



Transmara Sugar Company Limited v Okengo (Miscellaneous Civil Application 216 of 2023) [2024] KEHC 2335 (KLR) (7 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2335 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
MISCELLANEOUS CIVIL APPLICATION 216 OF 2023**

RPV WENDOH, J

MARCH 7, 2024

BETWEEN

TRANSMARA SUGAR COMPANY LIMITED APPLICANT

AND

ZABLON JOEL OKENGO RESPONDENT

RULING

1. Transmara Sugar Company Limited (applicant) filed a Notion of Motion dated 15/6/2023. The application is based on the grounds found on the body of the application and it is supported by the affidavit of Emmanuel Seriani, Counsel for the applicant sworn on even date. The applicant seeks the following orders: -
 1. That the appeal being Migori HCCA No 57 of 2021 be and is hereby reinstated for hearing and determination on merit.
 2. That the record of appeal annexed and marked "A" be deemed to be duly filed, served and properly on record.
 3. That this court do make any such further orders and issue any other relief it may deem just to grant in the interest of justice.
 4. There be costs in the cause.
2. It was deposed that the applicant was aggrieved by the decision of the trial court in this matter and filed Appeal No 57 of 2021; that the appeal was dismissed on 5/12/2022 for failure to file the record of appeal on time; that the failure to file the record of appeal on time was occasioned by the inability to get the typed proceedings and decree on time; that the delay was occasioned by the previous Counsel who had misplaced the office files and the appellant resorted in seeking the registry's assistance to allow



them make copies of the record of appeal from the court file. Counsel stated that the applicant was ready and amenable to adhere to this court's set timelines in disposition of this appeal.

3. The respondent opposed the application and filed a replying affidavit dated 4/7/2023. The respondent deposed Migori HCCA No 57 of 2021 was dismissed in the presence of all parties for failure of the applicant to file the record of appeal on time; that the application should have been filed in HCCA E057 of 2021 but not as a new case; that the present applicant has been brought over 6 months after the dismissal order; that this court has no jurisdiction to hear and determine this application as it was already heard and determined on 5/12/2022; that this application lacks merit and it should be disallowed with costs.
4. Both parties file their respective written submissions which I have duly considered.
5. The respondent has challenged the jurisdiction of this court in listening to the present application. Order 12 Rule 7 of the Civil Procedure Rules provides: -

"Where under this Order judgement has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgement or order upon such terms as may be just."

6. The same principles applies when an appeal has been dismissed. Having not heard and determined the merits of the appeal, this court is still seized with jurisdiction to hear and determine the main appeal.
7. The Rules provides that the court may set aside or vary the judgement on such terms as may be just. Therefore, it is an exercise of this court's discretion which must be exercised fairly and judicially based on good reasons. This was the finding in *Shah v Mbogo* (1967) EA 116 the court had this to say on the practice of discretion by a court: -

"The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice."

8. In *John Nabashon Mwangi v Kenya Finance Bank Limited (in Liquidation)* (2015)eKLR the court outlined the principles to be considered on reinstatement of a suit 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 acts 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."



9. The main ground upon which the applicant alleges on why it did not file the appeal on time, was that the previous Counsel misplaced the office file. However, the applicant has not furnished this court with correspondences between its present Counsel and former Counsel requesting for the original file. The instant application was filed a period of 6 months after the dismissal order was made.
10. The appeal HCCA E057 of 2021 was dismissed on 5/12/2022 after the court served Notice to Show Cause on the appellant. I think it is necessary to capture the history of the case. After the appeal was filed in 2021 no action was taken in the appeal till the court jolted the parties to action by inviting them for a mention on 19/7/2022 and 27/7/2022 but parties failed to appear. On 5/9/2022, the Deputy Registrar allowed the appellant's counsel Miss Akoya 21 days to file Record of Appeal. On that day, the proceedings were said to be ready. The parties failed to attend court on 27/9/2021 and on 27/10/2021 the Deputy Registrar found that even upto that date, the Record of Appeal had not been filed and sent the file before this court for hearing of the Notice to Show Cause which had been served.
11. On 5/12/2022 when the Notice to show cause came up for hearing, the appellant did not file any Replying Affidavit to explain why the delay or inability to file Record of Appeal. It is then Ms. Akoya informed the court that the decree was not ready which reason Mr. Jura discounted, arguing that the decree had been issued on 31/10/2022. In fact, Mr. Jura counsel for the Respondent indicated that he is the one who had prepared and served the Record of Appeal on the appellants' counsel. What the counsel has deponed to in the affidavit in support of this application for reinstalment of the appeal is contrary to the contents on the court record. The explanation that the appellants counsel purports to give in this application should have been given during the hearing of Notice to show cause for the court's consideration. I find that the applicant was accorded sufficient time to file Record of Appeal which time was squandered. Even when proceedings were ready way back in September, 2022 the applicant did not move with alacrity to file the appeal. The instant application was filed a period of 6 months after the dismissal order. Why the delay of six months when the proceedings were ready?
12. Mr. Jura opposed the application on account of jurisdiction. There is totally no reason why the applicant decided to file a separate Miscellaneous application in seeking to reinstate the appeal resulting from orders made in an appeal. The counsel knew the proper procedure. For unknown reason, counsel did not call for the original court record. The court has had to look out for HCCA E057 of 2021 to find out what transpired in the matter, before dismissal. This application should have been filed in HCCA E057 of 2021. It is a cardinal principle of law that litigation must come to an end. Equity does not aid the indolent.
13. For the above reasons, the application lacks merit and it is hereby dismissed with costs to the Respondent. File closed.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 7TH DAY OF MARCH, 2024

R. WENDOH

JUDGE

Ruling delivered in the presence of;

Ms. Akoya for the Applicant.

Mr. Jura for the Respondent.

Emma & Phelix Court Assistants.

