



**Anytime Limited v Onyiego & another (Civil Appeal E781 of 2022)
[2024] KEHC 8841 (KLR) (Civ) (19 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8841 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E781 OF 2022

JM OMIDO, J

JULY 19, 2024

BETWEEN

ANYTIME LIMITED APPELLANT

AND

ERICK MANYARA ONYIEGO 1ST RESPONDENT

ISAAC KIBET SHIKAMI 2ND RESPONDENT

RULING

1. This ruling is predicated on the Appellant’s application by Motion on Notice dated 15th July, 2024, presented under Sections 1A, 1B, 3A and 95 of the *Civil Procedure Act* Cap 21 Laws of Kenya, Order 10 Rule 11 and Order 22 Rule 52 of the *Civil Procedure Rules* and Articles 48, 50 and 159(1) and (2)(d) of *the Constitution* of Kenya and all other enabling provisions of the law which seeks the following orders:
 - a. [Spent].
 - b. [Spent].
 - c. That this Honourable Court be pleased to set aside the orders of Hon. Joe M. Omido dated 9th July, 2024 dismissing the appeal.
 - d. That upon granting prayer (c) above, this Honourable Court be pleased to grant the earliest convenient date for purpose of prosecuting the appeal.
2. I opine that a brief history of the matter would be apt before delving into the issues that the Appellant raises in the application and ultimately determining whether it is meritorious or not.
3. The appeal herein was preferred vide the Memorandum of Appeal dated 4th October, 2022 and lodged in court on the same day. The same emanates from the ruling and order of Hon. Gathogo Sogomo



Principal Magistrate delivered on 5th November, 2019 in Nairobi Milimani Commercial Court Civil Suit No. 1174 of 2020.

4. By a Notice of Motion application dated 15th September, 2023, the 1st Respondent herein moved the court and sought inter alia orders for the dismissal of the instant appeal for want of prosecution and that the Appellant be ordered to pay the entire decretal amount plus interest in the lower court matter.
5. The matter was first scheduled to be placed before me on 18th June, 2024 but I did not sit on that day as the Judiciary and the nation were mourning a departed Judicial Officer. I directed that the matter be mentioned on 1st July, 2024.
6. When this file was virtually mentioned before me on 1st July, 2024, Mr. Mochache Advocate was present and appeared for and on behalf of the 1st Respondent. There was no appearance for the Appellant despite the fact that service of the mention notice had been effected upon its Advocates, the law firm of Ochieng' Opiyo & Co. Advocates. The 2nd Respondent did not appear but the court noted that the said party had never taken part in the instant proceedings/appeal.
7. Mr. Mochache orally sought that the court allows the Motion dated 15th September, 2023 and proceeds to dismiss the appeal with costs to the 1st Respondent. I was hesitant to proceed in the manner mooted by Mr. Mochache for the reason that the matter was not listed for the hearing of the application on that day. I observed and ordered as follows:

Court: As the matter today is for mention, I will not dismiss the same. The application dated 15th September, 2023 to proceed on 9th July, 2023. A hearing notice to be served.

Signed

1st July, 2024.

8. It is instructive from the record that not only did the Appellant fail to appear on that day, but also failed to file a response (a replying affidavit or grounds of opposition) to the application.
9. The matter came for hearing of the Motion on 15th July, 2024 and Mr. Mochache was present for the Respondent (the Applicant in the application), when the same was reached and called out in the order of the day's cause list. Again, there was no appearance on the part of the Appellant. The proceedings that I took are as follows:

Mr. Mochache: We served and there is no response. We have severally served and they never respond. There is an affidavit of service dated 8th July, 2024. No replying affidavit has been served.

Signed

9th July, 2024.

Ruling

The application dated 15th September, 2023 is not opposed.

I proceed to dismiss the instant appeal with costs assessed at Ksh.25,000/- payable to the 1st Respondent.

The orders for stay pending appeal are hereby vacated.

The amount deposited shall be released to the first Respondent.

Signed



9th July, 2024.

