from raising issues that have been finally determined in previous litigation; even if the cause of action and relief are different. The purpose obviously is to prevent the repetition of lawsuits between the same parties. The Appellants' application, being an attempt at, a cosmetic facelift of its earlier application ought to be dismissed with costs.
45. The respondent further submit that the Appellants filed an application dated 9th November, 2022 seeking orders to extend time within which to comply with the conditions for stay pending appeal ordered vide a ruling dated 12th January,2022 and it should be noted that the appellants did not comply with the orders of the Honourable court by virtue of filing an application for extension of time and only sought to enlarge time after which the Respondents filed an application for release of money.
46. On whether the appeal should be reinstated, they submit 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 and cited the case of John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation)[2015]eKLR, the court held the tests to apply in an application to reinstate a suit are whether there are reasonable grounds to reinstate, considering the prejudice that the defendant would suffer if reinstatement of the suit was made against the prejudice the plaintiff would suffer if the suit is not reinstated.
47. That the Appellant filed the appeal, through a Memorandum of Appeal dated 4th October, 2021. The appeal was dismissed on 18th April, 2023; that it was the primary duty of the Appellants to take steps to prosecute the appeal but unfortunately 17 months down the line, no steps were taken to prosecute the appeal thereby resulting to dismissal for want of prosecution.
48. On challenge in preparing record of appeal, the respondent argue that the Appellants have failed to annex evidence of any correspondence to confirm any efforts made to secure the said decree. That it is not enough to make mere averments devoid of supporting evidence.
49. That Order 42 Rule 5(1) of the Civil Procedure Rules provides as follows: -
- “Unless Within three months after the giving of directions under rule 13 the appeal shall not 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”.
50. That the order dismissing the suit was justifiable.
51. On notice to show cause why the matter should not be dismissed, counsel submit that notice of dismissal of the suit was given through the judiciary website and cause-list prepared which is adequate notice to the parties and the law does not envisage a situation where courts are burdened with the process of looking for indolent litigants to personally serve them with a notice to show cause.



52. On whether setting aside dismissal order is prejudicial the respondent submit that the delay of 1 year and 5 months has not been satisfactorily explained by the Applicant and the delay is a source of prejudice to the Respondent and urged this court to deny the prayers sought by the Applicant.

Analysis And Determination

53. I have considered the grounds of application herein, averments by counsels for parties and submissions filed and wish to consider the application meets the threshold for grant of orders sought.

Whether this Honourable court should grant stay of execution pending appeal

54. Record show that the Applicants filed an application dated 4th October, 2021 before the trial court seeking stay of execution pending hearing and determination of the appeal. The trial court delivered its ruling on the 12th January 2022, with condition for Applicants to deposit a sum of Kshs. 808, 850/=, and Kshs.1,208,550/= in Kabarnet CMCC NO. 13 and 14 of 2020 respectively within 30 days failure of which the order lapses.

55. The Applicants failed to comply with the trial Court's orders of 12th January, 2022 which prompted the Plaintiff/ Respondent to file an application dated 26th August 2022 seeking release of the decretal sum of Kshs. 1,570,677/= that was being held in Family Bank account no. 0180xxxxxxx to the Plaintiff/ Respondent.

56. Having failed to comply with the court orders, the Applicants sought leave of the court to extend time within which to comply with the court order vide application dated 9th November, 2022, which application was dismissed with costs to the Respondent in a ruling that was delivered on the 24th day of March, 2023 and the court made an Order releasing the decretal sum of Kshs. 1, 570, 677/= together with the interest held in Family Bank Account No. 0180xxxxxxx to the Respondents' counsel which order the Appellants herein seeks to stay.

57. Section 80 of the Civil procedure Act provides that:-

“Review: 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.”

58. Under Order 45 Rule 1 of the Civil Procedure Rules provides as follows:-

“Application for review of decree or order [Order 45, rule 1.]

- (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 appellants, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

2. To whom applications for review may be made [Order 45, rule 2.]

- (1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.
- (2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.
- (3) If the judge who passed the decree or made the order is still attached to the court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other judge as the Chief Justice may designate.

59. The Order 50 Rule 6 of Civil Procedure Rules provides an express jurisdiction and discretion to extend time in the following terms:

“Order 50 Rule 6 Power to enlarge time.

6. Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

60. This Court accepts the guidance of the Supreme Court in *Nicholas Kiptoo Arap Salat v. Independent Electoral and Boundaries Commission & Ors.* [2014] eKLR on ‘the underlying principles that a court should consider in exercise of the discretion to extend time’ as follows:

“This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:



1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

61. In view of the above, it is clear that the issue of extension of time within which to comply with the conditional stay is discretionary and the lower court was therefore exercising its discretionary powers by declining to grant the extension of time in which to comply with the conditional stay based on the circumstances laid before it by the parties.

