



**Wambua v Woodmere Service Apartments (Civil Appeal 680 of 2017)
[2024] KEHC 3677 (KLR) (Civ) (2 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3677 (KLR)

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

CIVIL

CIVIL APPEAL 680 OF 2017

AN ONGERI, J

APRIL 2, 2024

BETWEEN

MWANIA WAMBUA APPELLANT

AND

WOODMERE SERVICE APARTMENTS RESPONDENT

RULING

1. The application coming for consideration is the one dated 2/10/2023 brought under Order 51 Rule 1 of the *Civil Procedure Code*, Sections 1A, 1B and 3A of the *Civil procedure Act*, article 159 of *the Constitution* of Kenya and all enabling provisions of law seeking the following prayers;
 - i. That this matter be certified urgent and service of this application be dispensed with in the first instance.
 - ii. THAT this honourable court be pleased to set aside the orders issued on 2nd October 2023 or such other day in which this appeal was dismissed.
 - iii. That this honourable court be pleased to order the reinstatement and reactivation of the instant appeal and to be heard and determined on merit.
 - iv. That the costs of this application be provided for.
2. The application is supported by the affidavit of Stephen Mwaura Muhia sworn on 2/10/2023 in which he deposed as follows;
 - i. That the appellant/applicant's application dated 10th May 2023 was coming up for hearing on 2nd October 2023 before Hon Asenath Ogeri.



- ii. That on the said date, the Appellant's Advocate had logged in on time and proceeded with the cause list until my matter which was number 20 was called out.
 - iii. That thereafter, the call fell abruptly and by the time the Advocate was logging back in, the Judge was calling out number 21 on the cause list.
 - iv. That when the Judge was done with number 21 on the cause list, the Advocate addressed her with regards to calling out my matter which was the previous one since I was experiencing some technical hiccup.
 - v. That the Judge advised that she will mention the matter again after she was done with the cause list.
 - vi. That when the Judge was done with the cause list, she mentioned a few matters for the advocates that experienced same challenge as ours.
 - vii. That she directed that since she was handling some hearings, she will not continue recalling the cause list and advised that the Advocate to check on the CTS.
 - viii. That when the Advocate checked on the e-filing portal to confirm whether any directions were issued, he discovered THAT the matter had been dismissed for want of prosecution.
 - ix. That no prejudice will be occasioned on the respondent herein should the orders sought be granted by this honourable court.
 - x. That this application is bona fide and has been brought without undue delay.
 - xi. That it is therefore in the interest of justice to have this appeal reactivated and accord the appellant/applicant his day in court and have his matter heard and determined on merit.
3. The respondent filed a replying affidavit by J K Njuguna sworn on 24/10/2023 stating that the trial courts judgement was issued on 8/11/2017.
 4. That the applicant only served the memorandum of appeal upon the respondent on 30/1/2023 six years after the judgment of the trial court. the appeal was dismissed on 3/5/2023 after several mentions and adjournments.
 5. That the applicant being aggrieved and dissatisfied with the dismissal filed a notice of motion dated 10/5/2023 seeking to set aside the said orders. The matter came up for hearing on 2/10/2023 where the court upheld its decision.
 6. He deponed that the application herein lacks merit and is an abuse of court process for reasons that the motion dated 2/10/2023 is res judicata and a delay of over 6 years in prosecuting the appeal is inordinate and inexcusable. The alleged technical hitch experienced by the applicant's advocate is not a good reason for the orders sought.
 7. The parties filed written submissions as follows; the appellant submitted that the chronology of events and activities since 2017 show that the appellant has not been indolent in prosecuting the appeal.



