



**Asad Motors Limited & 2 others v Kashuru (Civil Appeal
E134 of 2022) [2024] KEHC 6966 (KLR) (11 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6966 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E134 OF 2022
SM GITHINJI, J
JUNE 11, 2024**

BETWEEN

ASAD MOTORS LIMITED 1ST APPLICANT

OMAR YARROW ABDI 2ND APPLICANT

THOMAS MICHAEL CHARO 3RD APPLICANT

AND

SAMUEL RANDU KASHURU RESPONDENT

*(Being an Appeal from the Judgment and Decree of Hon J.Ong'ondo
– Senior Principal Magistrate delivered in Malindi Chief
Magistrate Civil Case Number 54 of 2021 on 30th November, 2022)*

RULING

1. On 20/7/2023, this Court dismissed this appeal for want of prosecution thus prompting the Applicants to file the present Notice of Motion dated 21/7/2023. The Application is brought under Article 48, 50 (1) and 159(2) of the Constitution of Kenya, Section 1A, 1B, 3 and 3A of the Civil Procedure Act, and Order 12 Rule 7, 42 Rule 11, 13, 20, 21 and 35, and Order 51 rule 1 of the Civil Procedure Rules, 2010. The Applicant seeks the following orders:
 - a. Spent.
 - b. Spent.
 - c. That the honourable court be pleased to set aside the order for dismissal of this appeal made on July 20, 2023 and reinstate the same for prosecution.
 - d. That costs of this application to be in the cause.



2. The application is premised on the grounds on the face of it and supported by the Affidavit sworn on the even date by Ms. Winnie Julu, counsel for the Applicants. Ms. Julu stated that she filed the present appeal on 8/12/2022 and on the same day, she sent a letter to the in-charge civil registry requesting for the typed proceedings. She exhibited the letter dated 8/12/2022 as WJ-1. That the registry responded on 5/5/2023 with an invoice which she exhibited as WJ-2. Upon making the necessary payments, the Applicants sent several reminders via email inquiring on the status of the typed proceedings, which she stated were never responded to until on 29/5/2023 when the Registry informed them that the same was still pending and would be updated once complete.
3. There was no further communication whatsoever until in the morning of 21/7/2023 when the Applicants learnt from the Judiciary Public Information e-kiosk that the appeal had been set down for mention and dismissed for want of prosecution. Ms. Julu further stated that the appeal was neither set down for directions nor admitted before the same was dismissed and that failure to prosecute the appeal was not deliberate, contributed to or caused by the applicants.
4. The application is opposed by the Respondent. He filed a replying affidavit sworn by his advocate, Mr. Geoffrey Kilonzo on 31/7/2023 wherein he deposed that the application lacks merit is brought in bad faith, is bad in law, an abuse of the court process and intended to deny the Respondent from enjoying fruits of litigation. According to Mr. Kilonzo, the Applicants are indolent having inordinately delayed to prosecute the appeal for over one year and failing to comply with orders of setting down the appeal for hearing within the time limits.
5. The application was canvassed by way of written submissions. The Applicants filed their set on October 24, 2023 and the Respondent on January 16, 2024. I have carefully considered the parties' written submissions and formulate the issue to be determined as whether the Applicants have established sufficient cause to justify the exercise of this court's discretion in their favour by allowing the application as prayed. In other words, whether the honourable court should set aside the order for dismissal of this appeal made on 20/7/2023 and reinstate the same.

Analysis and Determination

6. 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 on application, may set aside the judgment or order upon such terms as may be just.
8. Indeed, both the dismissal of this appeal for want of prosecution and its reinstatement is an act of the exercise of this court's discretionary power. Thus, the Court must caution itself not to exercise its discretion in a manner that will result in an injustice. This position is fortified in the case of [Richard Ncharpi Leiyagu v 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 *ex-parte* 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...”
9. I note that the dismissal of the appeal herein was on 20/7/2023 and this application was filed on 25/7/2023, just 5 days later. Thus, it cannot be said there was inordinate delay in bringing up the application.



10. I have taken into consideration that the respondent has strongly opposed the reinstatement of the appeal herein for various reasons. I however, find that the application is not fatally defective, and in my view, by applying the legal requirements of fair trial under Article 50 of the Constitution and requirements for dispensation of substantive justice under Article 159(2) (b) of the Constitution, this application should be allowed to give parties a chance to argue the substantive appeal. Counsel for the applicants stated that they were not served with the mention notice to show cause and indeed, there is no evidence of such service. I also find that the respondent will not suffer prejudice if the appeal is reinstated.
12. I thus do allow the application on conditions that the applicants pay to the respondent throw-away costs of Kshs. 15,000/= within 7 days from the date hereof; and that the appellants shall take steps to set down the appeal for hearing within 30 days: Failure to which, the appeal shall stand dismissed.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 11TH DAY OF JUNE, 2024.

S.M. GITHINJI

JUDGE

In the Presence of; -

Miss Nyambuto for the Respondent

Mr Kioko holding brief for Mr Jengo for the Applicant

