



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Riitho & 2 others v Morias (Civil Appeal E003 of 2020)  
[2024] KEHC 3632 (KLR) (12 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3632 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E003 OF 2020  
DO CHEPKWONY, J  
APRIL 12, 2024**

**BETWEEN**

**JOHN KIAMBO RIITHO ..... 1<sup>ST</sup> APPELLANT**

**SUPREME SHUTTLE LIMITED ..... 2<sup>ND</sup> APPELLANT**

**BETHWEL GATOTO IRUNGU ..... 3<sup>RD</sup> APPELLANT**

**AND**

**PETER MOGOI MORIAS ..... RESPONDENT**

**RULING**

1. What is before the court for determination is the Notice of Motion application dated 22<sup>nd</sup> March, 2022 which seeks the following orders:
  - a. Spent;
  - b. That the Honourable Court be pleased to set aside the Ruling/Order delivered on the 17<sup>th</sup> February, 2022 dismissing the Applicant's Appeal;
  - c. That the Honourable Court be pleased to reinstate the instant Appeal and he same be determined on merit;
  - d. Spent;
  - e. That the Honourable Court be pleased to grant stay pending the hearing and determination of this Appeal;
  - f. That this Honourable Court be pleased to make any such further Order and issue any other relief it may deem just to grant in the interest of justice;
  - g. That the costs of this application be in the cause.



2. The Application is based on the grounds as set out on its face and the Supporting Affidavit of Julius Orange sworn on 22<sup>nd</sup> March, 2022, wherein it is averred that the Applicants filed their Record of Appeal on 21<sup>st</sup> October, 2020 in respect to the Judgment delivered in Kiambu CMCC No. 566 of 2018. That, when the matter came up for Directions on 21<sup>st</sup> October, 2021, the Appellants had already deposited the decretal sum in a joint interest-earning account and the court directed that the Appeal be canvassed by way of written submissions.
3. It is the Applicants case that they were under the impression that their Submissions had been filed and when the matter came up on 17<sup>th</sup> February, 2022, the Appellant's Counsel failed to attend court on account of experiencing technical hitches. That subsequently, the Appeal was dismissed for non-attendance. Accordance to the Applicant, the file then went missing and was advised by the Registry staff that the file had been taken for extraction of warrants.
4. The Applicants contends that the Respondent has threatened to execute and they stand to suffer irreparable prejudice because of this. They urge that the court reinstates the Appeal so that it can be determined on merits and that the application will not be prejudicial to the Respondent as the same has been filed without unreasonable delay and that it will be in the interest of justice if it is allowed.
5. The Respondent, Peter Mogoi Morias filed a Replying Affidavit sworn on 15<sup>th</sup> May, 2023 in opposing the application. He holds that he obtained Judgment of general damages Kshs. 450,000/= and special damages Kshs. 38,750/= as against the Defendants/Applicants on 21<sup>st</sup> October, 2022. That the Applicants then lodged an appeal against the said Judgment and filed an application for stay of execution, which the court allowed on condition that the full decretal sum be deposited in a joint interest-earning account in the names of the Advocates. He goes on to state that the Applicants filed an Appeal and for purposes of fast tracking the hearing and determination of the Appeal, the parties recorded a Consent which was adopted on 18<sup>th</sup> March, 2021 allowing the Appeal to be heard on condition that the decretal sum be deposited into a joint interest-earning account and the monies were subsequently deposited.
6. However, according to the Respondent the Applicants failed to comply with directions of the court to file submissions as per the court directions on 21<sup>st</sup> October, 2021 and on 17<sup>th</sup> February, 2022, the court dismissed the Appeal for failure by the Applicant to file submissions. According to the Respondent, if at all it was true that the Applicant's Counsel had technical hitches, that he could not log into court, communicated with his Counsel to the Applicant could have found out what transpired in court. It is the Respondent's contention that the Applicants have attached Submissions which are dated 16<sup>th</sup> February, 2022 but are not filed when in court yet the Directions of the court were to the effect that the submissions so as to allow for the Respondent to file theirs. It is thus the Respondent's position that the application and attached submissions were an afterthought and only meant to mislead the court.
7. The Respondent refutes the claim that after 17<sup>th</sup> February, 2022, the file went missing in the registry due to extraction of warrants because at the time the Applicants had already deposited the decretal sum in a joint interest-earning account and therefore there is no threat of execution as stated. He contends that the Applicants have come to court with unclean hands with an intention of denying him the fruits of his Judgment. The Respondent has therefore urged the court to dismiss the application.
8. On 19<sup>th</sup> July, 2022, the court directed that the application be canvassed by way of written submissions. The Applicants filed their submissions dated 7<sup>th</sup> October, 2022 whereas those of the Respondent are dated 14<sup>th</sup> October, 2022, all of which the court has taken into consideration in its determination of the application.



