



**Makori & 5 others (Sued as officials of New Sengera 2011 Self Help Group) v Onchoke & 8 others (Civil Appeal E517 of 2021) [2024] KEHC 8213 (KLR) (Civ) (5 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8213 (KLR)

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

**CIVIL**

**CIVIL APPEAL E517 OF 2021**

**PM MULWA, J**

**JULY 5, 2024**

**BETWEEN**

**NICODEMUS O. MAKORI ..... 1<sup>ST</sup> APPELLANT  
COSMAS ONYANCHA ..... 2<sup>ND</sup> APPELLANT  
ROBERT KENYANYA ..... 3<sup>RD</sup> APPELLANT  
ERIC MAKORI ..... 4<sup>TH</sup> APPELLANT  
ANDREW O. MATICHA ..... 5<sup>TH</sup> APPELLANT  
DISMAS OSEKO ..... 6<sup>TH</sup> APPELLANT  
SUED AS OFFICIALS OF NEW SENGERA 2011 SELF HELP GROUP**

**AND**

**KEPHA O. ONCHOKE ..... 1<sup>ST</sup> RESPONDENT  
JEPHITER O. OKEMWA ..... 2<sup>ND</sup> RESPONDENT  
ENOCK O. NYANDWARO ..... 3<sup>RD</sup> RESPONDENT  
EVANS NYAMBANE ..... 4<sup>TH</sup> RESPONDENT  
POLYCARP M. MOGUSU ..... 5<sup>TH</sup> RESPONDENT  
JORAME O. MAKORI ..... 6<sup>TH</sup> RESPONDENT  
CHRIS M. MOSOTI ..... 7<sup>TH</sup> RESPONDENT  
JOHN M. ONCHOKE ..... 8<sup>TH</sup> RESPONDENT  
OBADIAH O. OKIOMA ..... 9<sup>TH</sup> RESPONDENT**



## RULING

1. By a Notice of Motion dated September 25, 2023, the 1<sup>st</sup> and 3<sup>rd</sup> appellants seek to review, vacate and/or set aside this Court's order dated July 21, 2023 dismissing their appeal with costs for want of prosecution. The applicants have invoked the provisions of Order 45 Rule 1 and Order 51 of the [Civil Procedure Rules](#) as well as Sections 1A, 1B and 3A of the [Civil Procedure Act](#).
2. The main ground founding the application is that there exists new and important matter or evidence which could not be produced by the appellants/applicants at the time the order was made. In the supporting affidavit sworn on September 25, 2023 by Robert Kenyanya, it is deposed that the appeal was dismissed for want of prosecution after the respondents challenged the manner in which the request for proceedings had been done; that the request for lower court proceedings had properly been made through the email at the time provided through a communique and therefore the appellants had taken the necessary steps towards prosecution of the appeal.
3. Further, the applicants contend that the respondents will suffer no prejudice if the orders sought are granted as they are at liberty to execute against some of the appellants.
4. The respondents, through Keph O. Onchoke swore a replying affidavit on November 3, 2023 and asserted that the application was an abuse of the court process and an afterthought and was meant to stall the taxation of the respondents' 'party to party' bill of costs dated August 23, 2023 which had been served upon the appellants. And that the applicants had not explained the delay in filing the application since July 21, 2023 when the orders sought to be reviewed were made.
5. Further, it was averred by the respondents that the applicants had not demonstrated any new matters of evidence that were not available to them at the time the impugned orders were made. And that the application does not meet the strict threshold for review under Order 45 of the [Civil Procedure Rules](#).

### Analysis and determination

6. The application was canvassed by way of written submissions which both parties filed, the applicants' dated April 3, 2024 and the respondents' dated April 11, 2024 respectively.
7. I have considered the application, rival affidavits and submissions filed. There is no doubt that this Court has discretion to set aside an order dismissing an appeal for want of prosecution. The only issues for determination are whether the circumstances of this case warrant the exercise of that discretion and who should bear the costs of this application.
8. A brief background of this matter will suffice. The appellants filed the appeal herein vide a memorandum of appeal dated August 21, 2021 to challenge the ruling by Hon. Mbeja in Milimani CMCC No. 892 of 2012. On June 7, 2023 the Deputy Registrar issued a Notice To Show Cause (NTSC) on why the appeal should not be dismissed for want of prosecution.
9. The appellants' counsel filed an affidavit to purge the NTSC which was equally responded to by the respondents. Having heard counsel, this Court on July 21, 2023 found the appellants had failed to show cause and dismissed the appeal with costs. It is that order which led to the instant application.
10. Order 45 Rule 1 of the [Civil Procedure Rules](#) gives the High Court discretionary power to allow review on the three limbs therein stated, that is; an applicant may bring an application for review upon discovery of new and important matter; where there is a mistake or error on the face of the record or for any other sufficient reason.



11. The appellant's application was hinged on the first ground, that there existed a new and important matter or evidence to warrant the Court not to order dismissal of the appellant's suit for want of prosecution. The new evidence was the availability of a communicate by the lower court on the email address to request for proceedings.
12. The court record is clear that before making the impugned order, the Court afforded the appellant opportunity to explain why the appeal should not be dismissed for want of prosecution. The explanation then, as it is even now, was that despite request the typed proceedings from the lower court were yet to be availed to the appellants to enable the preparation of the record of appeal.
13. Even with the instant application, the issue is not whether or not proceedings were requested for, but why it had taken the appellant close to two years to prosecute the appeal. The provision of a communicate from the lower court to guide on the platform for requesting for proceedings is itself not a new matter or evidence to warrant the grant of the orders sought. Indeed, I agree with the submissions by counsel for the respondents that the filing of this application is yet another clear case of indolence on the part of the applicants. That they were woken up from a deep slumber upon service of the 'party to party' bill of costs dated August 23, 2023, and notice of taxation dated September 20, 2023.
14. It must be clear that, even as I consider the prayer to set aside the impugned order, I am not persuaded that the appellants had the intention to prosecute the appeal herein. Litigation must come to an end.
15. In light of the foregoing, I find no merit in the appellants' application dated September 25, 2023 and the same is dismissed. The costs hereof are awarded to the respondents.

Orders accordingly.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 5<sup>TH</sup> DAY OF JULY 2024.**

.....

**P. MULWA**

**JUDGE**

In the presence of:

Mr. Odek for appellants/applicants

Mr. Webale for respondents

Court Assistant: Carlos