8. That the appellants advocates have been tirelessly pushing for the typed proceedings since the year 2019. The appellants advocate's efforts to continue following up were further hindered due to Covid 19 Pandemic where the courts were forced to go on a go-slow.
9. That the appellant's advocates resumed their efforts in 2021 by writing numerous letters to the lower court and it was not until December 2023 when the advocates were able to secure the proceedings.
10. The appellant/applicant argued that the matter being WIBA could not proceed even if the appellant so wished as it was awaiting the decision of the court of appeal regarding WIBA matters.
11. That dismissing the appeal at this stage would defeat the ends of justice for the appellant who has worked to ensure the record of appeal and the supplementary record of appeal have been filed before this court.
12. The appellant/applicant relied on *Daniel Kamau Kagai v Andrew Gitbae Kamau* [2021] eKLR where they relied on the case of *Pinpoint Solutions Limited & Another vs Lucy Waitbegeni Wanderi (as the legal administrator of the Estate of James Nyanga Muchangi)* [2020] eKLR where the court elaborated on the procedure relating to dismissal of appeals for want of prosecution, saying:-

“The provisions of the law relating to dismissal cannot be read in isolation. The bottom line is that directions must have been given before an appeal can be dismissed for want of prosecution. Indeed, there does not appear to be any penalty where an appellant fails to proceed as per Order 42 Rule 11 and Rule 13 of the *Civil Procedure Rules*, 2010.

This court took the view that an appeal cannot be dismissed before directions had been given. As there was no indication that directions had been given herein, the Appeal herein could not be dismissed under Order 42 Rule 35(1) of the *Civil Procedure Rules*. In any event, there was also no evidence that the Registrar had issued a notice under Order 42 Rule 12 of the *Civil Procedure Rules*. There was also no indication that the lower court file and proceedings had been forwarded to the High Court for the Registrar to proceed as aforesaid.”

13. The respondent submitted that the prayer sought in the instant application are res judicata as an application dated 10/5/2023 the appellant sought the setting aside of orders issued on 3/5/2023 and which orders had the net effect of dismissing the appeal herein.
14. That the aforementioned application was dismissed on 2/10/2023. The respondent argued that the instant application is a replica of the previously dismissed application as it seeks similar orders hence the instant application is an abuse of court process.
15. In support the respondent cited *Kennedy Mokua Ongiri v. John Nyasende Mosioma & Florence Nyamoita Nyasende* [2022] eKLR where it was held;

“A Decision of the court must be respected as fundamental to any civilised and just judicial system. Judicial determinations must be final, binding and conclusive. There is injustice if a party is required to litigate afresh matters which have already been determined by the court.

A Decision of the court, unless set aside or quashed in a manner provided for by the law, must be accepted as incontrovertibly correct. These principles would be ‘substantially undermined’ if the Court were to revisit them every time a party is dissatisfied with an Order and goes back to the same Court particularly when there is a change of a Judicial Officer in the Court station.”



16. The respondent further submitted that the instant appeal is wrongly before this court for late service of both the memorandum of appeal and record of appeal and the fact that the appeal was dismissed on 3/5/2023 and the same has not been reinstated. Further, the appeal herein was filed nearly 6 years from the date of the judgment subject of the appeal that was delivered on 8/5/2017. No reasonable explanation was given by the appellant as to the reason of the delay and it can be inferred that the appellant is not interested in prosecuting the appeal.
17. The sole issue for determination is whether the suit should be reinstated for hearing.
18. The court has a discretion to reinstate the suit upon certain conditions. In *Ivita vs. Kyumbu* [1984] KLR 441 Chesoni J stated:

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”

19. In the current case, the appellant has explained reason for the delay including the fact that this being a WIBA matter it could not proceed even if the appellant so wished as it was awaiting the decision of the court of appeal regarding WIBA matters.
20. The respondent has not disputed the reasons for the delay which also included the Covid 19 Pandemic where the courts were forced into a go-slow.
21. I find that it is in the interest of justice in the circumstances to allow the appellant to exercise his right of appeal.
22. The appeal is reinstated on the following conditions;
 - i. That the applicant pays thrown away costs of kshs.10,000.
 - ii. That the appeal be prosecuted within 90 days of this date.
 - iii. That the costs of the application to abide the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 2ND APRIL, 2024.

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A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

