



H. Young & Co. (EA) Ltd v Ngongo & Msagija (Suing as the Legal Representatives of the Estate of Lucas Msagija - Deceased) & another (Civil Appeal E005 of 2021) [2024] KEHC 4718 (KLR) (7 May 2024) (Ruling)

Neutral citation: [2024] KEHC 4718 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CIVIL APPEAL E005 OF 2021
SM GITHINJI, J
MAY 7, 2024**

BETWEEN

H. YOUNG & CO. (EA) LTD APPLICANT

AND

PENINAH WANJALA NGONGO AND HEZRON MSAGIJA (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF LUCAS MSAGIJA - DECEASED) 1ST RESPONDENT

FATUMA ABDI MOHAMED 2ND RESPONDENT

(Being an Appeal from the Judgment/decree of Hon E.M.Kadima – Senior Resident Magistrate delivered on 10th June, 2021 in Garsen PMCC NO.76 of 2019)

RULING

1. Before me is a notice of motion dated 11th July, 2023 substantively brought under Section 3A of the [Civil Procedure Act](#); Order 12 rule 7, Order 42 rule 6 and Order 51 rule 1 and 15 of the [Civil Procedure Rules](#) and all other enabling provisions of the law. The application seeks orders as follows: -
 1. Spent.
 2. Spent.
 3. That the honourable court be pleased to set aside the order issued on 6th July 2023 dismissing the appeal herein in default of appearance and the appeal be re-admitted for hearing and disposal on its merit.
 4. That the costs of this application be provided for.



2. It is supported by grounds on its body and supporting affidavit of Mr. Mbago A Omondi, counsel for the Applicant. The Applicant's case is that the appeal was scheduled for directions on 6th July 2023 when it was dismissed with costs for non-attendance. That the said mention date was served via their former law firm email address msa@mmmnlaw.com which was under the control of the then managing partner, Mr. Boniface Ndumia, who withdrew from the firm preventing access of the account by the other partners and employees. As such, so Mr. Mbago deposed, they were not aware of the mention date until when they were served with the warrants of attachment by M/s Mutrix Auctioneers.
3. Mr. Mbago urged the court to allow the present application in the interest of natural justice and let the appeal be heard on merit. He added that the Respondents will not be prejudiced since the Applicant had already furnished the relevant security.
4. The application is opposed. Mr. Kilonzo, counsel for the 1st Respondent, filed a replying affidavit which he swore on 31st July 2023 stating that the application is bad in law, lacks merit and is meant to delay the respondent from enjoying the fruits of litigation. He accused the Applicant of being an indolent litigant having delayed the conclusion of this appeal since 2021. Mr. Kilonzo added that the Applicant failed to deposit the entire security amount as directed by the court and does not deserve the court's favour or discretion. He deposed that the Applicant deposited the sum of Kshs. 272,000 as opposed to Kshs 387, 754 as directed by the court. According to Mr. Kilonzo, the firm's personal business is not sufficient reason as to why the Applicant failed to attend court.
5. The application was canvassed by way of written submissions which I have carefully perused. Having keenly considered the application, affidavits and annexures thereto, submissions and authorities cited to me by both counsel, I find that the sole issue for determination is whether the orders dismissing the appeal ought to be set aside and the appeal be reinstated.

Analysis and Determination

6. In *Joseph Kinyua v GO Ombachi [2019]* eKLR, Gikonyo J explained as follows regarding reinstatement of suits -

- “ 3. The application is asking for reinstatement of the appeal for hearing on merit. I will not re-invent the wheel on this subject. I stated the principles governing reinstatement of suit in the case of *John Nahashon Mwangi v 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.”

7. The applicant stated that his appeal was admitted on 4th May 2023 and slated for mention for directions on 6th July 2023. That the mention date was then served to them via an email address that was inaccessible to the members of the firm. This they explained was because the advocate who controlled the said email address had ended his partnership with the firm. That they informed the court registry and the Respondents’ advocates of the change in email address on 25th May 2023 and 15th June 2023. The Applicant however, did not produce any evidence to demonstrate that the said advocate left the firm or that it made any follow ups as to the status of its appeal.
8. Be that as it may, I am aware that Article 50 and 159 of *the Constitution* of Kenya, 2010 enjoins the court to administer substantive justice and to protect an individual’s right to be heard. It is also trite that the mistake of an advocate should not be visited upon a litigant. Further, as it was demonstrated in the aforementioned case, dismissal is a draconian act. I therefore find that justice will be better served in reinstating the appeal albeit with strict conditions.
9. Accordingly, I set aside the order issued on 6th July 2023 and reinstate the appeal on condition that the Applicant sets down the appeal for hearing within 21 days from the date hereof and pay costs of this application to the Respondents within 21 days, failure to which the appeal shall stand dismissed. Respondents should compute their costs and serve the applicant within 7 days from the date hereof. Mention of the matter on 29th May, 2024.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 7TH DAY OF MAY, 2024.

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S.M. GITHINJI

JUDGE

In the Presence of; -

1. Mr Mbithi for the Appellant/Applicant
2. Mr Kilonzo for the Respondent

