



Gicheru & another v Kamande (Being sued as the administrator of the Estate of Boniface Gitau Waweru (Deceased)) (Civil Appeal 27 of 2023) [2024] KEHC 6728 (KLR) (6 June 2024) (Ruling)

Neutral citation: [2024] KEHC 6728 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 27 OF 2023
FN MUCHEMI, J
JUNE 6, 2024**

BETWEEN

JAMES NJOROGE GICHERU 1ST APPLICANT

EVANSON GICHERU NJOROGE 2ND APPLICANT

AND

LUCAS WAWERU KAMANDE (BEING SUED AS THE ADMINISTRATOR OF THE ESTATE OF BONIFACE GITAU WAWERU (DECEASED) RESPONDENT

RULING

Brief Facts

1. The application for determination dated 15th December 2023 seeks to reinstate and readmit the instant appeal for hearing.
2. The respondent filed a Replying Affidavit dated 8th April 2024 in opposition to the application.

The Applicants' Case

3. The applicants state that they lodged an appeal being Kiambu HCCA No. 210 of 2022 as they were aggrieved by the judgment in Ruiru SPMCC No. 579 of 2021 delivered on 19th August 2022. The applicants thereafter deposited KShs. 1million as security pending the hearing and determination of the appeal. The applicants further state that the appeal was transferred to Thika High Court and subsequently dismissed for want of prosecution as they had not filed their record of appeal.
4. The applicants are apprehensive that the respondent will execute his decree against him. Further, the applicants state that it is only just and fair that the appeal be reinstated and readmitted and heard in the normal way as they have paid and requested for the certified copies of the proceedings, judgment and decree but the registry at Ruiru Law Courts has failed to supply the same. Unless the appeal is



reinstated, the applicants aver that they stand to suffer irreparable loss and damage and their appeal rendered nugatory since the respondent may at any time move to execute the decree.

5. The applicants argue that no prejudice will be occasioned to the respondent or any damage that cannot be compensated by way of costs.

The Respondent's Case

6. The respondent states that the application is frivolous, vexatious and amounts to an abuse of the court process. Further, the respondent states that the application for stay is fatally defective in that it is premised on a non-existent appeal which was already dismissed and therefore it lacks substratum.
7. The respondent argues that the application offends the doctrine of res judicata as it has previously been canvassed and orders made by a competent court. Furthermore, the applicants have not offered any reasons why the appeal should be reinstated.
8. The respondent states that the court in Kiambu HCCA No. E210 of 2022, by consent of the parties, granted stay of execution pending appeal on 26th July 2023 on condition that the applicants file the Record of Appeal within 21 days from the date of the and in default, the orders would stand vacated. The respondent further states that the orders were made upon him informing the court that the typed proceedings and judgment of the lower court were ready and were in the lower court file.
9. The respondent argues that the applicants never took any steps to prepare the record of appeal and to file the same despite the said proceedings being ready for collection.
10. The respondent further argues that although the applicants said that they had requested for typed copies of proceedings and judgment on 7th August 2023, the letter requesting the proceedings was addressed to the wrong person and court namely the Deputy Registrar High Court Kiambu instead of to the Executive Officer Principal Magistrates Court Ruiru. Furthermore, although the letter is dated 7th August 2023, the respondent states that the applicants never paid for the proceedings until 4th December 2023. From the foregoing, the respondent states that it is clear that the applicants have never been serious with the prosecution of the appeal and that the said delay led to the appeal being dismissed for want of prosecution on 30th November 2023.
11. The respondent argues that the execution of the lower court judgment in Ruiru SPMCC No. E579 of 2021 has already commenced and part of the decretal sum being Kshs. 1million which had been deposited in Kiambu High Court has been released to him. The execution of the balance of the decree is at an advanced stage in the form of a declaratory suit being Milimani Chief Magistrate Court MCCC/ E No. E4823 of 2022 coming up for hearing on 2nd May 2024.
12. The respondent thus states that it would not be fair to allow reinstatement of the said appeal for it would occasion him great prejudice. The respondent further argued that the applicants have shown little or no interest in prosecuting the appeal and that the sole purpose of filing it was to delay the process of execution.
13. Directions were issued to the effect that the application be canvassed by way of written submissions. The respondent chose not to file any written submissions while the applicant failed to file theirs within the time allowed by the court.