62. One of the key elements that a court of law is bound to consider when granting an order of stay of execution of decree pending appeal as stipulated under Order 42 Rule 6(2) of the Civil Procedure Rules is the security to be given by the party appealing, for the due performance of decree appealed from. The trial court did consider arguments made by each party on the application for stay of execution of decree, which application was made immediately after judgment was delivered in the lower court, before granting a conditional stay with timelines.

63. I note that though the Appellants did not comply within the stipulated timelines it did eventually comply with the orders of the court and deposited the monies/security as ordered by the court. Having considered averments herein from both parties, I find that it will be in the interest of justice to allow the applicant prosecute the appeal. I therefore set aside the Order dated 27th April, 2023 in Kabarnet CMCC 13 of 2020 as consolidated with Kabarnet CMCC 14 of 2020 for release of security in Family Bank Nakuru Branch Account No. 0180xxxxxxx to the Plaintiff and the Appellants/Applicants are therefore granted stay of execution of the Decree delivered on 22nd September 2021 in the primary suit being KABARNET CMCC NO. 13 OF 2020 of the Lower court issued on the pending the hearing and determination of the appeal.

Whether the applicant has established sufficient cause to justify the exercise of this court’s discretion in his favour by reinstating his appeal as sought

64. Indeed, both the dismissal of this appeal for want of prosecution and its reinstatement is an act of the exercise of this court’s discretionary power. Thus, the principles in the case of Mbogo & Anor v Shah [1968] E.A 93 apply.

65. Order 42 rule 35 of the Civil Procedure Rules which deals with dismissal of appeals for want of prosecution states as follows:



- (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.
66. The above provision contemplates two scenarios in which an appeal can be dismissed for want of prosecution. The first one is, if within three months after directions are given, the appellant does not fix the appeal for hearing, the respondent has an option of either setting down the appeal for hearing or applying to the court to have the appeal dismissed for want of prosecution.
67. The second scenario envisages a situation where the appeal is not set down for hearing for over a year after service of the memorandum of appeal. In such a case, the registrar shall on notice to the parties list the appeal before a judge for dismissal.
68. In this case, it is clear from the proceedings that the appeal was dismissed under order 42 rule 35 (2) as it is clear that directions on the disposal of the appeal had not been issued before the appeal was dismissed. I agree with the respondent's submissions that the court had inherent jurisdiction to dismiss an appeal for want of prosecution if it was satisfied that there was prolonged and unjustified delay in prosecuting the appeal and that the delay was deliberate and was aimed at defeating the course of justice.
69. That said, my perusal of the court record and the depositions made by the parties in support and in opposition to the application. I take note of the fact that among factors that has delayed this matter is signing of degree. I also agree with the Respondents that the Appellants had the avenue of filing a record of appeal and later on upon getting the signed decree file a supplementary record of appeal. I however note that the Appellant has indicated that they are interested in prosecuting the appeal and has demonstrated that by complying with trial court's orders to deposit security.
70. In applications of this nature, the court is called upon to weigh the competing interests of both parties and to make a decision that best serves the interests of substantive justice. The court is alive to the fact that being aggrieved by the trial court's decision, the applicant had a right to be facilitated to exercise his constitutional right of appeal. On the other hand, the respondent being the successful party in the lower court had a right not to be unduly delayed before enjoying the fruits of his judgement.
71. In weighing and balancing the interests of the parties, the court is enjoined to consider the prejudice each party was likely to suffer if the application was decided one way or the other. In my view, if the application was allowed, the respondent was not likely to suffer any prejudice that cannot be ameliorated by an award of costs. But if the application was dismissed, the appellants will definitely suffer grave prejudice as they will be denied the right to be heard on appeal which will violate their constitutional rights under article 48 as well as article 25 and article 50 (1) of *the Constitution* which guarantees to all person's access to justice and the right to a fair trial.
72. In view of the foregoing, I am persuaded to allow the application but on conditions which will ensure that the appellant does not go back to sleep after the appeal was reinstated.

Final Orders

1. Appeal herein is hereby reinstated.
2. The security deposited in the joint names of counsels herein to remain in the said account pending hearing and determination of the appeal.



3. Directions on hearing of appeal to be given upon delivery of this ruling.
4. Appellant to pay thrown away costs of Kshs 50,000 to the respondent within 30 days from the date of this ruling.
5. Orders 1 – 4 above to apply in HCCA No. E017 of 2021.

RULING DELIVERED, DATED AND SIGNED IN VIRTUALLY AT ELDAMA RAVINE HIGH COURT SUB-REGISTRY THIS 22ND DAY OF FEBRUARY 2024.

.....

RACHEL NGETICH

JUDGE

In the presence of

Njoroge - Court Assistant.

Ms Tunda for Respondent.

No appearance for Applicant.

