



**Ngechu & another v Maina (Miscellaneous Civil Case  
E076 of 2022) [2024] KEHC 4499 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4499 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
MISCELLANEOUS CIVIL CASE E076 OF 2022**

**GL NZIOKA, J**

**APRIL 11, 2024**

**BETWEEN**

**JOHN CHEGE NGECHU ..... 1<sup>ST</sup> APPELLANT**

**SATIMA CO-OP SOCIETY SACCO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MARTIN KIBOI MAINA ..... RESPONDENT**

**RULING**

1. By a notice of motion application dated, 18<sup>th</sup> November 2022 brought under the provisions of; section 1A,1B, 3A and 95 of the *Civil Procedure Act*, (chapter 21) Laws of Kenya and Order 45 Rule 1, Order 42 Rule 6, Order 42 Rule 21, Order 50 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules, 2010* and all other enabling provisions of the law, the applicant is seeking for the following orders:
  - a. Spent
  - b. Spent
  - c. That this Honourable court re-open Naivasha HCCA 3 of 2020 that was closed on 11<sup>th</sup> October 2022.
  - d. That civil appeal Naivasha 3 of 2020 that was dismissed on 11<sup>th</sup> October be and is hereby re-instated and/or re-admitted for hearing and determination on merit.
  - e. That the record of appeal annexed herein be deemed to be properly filed and on record.
  - f. 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
  - g. That the costs of the application be in the cause



2. The application is supported by the grounds thereto and affidavit of Lawrence Njuguna, an Advocate of the High Court who has conduct of the matter. He avers that judgment was entered in the Chief Magistrate Court, in favour of the respondent on 6<sup>th</sup> December, 2022
3. However, being aggrieved by the judgment the appellants lodged an appeal being; High Court Civil Appeal No. 3 of 2020, through the firm of; Kairu and McCourt & Co. Advocates, who requested for copies of type proceedings, judgment and decree to prepare the record of appeal.
4. That on 17<sup>th</sup> June 2020, the firm of Kimondo Gachoka & Co. Advocates came on record for the appellants vide a consent that was executed on 17<sup>th</sup> June 2020, but the change of Advocates was not smooth and therefore there was no proper handover.
5. That the court directed that the record of appeal be filed by latest 4<sup>th</sup> April 2022. However, despite request, the proceedings were not availed to enable the appellants to file the record of appeal and neither could the file be traced at the registry to enable receipt of letters of request for proceedings.
6. On 6<sup>th</sup> October, 2022, the matter was before court and the appellants were required to justify the failure to file the record of appeal since the certified typed copies of the proceedings, judgment and decree were available in the court file.
7. However, the Executive Officer did not communicate to the appellants when the missing file was traced in the registry but further forwarded the same to the typing pool for typing of the judgment, proceedings and decree.
8. As such the appellants did not have any tangible proof that they indeed were following up on the certified copies of the typed proceedings, judgment and decree and the appeal was dismissed.
9. The appellants aver that the error and/or mistake of the registry in not supplying the typed proceedings, judgment and decree should not be imputed to them since they made efforts to obtain the copies of the proceedings, judgment and decree.
10. Further the registry also occasioned the delay in filing this application as they refused and/or declined to furnish certified copies of the proceedings, judgment and decree as the file had to be returned to Engineer Court Registry for the appellants to obtain the aforementioned documents.
11. That the record of appeal was filed when the certified copies of the proceedings, judgment and decree were obtained. As such, it is only just and fair that the appeal be reinstated and/or re-admitted on merit to its logical conclusion. That if it is not reinstated the appellants stand to suffer irreparable loss and damage and the appeal on quantum be rendered nugatory.
12. Finally, that the respondents will not suffer any prejudice that cannot be compensated by way of costs if this application is allowed.
13. However, the appeal was opposed vide a replying affidavit dated 31<sup>st</sup> January 2023 sworn by the respondent Martin Kiboi Maina. He deposed that after filing the memorandum of appeal, the applicants sought stay of execution of the decree pending hearing and determination of the appeal.
14. That after the stay was granted, the applicants did not take any steps to prepare records of appeal despite the court giving them several opportunities to file the record, hence the appeal was dismissed.
15. The respondent termed the application as an abuse of the court process as no good reason has been given why the appellants failed to comply with several court orders to file the record of appeal.



