



Mbagara v Owino (Suing as the Legal Representative of the Estate of Joackim Henry Owino) (Civil Appeal 162 of 2018) [2024] KEHC 8189 (KLR) (5 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8189 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 162 OF 2018
HM NYAGA, J
JULY 5, 2024**

BETWEEN

JOSEPH NDUNGU MBAGARA APPELLANT

AND

EUNICE ADHIAMBO OWINO RESPONDENT

SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JOACKIM HENRY OWINO

RULING

1. Before Court is an application by way of Notice of Motion dated September 20, 2023.
2. The application has been brought under Sections 1A,1B,3A and 95 of the *Civil Procedure Act* and Order 12 Rule 7 of the *Civil Procedure Rules, 2010* wherein the Applicant seeks for reinstatement of the Appeal and costs of the Application.
3. The application is based on the grounds set out therein and is supported by the affidavit sworn by the Applicant, Joseph Ndungu Mbagara.
4. In a nutshell, the application is premised on grounds that;
 - a. This Appeal was dismissed on January 23, 2023 after the same was listed for Notice to show cause before Justice D. Kizito Magare.
 - b. On the material day, the Honourable Judge started his session at 8.30 am and this matter was called in the absence of the Appellant or his Advocate.
 - c. At the time counsel logged in at around 9.00 am, he was informed that the matter had been dealt with in the absence of the parties.



- d. The circumstances contributing to the delay have not been occasioned by the Appellant since in the year 2021, the Applicant's counsel Mr. D.M Kimatta passed on and the Appellant was unable to access the file from the said office.
 - e. The Appellant having preferred an appeal, appointed the firm of Kairu Maina & Associates who filed Nakuru HCA No. 134 of 2024 without knowledge of the institution of this Appeal by the firm of Kimatta & Co. Advocates.
 - f. The confusion relating to the two appeals was raised but the same was never addressed with the passing on of the Appellant's initial counsel.
 - g. Similarly, the Respondent's Advocate passed on and his office remained closed in 2020 to date and efforts to establish the status of this matter were in futility and having settled on this Appeal, serving the Respondent became hard as her physical address was unknown to the Applicant.
 - h. NTSC was sent to the firms of Kimatta & Co Advocates and N.K Bichanga & Co. Advocates both whose offices were undergoing administration at the time and that information was never communicated to the Applicant to enable him comply.
 - i. Proceedings in Nakuru CMCC No. 655 of 2017 have never been typed and efforts to have them typed have caused further delay.
 - j. The Applicant will suffer irreparable loss and damage if the Appeal is not reinstated since the Respondent had obtained judgement without serving the pleadings upon the Applicant.
5. The Application was duly served upon the firm of Gati & Co. Advocates as evidenced by the Affidavit of Fredrick Maina sworn on October 16, 2023 but they filed no response.
 6. On February 14, 2024, the Applicant's counsel told this court that they shall be relying on their earlier filed Submissions.
 7. The appellant submitted that he is desirous of prosecuting this Appeal and his application is merited and not meant to deny the Respondent the benefit of the lower court judgement.
 8. It was submitted that the failure by the Applicant's counsel to attend court at 8.30 am on the material date was a mistake and error that ought not to be visited upon the client and that the court had not issued a notice that it will commence proceedings at 8.30 am and efforts made to recall the file were in futility.
 9. To buttress his submissions, the Appellant relied on the following cases: -
 - i. *Belinda Murai & others vs. Amos Wainanina* [1979] eKLR cited in the case of *Jason Njuru Mwangi & Anor vs. Nyambura Mwangi & Anor* [2012] eKLR
 - ii. *Philip Chemwolo & Anor Vs. Augustine Kubende* [1986] eKLR.

Analysis & determination

10. The only issue that arises for determination is whether the appeal should be reinstated as sought.
11. Re-instatement of an appeal/suit is a matter of discretion, which must be exercised judiciously and If this Court is to exercise its discretion in favour of a party, the party is obliged to place before it some material to justify the exercise of that discretion.



12. A perusal of the material in the court record shows that the lower court ruling was delivered on September 5, 2018. Subsequently, a memorandum of appeal was filed on October 18, 2018. Thereafter, there was total inactivity until March 1, 2021 when this matter was mentioned.

13. This court in its earlier ruling delivered on September 20, 2023 with respect to the Applicant's Application dated January 27, 2023 observed as follows: -

“I have noted that the applicant has gone to great lengths to explain himself on the events of January 23, 2023, when the Appeal was dismissed for want of prosecution. However, counsel for the applicant has conveniently omitted to state that he had appeared in this particular case from way back on March 1, 2021. On that day, the Counsel asked for time to sort out the issue of the 2 files namely this Appeal and High Court Civil Appeal No. 134 of 2020. The court gave a mention date of May 18, 2021 and come that date, he sought 30 days to enable him comply and take a date for hearing. It is important to note that the firm of Kairu Maina, who filed the present application, have never filed a Notice of Change of Advocates, to take over the firm of Kimatta and Co. Advocates. This may explain why the court sent the Notices to Show Cause to the firm of Kimatta and Co. Advocates despite his demise.”

14. I then proceeded to strike out the application on the ground that Ms Kairu Maina and Co. Advocates were not properly on record. This is what prompted the current application.

15. I note that the hurdle that was pointed out by the court has now been surmounted by the applicant with the filing of the notice of change of advocates which was served upon the firm of Gatuu Magana & Co. Advocates, the administrators of the firm of Kimatta and Co. Advocates.

16. The explanation given by Counsel for the applicant is that logged in after 8:30 am only to find that the appeal had been dismissed. This averment cannot be ascertained since the record for that day is not available. What is certain is that there was no appearance for either side when the matter was called out and the court went ahead to dismiss the appeal.

17. The considerations to be made in determining whether or not to dismiss matters for want of prosecution and whether to order reinstatement were considered in the case of *Ivita vs Kyumbu*, Civil Suit No. 340 of 1971 (1975) EA 441, 449, *Ivita vs Kyumbu* [1975] eKLR where Chesoni J. (as he then was) held as follows:

“So the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant; so both parties to the suit must be considered...”

18. I note that the Applicant after learning that his appeal had been dismissed, moved with speed and filed an application seeking to reinstate the same on February 13, 2023. This act demonstrated that the Applicant still had interest in prosecuting his appeal. He should thus not be ousted from the seat of justice.

19. In light of the above, I opine that justice can still be done despite the Applicant's delay in prosecuting the appeal and in the interest of justice, this court will exercise its discretion and reinstate the Appeal.

20. Having said that, I allow the Appellant/ Applicant's Notice of Motion dated 20/9/2023 in the following terms: -

a. The appeal herein is hereby reinstated, and shall be heard and determined on merit.



- b. The Appellant/Applicant shall prepare, file and serve the record of appeal within the next sixty (60) days from the date hereof, failing which this appeal risks dismissal again.
- c. Costs shall abide the outcome of the Appeal.

21. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 5TH DAY OF JULY, 2024.

H. M. NYAGA

JUDGE

In the presence of;

Court Assistant Jamleck

Ms Otokoma for Appellant/Applicant

No appearance for Respondent