## Analysis and Determination

9. This court has considered the application, the affidavits, both in support and rebuttal thereof with the written submissions filed by the parties herein and find that the main issue for determination is whether the application has merit to warrant the reinstatement of the Appeal.
10. From the court record, it is common ground that the present Appeal was filed on 16<sup>th</sup> November, 2020, after the court first addressed the issue of the application for stay of execution which was allowed by consent of both advocates for the parties that the Applicants deposit the full decretal sum which was duly complied with. On 21<sup>st</sup> October, 2021, the court then, in the presence of Counsel for both parties moved to the main Appeal and issued Directions that the Appeal be canvassed by way of written submissions. A mention to confirm this was fixed for on 17<sup>th</sup> February, 2022, but the Applicants' counsel was absent. The court, on noting this and finding that submissions had not been filed, proceeded to dismiss the Appeal for non-attendance.
11. It is worth-noting that although the application was made without inordinate delay, this Appeal was lodged way back in 2020. This court appreciates that court orders are not issued in vain and are meant to be obeyed and complied with by all parties at all times. This court issued Directions for the filing of submissions in respect of the Appeal herein, and not only did the Applicant fail to file the same but also to the Applicant's counsel failed to log onto the court's platform due to a technical hitch. The court finds this reason not substantive, as they had filed their submissions as directed on 21<sup>st</sup> October, 2021 for the court's consideration. It is noted that the submissions attached to the application had not been filed then and even if they were, it would still have been out of the thirty (30) days timeframe that the court had given the parties.
12. This application is governed by the provisions of Order 12 Rule 7 of the [Civil Procedure Rules](#) which states as follows:–
  - “[7]. Where under this order judgment has been entered or the suit has been dismissed the court, an application, may set aside the judgment or order upon such terms as may be just”
13. It is trite that the court has to consider certain factors before setting aside a court order or Judgment. These factors were explained in the case of [Richard Ncharpi Leiyagu -vs- Independent Electoral Boundaries Commission & 2 Others](#) [2013] eKLR, where the Court of Appeal stated:
  - “We agree with those noble principles which go further to establish that the court's discretion to set aside an *exparte* judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. We have considered the reasons that were offered by the appellant regarding their failure to attend court on the 10<sup>th</sup> June, 2013 with anxious minds. We have asked ourselves whether failure to attend court on 10<sup>th</sup> June, 2013, constituted an excusable mistake, an error of Judgment regarding counsel's failure to diarize the date properly or was it meant to deliberately delay the cause of justice.”
14. In this case, the court finds that this being a 2020 Appeal, it ought to have been disposed off by today. The reasons given by the Appellants that their counsel experienced a technical hitch, hence could not log onto the platform has not been sufficiently substantiated as the Counsel could have either sought to establish from the Respondent's counsel or court what had transpired in court . However,



since the record shows the Applicants had always attended court and complied with the directions to deposit the decretal sum in a joint interest-earning account but only failed to attend court once, on 17<sup>th</sup> February, 2022. It is in the interest of justice that they be allowed to prosecute the Appeal so that same is determined on merit as justice requires that courts should be slow in drive away parties without giving them a chance to be heard. The court also noted that the Record of Appeal is yet to be filed. In the circumstance, the Notice of Motion application dated 22<sup>nd</sup> March, 2022 be and is hereby allowed in the following terms:-

- a. The Ruling/Order delivered on the 17<sup>th</sup> February, 2022 be and is hereby set aside.
- b. The instant Appeal is hereby re-instated for determination on merit.
- c. The Appellants/Applicants to file and serve a Record of Appeal within twenty-one (21) days from the date of this ruling.
- d. Mention on 13<sup>th</sup> May, 2024 for parties to confirm compliance and take further directions.
- e. Failure to comply with the above orders, the Appeal shall be rendered as dismissed.

It is so ordered.

**RULING DELIVERED, DATED AND SIGNED AT KIAMBU THIS .....12<sup>TH</sup> .....DAY OF...  
APRIL,...., 2024.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

No appearance for and by the Appellant/Applicant

No appearance for and by the Respondent

Court Assistant - Martin

