



**Cooperative Insurance Co (Kenya) Ltd v Thama (Civil Appeal
45 of 2020) [2024] KEHC 7245 (KLR) (3 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 7245 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 45 OF 2020
DO CHEPKWONY, J
MAY 3, 2024**

BETWEEN

THE COOPERATIVE INSURANCE CO (KENYA) LTD APPELLANT

AND

PATRICK KARIUKI THAMA RESPONDENT

RULING

1. What is before court for determination is the Notice of Motion application dated 17th March, 2022 which seeks the following orders:-
 - a. That the Order of the Honourable Court made on 20th September, 2021 dismissing the Appeal herein together with all consequential orders be reviewed, varied and/or set aside.
 - b. That this Honourable Court be pleased to reinstate the Appeal.
 - c. That costs of this application be provided for.
2. The Application is based on the Supporting Affidavit of Eddah Simiyu sworn on 17th March, 2022 and the following grounds:-
 - a. That the Order made on 20th September, 2021 dismissing the Appeal filed herein was made through no fault or wrongdoing on the part of the Applicant but through the omission and error of the court to issue notice to the applicant regarding court attendance.
 - b. That in the interests of justice, the said order ought to be reviewed and the suit herein reinstated for hearing and determination.
 - c. That no prejudice shall be occasioned to the Respondent if the said application is allowed since the Appellant's case hasn't been heard.
 - d. That it is just and fair that the orders sought herein by the Appellant/Applicant be granted.



3. The Respondent opposed the application through the Replying Affidavit sworn on 16th July, 2022 by his counsel Gerald Gakaria. He avers that the application for reinstatement was made six (6) months after the dismissal of the Appeal and the reasons given by the Appellant have not satisfactorily explained the delay. He avers that he has been receiving notification from the court and believes that the Applicant has been receiving the same notifications. Therefore, it cannot be argued that the Appellants have been aware of the dates allocated.
4. According to the Respondent's counsel, the Appellant has not provided any evidence to show that they wrote to court protesting unavailability of the file for the court to take a step. He avers that prior to the Appeal. On 12th June, 2014, the trial court had granted the Appellant stay on condition that it deposits a sum of Kshs 460,000/= in names of both Counsel that the Appellant waited until 3 days to expiry of the compliance time to write to his firm to request the signing of account opening documents and or to avail the required documents which shows a pattern of indolence on part of the Appellant.
5. The learned Counsel avers that the Appellant did not comply with the conditions for stay orders and even if they did, they did not take any further steps to prosecute the appeal. In his view, this court is now functus officio having dismissed the appeal hence the only avenue available was to appeal to the Court of Appeal. He urges the court not to allow the Appellant to have a second bite of the cherry but instead to dismiss the application with costs.
6. Further, the Appellant filed Supplementary Affidavit which was sworn by its advocate M/S Eddah Ngichave Simiyu on 28th August, 2023 in response. She refuted the claim that the failure to comply with the conditions for stay orders was on the part of the Respondent's counsel who failed to cooperate in the account opening process. She confirms that they had written to the Respondent's counsel vide a letter dated 4th July, 2014 seeking him to provide the requisite documents for the opening of the account. Instead, the Respondent's Counsel remained unresponsive to the letter prompting an application for the court to review the condition for stay so as to have the cheque returned to the Appellant.
7. The Appellant's counsel annexed communications to the Deputy Registrar seeking the matter to be allocated a mention date for directions to issue and more specifically, letters dated 27/5/2015, 3/3/2016, 5/7/2016, 27/03/2017, 11/5/2017 and 2/3/2017 which were all stamped and received. She added that the Appellant had filed a Supplementary Record of Appeal on 5/08/2018 which shows that the Appellant is interested in the Appeal.
8. The Appellant's counsel further averred that the file was transferred from Nairobi to this court in the year 2020 during the Covid-19 Pandemic without their knowledge and they only learnt of the dismissal in February, 2022. She avers that upon being aware of the dismissal, the Appellant immediately filed the present application for reinstatement of the Appeal and urges the court to set aside the dismissal and reinstate the appeal for its disposal on merit.
9. Directions were issued that the appeal be canvassed by way of written submissions and the record shows parties duly complied. The parties submissions will be considered in the determination of the application.

Analysis and Determination

10. The court has considered the application and eh response thereto, and the issue arising for determination is whether the Appellant has made a case for review of the orders dismissing the appeal herein and if so, whether the appeal should be reinstated.



11. The principles governing reinstatement of a suit are as stated in the case of *John Nabashon Mwangi – vs- Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR 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.”

12. With regard to the instant case, and bearing in mind the above-cited principles, whereas the Appellant avers that the file was transferred from Nairobi to this court without their knowledge, the court record reflects that the appeal has been listed before this court for various purposes and more specifically on 5th August, 2020, 16th December, 2020, 17th May, 2021 and 20th September, 2021 but in absence of the parties. On 17th May, 2021 the court issued Notice to Show Cause in absence of the parties and reconvened for hearing of the same on 20th September, 2021. On this day, only the Appellant’s counsel attended court and consequently, the appeal was dismissed for want of prosecution. It appears that the Appellant awoke from slumber upon being prompted through an execution and filed the present application seeking reinstatement of the Appeal.
13. The only evidence which the Appellant has presented to show its interest on the appeal are the which date between 2015 and 2017 and the filing of the Supplementary Record of Appeal on 5th August 2018. There is no further evidence of any step taken from 2018 as efforts asserted to prosecuting the appeal until the 17th March, 2022 when the application for reinstatement was made.
14. It is reknown in law that equity aids the vigilant and not the indolent. The much delay exhibited in this matter displays the Appellant as a lithergic and indolent litigant who slept on his rights. In the case of *Simon Wachira Nyaga –vs- Patricia Wamwirwa* (2018) eKLR, the Court held that:-
- ‘Equity helps the vigilant but not the indolent. The law encourages a speedy resolution for every dispute. A court of equity has always refused its aid to stale demands, where a party has slept on his right and acquiesced for a great length of time. The Appellant slept on his rights even after being offered a warning by the Court.’
15. Upon a consideration of the lengthy delay in this matter, this court is not persuaded by the explanation given by the Appellant to warrant reinstatement of the Appeal. Thus, this Court is of the opinion that the appeal was correctly dismissed for want of prosecution.
16. The upshot is that the Notice of Motion application dated 17th March, 2022 lacks merits and the same is hereby dismissed and all consequential orders in place thereof are hereby discharged. Costs of the application are awarded to the Respondent.

It is so ordered.



RULING DATED AND SIGNED AT KIAMBU THIS 3RD DAY OF MAY , 20 24.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Simiyu counsel for Applicant

Court Assistant - Martin