16. That there is nothing to show that the purported letters written to court were received and no reply whatsoever has been attached to show that the court acknowledged receipt of the said letters. Further the applicants are blaming the court for delay but no proof that the court delayed to issue the applicants with typed proceedings and decree, and had the applicants followed the proceedings they could have prepared the record in time.
17. That, it is clear that the application herein is made in bad faith and is only intended to further frustrate and deny him from enjoying the fruits of his judgment and if the appeal is allowed, he will be prejudiced by the delay caused, for over 2 years and which is not excusable. Therefore, he urged the court to dismiss this application with costs.
18. The application was disposed of vide written submissions. The applicants filed submissions dated; 9<sup>th</sup> January, 2022 reiterated the averments in the supporting affidavit. That the filing of the record of appeal and the present application shows that they are desirous of prosecuting the appeal and it is in the interest of justice that the appeal is reinstated and readmitted as it raises triable issues for the court to determine on its merits.
19. The applicants cited Article 50 (1) of the Constitution of Kenya, 2010 which provides that 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.
20. The applicants also relied on the case of; Grace Njeri Theuri v John Mburu Wainaina [2022] eKLR where the court held that, the provision for dismissal under Order 42 Rules 11, 13 and 35 of the Civil Procedure Rules cannot be read in isolation and that directions must have been given before an appeal is dismissed for want of prosecution.
21. However, the respondent in submissions dated, 31<sup>st</sup> January 2023, argued that, the applicants filed their appeal on 27<sup>th</sup> January 2020, and it was dismissed on 11<sup>th</sup> October 2022, which was two (2) years and ten (10) months from the date of filing. Further, the applicants took forty-one (41) days before filing the present application and have failed to give any justification for the delay.
22. The respondent submitted that, the decision to reinstate a suit is discretionary and depends on the facts of the case. He relied on the case of; Ivita v Kyumbu (1984) KLR 441 where Chesoni, J (as he then was) in considering an application to dismiss a suit for want of prosecution stated that, the test to be applied was whether the delay was prolonged and inexcusable, and whether justice can be done to both parties.
23. Further, the position of the judge must be considered taking into account missing witnesses or weak evidence due to loss of memory occasioned by lapse of time. Furthermore, the defendant must satisfy the court that he or the plaintiff will be prejudiced by the delay.
24. The respondent argued that, the delay of two (2) years and ten (10) months was prolonged. That, the failure to get the proceedings is a mere excuse considering that the proceedings were in the appeal file but they did not bother to follow up showing lack of interest.
25. Further, the applicants frustrated his effort to enjoy the fruits of his judgment as they decided to sleep once the stay of execution was granted. In the circumstance, the delay is not excusable and the application lacks merit and should be dismissed. He relied on the case of; Attorney General Another v Phylis Wangari Maina & Ano (2001) eKLR where the Court of Appeal held that, pure delay even though some reasons may be given does not constitute sufficient reason even if the opposing party does not oppose extension.



26. Having considered the application in the light of materials placed before the court, I note that the matter before the court has been pending since 28<sup>th</sup> February 2018, when the plaint was filed before Chief Magistrate court. That is a period six (6) years. That the judgment in the trial court was rendered on 6<sup>th</sup> December 2019, being a period of four (4) years, therefore any further delay in the matter does not serve the interest of justice.
27. Be that, as it may, the key question is whether, the applicants have advanced a reasonable explanation as to why the appeal was not prosecuted as per the directions given by the court. The record of the court in this matter reveals that the applicants were given an opportunity to file the record of appeal on several occasions in vain.
28. That on 23<sup>rd</sup> November, 2021 they were given sixty (60) days to file and serve record of appeal and they did not. On 4<sup>th</sup> April, 2022 the court gave the appellants a last opportunity and a further 60 days to file and serve a record of appeal. By the 6<sup>th</sup> October 2022, no record of appeal had been filed.
29. On 6<sup>th</sup> October 2022, the appellants were accorded yet another opportunity to offer an explanation for the delay in filing the record of appeal and on 11<sup>th</sup> October 2022, there was no reasonable explanation offered, and when challenged to produce any letters written to the court to prove that the appellants have been following up on proceedings of the trial court, the appellants could not produce any consequently the appeal was dismissed accordingly.
30. Furthermore, it suffices to note that, in the matter herein, the only documents annexed to the affidavit in support of the application are two letters dated; 21<sup>st</sup> February 2020 and another with invisible date wherein the applicants were seeking for typed proceedings. The final document is dated; 14<sup>th</sup> April 2022 being an email whose contents are to that effect that, file No. CMCC 15 of 2028 was missing.
31. With utmost respect to the applicants, it cannot have taken six (6) years to get the trial court typed proceedings. The appellants should have even sought for intervention of the Appellate Court under its supervisory/administrative authority.
32. It is the considered opinion of the court that, this is a clear case of a litigant being indolent. Equity aids the vigilant and not the indolent.
33. Be that as it may, I have considered the record of appeal filed and the merit or otherwise of the appeal as to whether there is a prima facie arguable appeal. I hold the view that it is in the interest of justice to allow the appellants an opportunity to be heard.
34. However, the file No. High Court Civil Appeal file N0. 3 of 2020 shall be re-opened only on condition that, the appellants pay the respondent 50% of the decretal sum and secure the balance together with any accrued interest thereon from the date of judgment or decree (if any) in the trial court and within twenty-one 21 days of the date of this order. The record of appeal be filed within seven (7) days of the date of this matter.
35. The balance shall be secured vide the deposit thereof in an interest earning account, in joint names of both counsels representing the parties. If the payments ordered are not honoured, the order allowing the re-opening of the file shall automatic lapse on the 22<sup>nd</sup> day thereof. The costs of this application assessed at Kshs 20,000 is awarded to the respondent. That figure is based on the numerous adjournments in the High Court Civil Appeal No. 3 of 2020.
36. It is so ordered.

**DATED, DELIVERED AND SIGNED THIS 11<sup>TH</sup> DAY OF APRIL, 2024.**



**GRACE L. NZIOKA**

**JUDGE**

**In the presence of:-**

N/A for the Applicants

Mr. Owour for the respondent

Ms Ogutu: Court Assistant