The Law

Whether the applicant is entitled to an order setting aside dismissal of the appeal for want of prosecution.

14. The law concerning dismissal of an appeal for want of prosecution is contained in Order 42 Rules 35(1) & (2) of the [Civil Procedure Rules](#) which provides as follows:-

Unless within three months after the giving of directions under Rule 13 the appeal shall be set down for hearing, the respondent shall be at liberty to either set down the appeal for hearing or apply by summons for its dismissal for want of prosecution.

If within one year after service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.

15. It is trite law that the court's discretion to set aside an order dismissing the appeal for want of prosecution is unfettered. In [Richard Ncharpi Leiyagu vs IEBC & 2 Others](#) [2012]eKLR, it was held that the court's discretion to set aside an ex parte order or judgment 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.

16. In an earlier case of [CMC Holdings Limited vs Nzioki](#) (2004) eKLR 173 the court held that:-

The discretion must be exercised judiciously.....In law, the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong in principle.....the answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so, she drove the appellant out of the judgment seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant.

17. It is evident from the record that the applicants lodged their appeal Kiambu HCCA No. E210 of 2022 on 21st September 2022. On the same date, the applicant filed an application for stay of execution pending appeal whereas the court granted orders for stay of execution on condition that the applicants deposit Kshs. 1 million in court. On 15th June 2023, the court gave directions on the hearing of the appeal and gave the applicants 30 days to file and serve the record of appeal. The matter was fixed for mention for compliance on 26th July 2023. On 26th July 2023, the applicants had not filed the record of appeal for the reasons that the typed proceedings had not been supplied to them. Interestingly, counsel for the respondent told the court that he had taken the initiative to apply for typed proceedings and that the said proceedings were ready on 10th July 2022. The court thus gave directions and gave the applicants 21 days to file and serve the record of appeal failure to which the stay of execution orders stood vacated and the respondent was at liberty to execute. On 29th August 2023, this appeal was transferred to Thika High Court pursuant to Gazette Notice No. 11082 that established a High Court in Thika. The matter then proceeded for mention on 30th November 2023 and Counsel for the respondent made an application to have the security of Kshs. 1 million deposited in court to be released to the respondent as the applicants had failed to file and serve their record of appeal as directed by the court. The court noted that no plausible reasons were given by the applicants for failure to file the



record of appeal and proceeded to dismiss the appeal for want of prosecution. The court on application by the respondent released the sum of Kshs. 1 million to the respondent which had been deposited as security in 2022.

18. It is evident that the applicants were not desirous of pursuing their appeal given their conduct at the time the appeal was pending filing of the record. To this application, the applicants have annexed a letter dated 7th August 2023 addressed to the Deputy Registrar Kiambu High Court requesting for the typed proceedings and judgment. The respondent had informed the court that the proceedings were ready on 10th July 2022 for collection. Also annexed is a copy of the said proceedings to the replying affidavit. Therefore the applicants had no justification for the delay in filing the record of appeal. I agree with the respondent's averment that the appellant filed this appeal to delay execution of the judgment. The grounds of appeal in my view do not raise arguable issues and as such has limited chances of success.
19. It is my considered opinion that the applicants have not given any plausible reason to warrant the court exercise its discretion in their favour to reinstate the appeal. Having declined to grant the main prayer seeking to reinstate the appeal, the prayer for stay of execution of the trial court's judgment automatically fails for the reason that there is no appeal in existence.
20. Consequently, it is my finding that the application dated 15th December 2023 lacks merit and is hereby dismissed with costs to the respondent.
21. It is hereby so ordered.

RULING DELIVERED, DATED AND SIGNED AT THIKA THIS 6TH DAY OF JUNE 2024.

F. MUCHEMI

JUDGE