10. Having called the short history of the appeal as will be relevant to the application before me, I will now address the grounds upon which the Appellant seeks the desired orders, which are as follows:
 - a. That on 9th July, 2024, the Honourable Court dismissed the Appellant's appeal, following an application by Counsel for the 1st Respondent vide his application dated 15th September, 2023, for non-attendance by Counsel despite the Appellant's Counsel being keen and intent on prosecuting the appeal to its logical conclusion.
 - b. That the appeal was dismissed based on the mistake of Counsel, who at the time the suit was called out, experienced a power outage and by the time he was logging back into the court session using a mobile phone device, the court had already issued its orders, consequently dismissing the appeal.
 - c. That the Appellant/Applicant will be highly prejudiced, devastated and disadvantaged if the appeal is not reinstated as they are now exposed to the threat of execution as the 1st Respondent had already taken out warrants of attachment and had commenced execution prior to stay of execution being granted and the Appellant being granted leave to file its appeal.
 - d. That the orders sought will not prejudice any party but will ensure that justice prevails and that it is the Appellant/Applicant who stands to be highly prejudiced if it is not allowed to prosecute its appeal.
11. The application is supported by the affidavit of Mr. Emmanuel Chasia, Advocate, sworn on 9th July, 2024 in which the deponent expounds on the above grounds.
12. The application is resisted by the 1st Respondent who filed a statement of grounds of opposition dated 12th July, 2024 and a replying affidavit sworn by Mr. Robert Mochache on even date.
13. The statement of grounds of opposition filed by the 1st Respondent proffers the following reasons:
 - a. The Notice of Motion application is mischievous, misconceived, frivolous, vexatious and bad in faith and otherwise an abuse of the court process.
 - b. The Appellant is out to frustrate the 1st Respondent from enjoying the fruits of his judgement granted way back on 10th December, 2021.
 - c. The Appellant is out to waste the court's time by approaching it with dirty hands since the dismissed application (sic) was not opposed despite having been properly served nor did they attend court on the hearing despite having been properly served with a hearing notice.
 - d. The Appellant is also completely guilty of laches since it has never bothered to move the dismissed appeal since it was filed way back in 2022.
 - e. It is trite law under the principles of equity that he who goes to equity must do so with clean hands.
14. This court directed that the application proceeds by way of oral submissions and the two learned Counsel on record – Mr. Chasia and Mr. Mochache appearing for the Appellant and the Respondent respectively – made their submissions on 16th July, 2024.
15. I will proceed to consider the application, affidavits, grounds of opposition and submissions contemporaneously.



