



REPUBLIC OF KENYA



KENYA LAW
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**Ogongi & another v Ratemo (Civil Appeal 71 of 2017)
[2024] KEHC 7227 (KLR) (19 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7227 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 71 OF 2017**

**JM OMIDO, J
JUNE 19, 2024**

BETWEEN

WYCLIFF ATIENO OGONGI 1ST APPELLANT

BHAKTIPRIYA BUILDERS LIMITED 2ND APPELLANT

AND

ROSE AWINJA RATEMO RESPONDENT

RULING

1. The application subject of this ruling is the one presented by the Respondent dated 4th May, 2023, under Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya and Order 50 Rule 6 of the *Civil Procedure Rules*, 2010, that seeks the following orders:
 1. [Spent].
 2. [Spent].
 3. That the Honourable Court be pleased to enlarge the time frame for filing the application to revive this suit (sic) in the lower court at Kikuyu.
 4. That the costs of this application be provided for.
2. The application is premised on the grounds on its face and supported by the affidavit of Ben Musundi Waliubah, Advocate, sworn on 4th May, 2023.
3. The motion is opposed by the Appellants. A replying affidavit sworn on 23rd May, 2023 by Catherine Ngala, Advocate was filed to that end.
4. In precis, the history of this matter is that the lower Court (Hon. D.N. Musyoka, SPM) rendered a ruling allowing the Respondent's application for leave to file out of time, an application to revive Kikuyu SPMCC No. 62 of 2010 which had abated.



5. The Appellants, being dissatisfied with the lower court's ruling, preferred the instant appeal, which was heard and judgement thereof delivered on 5th December, 2019. The appeal was dismissed and the Court (C. Meoli, J.) held as follows, in part:

“Nonetheless, in my own consideration of the matter at hand, and applying the relevant principles, I have concluded, that though the delay of five years was long, the explanation given by the applicant in the circumstances of this case was probable and reasonable. And that, balancing the interests of the Respondents and those of the Appellants, the justice of the case lay in giving the Respondent an opportunity to file an application to revive the abated suit within a given time frame, as the Respondent has demonstrated since September, 2015, an alacrity in moving the matter forward.

The Court directs that the time for filing such application will be 30 days from the date of this judgement and not 3 months as provided in the lower court's ruling. In the circumstances, I would dismiss the appeal and order that the costs be paid to the Appellants in any event. Further, I direct that the lower court file be returned to the subordinate court as a matter of urgency so that the parties can take the next steps as a matter of priority.”

6. The application subject of the instant ruling was thus filed three and a half years after the judgement above was rendered. The Respondent urges the court to once again enlarge the time frame for filing the application to revive the suit in the lower court on the grounds that after delivery of the judgement herein, it took a period of more than two years for the lower court file to be returned to Kikuyu Law Courts and that the thirty days given by this court in the judgement were not practical given the time taken for the file to be returned.
7. The Respondent further urges that given the time that it took for the file to be transmitted to the lower court, the Respondent stood locked out of filing the application to revive the suit and hence stands to face prejudice. The Respondent states that the delay in returning the file to the lower court was through no fault of the Respondent and that she should not bear the consequences thereof.
8. In the Appellants' counter to the application, it is stated that there has not been exhibited any documentary evidence that there was any effort made by the Respondent to file the application to revive the abated suit, over the period of three and a half years after this court gave strict time lines of thirty days to the Respondent to file the said application.
9. The Appellants further state that there is no letter or document annexed to the affidavit of service to prove that there indeed was such delay, as alleged, to transmit the lower court file to Kikuyu Law Courts.
10. I have considered the application, the affidavit in support thereof, the replying affidavit, the rival written submissions and the record in its entirety. The issue for this court to determine, as discernible from the material before me is whether this court can enlarge time, for the second occasion, to allow the Respondent to file an application to revive the abated suit, Kikuyu SPMCC No. 52 of 2010.
11. It is to be noted that the initial application from which the appeal herein emanated was made in the lower court where the Respondent was granted three months within which to file the application to revive the abated suit. On appeal, my sister C. Meoli, J. was unequivocal that the time for filing the application would be 30 days from the 5th December, 2019, being the date that she delivered the judgement.
12. The Court further directed that the lower court file be returned to Kikuyu Law Courts as a matter of urgency so that the parties could then take the appropriate steps, as a matter of priority.



13. This being an appeal in which judgement has already been delivered, my view is that the matter is not one in which the avenue of filing yet another application for enlargement of the time frame for filing the application to revive the suit in the lower court would be available.
14. The manner in which to vary the judgement that was rendered on appeal would be perhaps via review as provided for under Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*. On that account alone, as the application is not one for review, the same is incompetent.
15. Be that as it may, even assuming that the court had been properly moved, nothing has been exhibited by the Respondent to show what steps she took, if any, within the period of 30 days that this court granted, to ensure compliance. There was no application filed before the expiry of the period granted of 30 days seeking for the extension of that period.
16. There is no proof, for instance, that the Respondent followed up within the thirty days to ensure that the lower court file was transmitted to Kikuyu or that she made a formal report to the two courts (Kikuyu SPM's Court and this Court) or either of them that the file had not been returned to the lower court. In the absence of such proof, it can safely be held that no such steps or attempts were made and the Respondent was remiss. Equity aids the vigilant, not the indolent.
17. The application as presented merely states that the Respondent was unable to comply with the orders issued in the judgement because it took more than two years for the file to be returned to Kikuyu Law Courts. If that be so, she does not explain why it took her three and a half years to present the application before me. The equitable doctrine of laches works against her.
18. For the reasons foregoing, I reach the conclusion that the motion dated 4th May, 2023 is devoid of merit and the fate that it suffers is that of being dismissed with costs to the Appellants.

DELIVERED (VIRTUALLY), DATED AND SIGNED THIS 19TH DAY OF JUNE, 2024.

JOE M. OMIDO

JUDGE

For Appellants: Ms. Njomo.

For Respondent: Mrs. Ngala.

Court Assistant: Ms. Njoroge.