16. In abstract, learned Counsel for the Appellant makes depositions and oral submissions that although he was aware that the application seeking orders of dismissal of the appeal was lined up for inter partes hearing on 15th September, 2024, he was unable to address the court when the matter was reached and called out as there was a power outage which rendered his desktop computer to go off as a result of which he lost connectivity to the virtual court session.
17. Counsel states further that by the time he was able to log back into the court session, the court had dealt with the matter and had allowed the application by the 1st Respondent and effectively dismissed the appeal for want of prosecution.
18. In his affidavit, Mr. Chasia also blames Mr. Mochache for the delay in prosecuting the appeal urging that it is the latter who has frustrated the Appellant's efforts to proceed with the same. He states that the Appellant had prior to the filing of this appeal engaged another law firm which filed an application for stay of execution in the lower court file and that the lower court ruling that gave rise to this appeal held in abeyance the prosecution of the appeal.
19. That subsequently, the Appellant moved the High Court vide High Court Miscellaneous Application No. 586 of 2022 Anytime Limited v Erick Manyara Onyiego & another pursuant to which a conditional order of stay of execution was issued, with the Appellant complying with the condition to deposit Ksh.1,000,000/-.
20. Counsel further states that the veracity of the ruling that gave rise to this appeal has been a subsisting contentious matter and that it was on that basis that my senior brother Hon. Justice Jesse Nyagah ordered on 9th March, 2023 that this appeal be stayed pending the hearing and of High Court Miscellaneous Application No. 586 of 2022 Anytime Limited v Erick Manyara Onyiego & another.
21. That as such, this appeal remained stayed pursuant to my brother's orders as the Miscellaneous Application has not been determined and that the 1st Respondent has in any event never responded to the application. That it was therefore improper for the 1st Respondent to fail to disclose to the court that the appeal had been stayed and instead proceed with the application for its dismissal for want of prosecution, knowing well that there was an order of stay in place.
22. In his affidavit and submissions, Counsel states further that his client still holds the purpose and intention of prosecuting this appeal, a fact he states is well demonstrated by the Appellant who duly complied with the order of the court requiring it to deposit Ksh.1,000,000/-.
23. In winding, Mr. Chasia depones and states that it is in the interest of justice that the application subject of this ruling be allowed to pave way for the hearing of the appeal. He states that the 1st Respondent stands to suffer no prejudice if the application is allowed and that conversely, his client stands to suffer immense prejudice if the motion is disallowed.
24. In his affidavit and oral submissions, Mr. Mochache explicates on the grounds above and states that the affidavit in support of the application is blemished with falsehoods. He states that on 9th July, 2024, this court dealt with other matters before the instant matter was reached and called out at about 9.15am. That when the court embarked on handling this file, Mr. Chasia had not logged into the virtual court session. That the court took some time – about 10 minutes – to address the matter and by the time that was done, Counsel for the Appellant had still not logged in.
25. Counsel states that the Appellant's absence on that date replicated the previous court session of 1st July, 2024 whereby the Appellant and/or his Counsel on record, without reasonable excuse, failed to attend court despite having been served with a mention notice and an affidavit to that end filed.



26. Further, Counsel for the 1st Respondent states in his affidavit and submissions that in any event, the Appellant never filed any response to the application that was the basis upon which the appeal was dismissed even though the same had been served upon the Appellant way back on 31st October, 2023. He states that the claims by the Appellant that he had frustrated the appeal were in the premises not only untrue but malicious and defamatory.
27. Regarding the Miscellaneous Application, Counsel states that he responded to the same by filing a replying affidavit sworn on 8th May, 2023 and further affidavits sworn on 17th November, 2023 and 2nd December, 2023 respectively. I confirm from the record that responses were filed to that application.
28. In his final deposition, learned Counsel for the 1st Respondent states that upon securing the order of stay pending appeal, the Appellant has never been keen in prosecuting the appeal and has not made any step towards advancing the same. He states that in the premises, the Appellant is not deserving of the discretionary orders that it seeks and the 1st Respondent should be allowed to enjoy the fruits of the judgement that was delivered in the lower court.
29. Counsel added that the application is not made in good faith and is reminiscent of the previous conduct of the Appellant who reneged in a consent that had been signed by the parties that would have resulted in the deposited security being released to the 1st Respondent, attached as an annexure.
30. Regarding the ruling of the lower court, Counsel states that the present appeal does not address the issue of its veracity.
31. Mr. Mochache is emphatic that there was no order issued by Hon. Justice Nyagah staying the instant appeal as claimed by the Appellant and that this court was within its mandate to proceed with the application seeking the dismissal of the appeal for want of prosecution, once certified that the same was properly served.
32. I have carefully perused the application, the affidavit in support thereof, the replying affidavit and the statement of grounds of opposition. I have also considered the oral submissions by both learned Counsel. I have further perused and considered the record in its entirety and I am well versed with the matters presenting the controversies in the application before me. The issues for determination as discernible from the record in settling the Motion dated 9th July, 2024 are as follows:
 - a. Whether there is an order that was issued herein on 9th March, 2023 staying the present appeal pending the hearing and determination of High Court Miscellaneous Application No. 586 of 2022 Anytime Limited v Erick Manyara Onyiego & another
 - b. Whether there is a mistake on the part of the Counsel for the Appellant that resulted in non-attendance in court on 9th July, 2024 and whether the mistake, if any, is excusable.
 - c. Whether sufficient grounds have been presented by the Appellant in (a) and/or (b) above to warrant the setting aside of the orders issued on 9th July, 2024 that allowed the application dated 15th September, 2023 and therefore effectively dismissing this appeal with costs to the first Respondent.
 - d. Subject to (c) above, whether the court should allow the appeal to proceed.
33. As presented above, the application seeks that the order that allowed the proceedings of 9th July, 2024 that culminated in a ruling on the Motion dated 15th September, 2023 be set aside. The ruling on that application dispensed with the entire appeal by ordering it dismissed with costs.



34. It is noteworthy that although the Appellant in essence seeks that the proceedings taken on that day be set aside, it does not, for unexplained reasons, seek to have the application that proceeded in the absence of its Counsel heard afresh. Rather, the application as framed seeks that the orders of 9th July, 2024 be set aside and the appeal be set down for hearing.
35. It is then apparent then that the Appellant, in my view, does not intend to have this court hear the application afresh and determine the issues raised therein, particularly that of the prayer that sought dismissal of the appeal for want of prosecution.
36. In the premises, it occurs to me that the Appellant, vide the present application seeks to avoid the application that proceeded on 9th July, 2024 altogether while attempting to have the dismissed appeal reinstated and heard without that application first being determined.
37. That is perhaps well demonstrated by the fact that although the Appellant claims that it still has an interest in the appeal, it admittedly did not file a response to the application, which was served upon its Advocates way back on 31st October, 2023, about nine months prior to the date that the application proceeded and the appeal dismissed. No reason is given as to why no response was filed as at the time the application was heard.
38. Be that as it may, the Appellant's Counsel presents the reason that he did not attend to this matter on the day that the application proceeded because of a power outage that caused his desktop computer to go off, as a result of which he got logged out, having previously logged in.
39. The 1st Respondent's Counsel disputes the position presented by the Appellant's Counsel and states that the present matter was not the first one on the cause list of 9th July, 2024 and that by the time this matter was called out on that day, the Appellant's Counsel had not logged into the virtual court at all. He therefore states, in my understanding, that the claim by Mr. Chasia that he got logged out pursuant to a power outage after logging in was not true as he did not log in at all until well after the matter had been heard and orders issued.
40. Mr. Mochache further states that the court not only took some substantial time to reach the matter but also took more than 10 minutes to handle the same and all that time, learned Counsel for the Appellant was not present in the virtual court session.
41. One advantage that the Microsoft Teams virtual platform offers is that court proceedings are recorded. I have had the occasion of replaying the proceedings of that day and it is true, as Mr. Mochache states, that Mr. Chasia did not log in until well after the matter had been called out, handled and orders made. In fact, Counsel for the Appellant first logged into the virtual court moments after I had gone through the cause list. The recording of the proceedings of that day is available and it is not true that he logged in and was logged out.
42. The Appellant's absence at the time that I dealt with the matter, remains unexplained, in the premises. An unexplained "mistake" cannot be one that the court can excuse more so when the Counsel is less than candid in the facts that he presents.
43. The other reason that is presented by the Appellant is that on 9th July, 2024, the court should not have proceeded to hear the application dated 15th September, 2023 as there subsisted an order issued herein by my brother Hon. Justice Nyagah on 9th March, 2023 staying the present appeal pending the hearing and determination of High Court Miscellaneous Application No. 586 of 2022 Anytime Limited v Erick Manyara Onyiego & another



44. In rejoinder, the 1st Respondent's Counsel disputes the existence of such orders and states that no such order exists.
45. I have combed through the record and I can without doubt confirm that no such order was issued in this matter. In fact, there were no proceedings taken on 9th March, 2023 and the present matter did not even have that scheduled date. On that, nothing prevented this court from proceeding to hear the application dated 15th September, 2023 on 9th July, 2024. There was an affidavit of service filed and the Appellant admits having been served with a hearing notice for that day.
46. With regard to the contention by the Appellant that it is still interested in pursuing the appeal, I note from the record that since the lodging of the Memorandum of Appeal on 4th October, 2022, the Appellant has not taken any steps to advance the progress of the appeal. No Record of Appeal has been filed ever since, even after the nudging by the 1st Appellant through the application to dismiss the appeal dated 15th September, 2023. No reasons are given for such inaction.
47. The inaction, as will be observed from the record, is compounded by the fact I have highlighted above, that even the application to dismiss the appeal was not opposed as no replying affidavit or grounds of opposition were filed to resist it. It would seem that the Appellant landed in a comfort zone and slumbered after securing the conditional order of stay pending appeal. This without doubt, is a party that long lost interest in pursuing its appeal.
48. The Appellant cites Sections 1A and 1B of the [Civil Procedure Act](#) as among the provisions under which it presents its application. The provisions address the overriding objectives of the [Civil Procedure Act](#), Cap 21 Laws of Kenya. Section 1A provides that the overriding objective of the statute and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
49. Section 1B of the Act provides that for the purpose of furthering the overriding objective specified in Section 1A, the court shall handle all matters presented before it for the purpose of attaining among others, the efficient disposal of the business of the court and the timely disposal of the proceedings before the court.
50. The inaction by the Appellant to prosecute the appeal has without a doubt caused delay that has not been explained and flies in the face of those very provisions that it seeks to rely on. The Appellant is guilty of laches. The Appellant has not sought to come to equity with clean hands as it has no explained the inaction. Equity aids the vigilant, not the indolent and delay defeats equity.
51. The circumstances of this case lead me to take guidance from and agree with the dicta in the case of *Thathini Development Company Limited v Mombasa Water & Sewerage Company & another* [2022] eKLR in which it was held that the court may in its discretion dismiss an action if there is delay that is inexcusable.
52. There is also the decision of *China Road & Bridge Corporation v John Kimenye Muteti* [2019] eKLR in which the court held that it is upon an Appellant to cause the appeal to be prosecuted and that the court is within its duty to proceed to dismiss an appeal where the delay is impertinent.
53. An application to set aside orders or proceedings that have been issued or taken, as the case may be, in the absence of a party is one that is by its very nature discretionary (see *Mureithi Charles & another v Jacob Atina Nyagesuka* [2022] eKLR). In determining such an application, the court must exercise its discretion judiciously. It remains the onus of the party that files the application to present material to the court that would persuade the court to exercise discretion in favour of the applying party.



54. Germane to the issue of setting aside ex parte orders is the persuasive decision of PMM v JNW [2020] eKLR in which the court held that in setting aside ex parte orders, the court must be satisfied of one of two things, namely, either that the respondent was not properly served with summons or that the respondent failed to appear in court at the hearing due to sufficient cause.
55. In the present case, there admittedly was proper service. The unexplained non-attendance by the Appellant before court on the day that the orders sought to be set aside were issued, the unexplained delay in pursuing this appeal and the fact that the application was in any event not opposed by the Appellant are impediments that will not allow this court to exercise its discretion in favour of the Appellant.
56. The upshot of all the foregoing is that the Appellant's motion dated 9th July, 2024 lacks merit and is accordingly dismissed forthwith with costs to the 1st Respondent.
57. The further order that follows the dismissal of the application is that the Ksh.1,000,000/- deposited by the Appellant in Milimani HCCC Miscellaneous Application No. E586 of 2022 Anytime Limited v Erick Manyara Onyiego & another, as security shall be released forthwith to the 1st Respondent's Advocates on record. For avoidance of doubt, the order for stay pending appeal stood vacated on 9th July, 2024.
58. Orders accordingly.

DELIVERED DATED & SIGNED THIS 19TH DAY OF JULY, 2024.

JOE M. OMIDO

JUDGE

This ruling has been delivered by sending a signed copy to the following email addresses of the Advocates on record as notified on 16th July, 2024:

Appellant:

Respondent:

JOE M. OMIDO

JUDGE

