



**Cytonn Investments Management PLC & another v Muthuku & another
t/a Kinyanjui, Kirimi & Co Advocates (Civil Appeal E027 of 2020)
[2024] KEHC 11917 (KLR) (Commercial and Tax) (4 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11917 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E027 OF 2020
FG MUGAMBI, J
OCTOBER 4, 2024**

BETWEEN

CYTONN INVESTMENTS MANAGEMENT PLC 1ST APPLICANT

CYTONN HIGH YIELD SOLUTIONS LLP 2ND APPLICANT

AND

**KIRIMI DAVID MUTHUKU ANTHONY KINYANJUI WARINGA T/A
KINYANJUI, KIRIMI & CO ADVOCATES RESPONDENT**

RULING

Introduction And Background

1. For determination is the Notice of Motion dated 18/3/2024 brought under Order 49 Rule 5, Order 50 Rule 1 and 6, Order 51 Rule 3 of the Civil Procedure Rules, 2010, Section 1A and 3A of the *Civil Procedure Act*. Cap 21, Articles 48,50 (1) and Article 159 (2) of *the Constitution* of Kenya, 2010 and all other enabling provisions.
2. The applicants seek the following orders:
 - i. An order to set aside the orders of Hon. Lady Justice Dr. Githiru Freda Mugambi, made on 14th March 2024 and reinstate the Appellants/Applicants memorandum of appeal dated 27th June 2020 and Record of Appeal dated 10th March 2024;
 - ii. An order to extend the time within which the Appellants herein may set the Appeal for hearing;
 - iii. The Honorable Court be pleased to give directions as to an early Hearing date for the Appellant Appeal; and



- iv. Costs of this Application be in cause.
3. The application is premised on the grounds on the face of the record and supported by the affidavit of Adamskey O. Dudi the Legal Manager, Cytonn Investment Management, sworn on 18/03/2024. He faults their then advocate for failing to comply with the court directions and urges the court not to punish the applicant for the mistakes of the counsel. He contends that the appeal should be reinstated for it raises arguable grounds.
 4. The application is opposed by the replying affidavit of Kirimi David sworn on 8/05/ 2024, on behalf of the respondents. It is their case that the application is an afterthought meant to circumvent justice and unnecessarily prolong the determination of this matter.
 5. He states the applicant is not desirous of prosecuting the appeal and the application is being used as a mechanism to evade compliance with the judgment of the lower court. He avers that the applicants have slept on their rights to be heard and have only been awakened by the dismissal of the appeal. The respondents further contend that the indolence is demonstrated by the fact that the appeal has been mentioned a record 35 times between 27/7/2020 to date. He argues the court is functus official and determining the instant application amounts to sitting on an appeal of its own decision.
 6. The parties agreed to canvass the application by way of written submissions. I have given due consideration to the parties' respective positions as deposed and submitted. I am aware that the Official Receiver attended court on 13/3/2023 and confirmed that the 2nd applicant was in liquidation and that the Official Receiver would not be participating in these proceedings. The sole issue for determination is whether the 1st applicant is deserving of the orders sought.

Analysis and determination

7. The events leading to the dismissal of the appeal are not controverted. The record confirms that the applicants filed the present appeal on 27/7/2020. The record further shows that the matter was mentioned numerous times between then and 7/12/2023 on account of the fact that the lower court file could not be traced.
8. When the matter came up on 22/2/2024 the 1st applicant informed the court that the trial court file had been traced and sought 7 days to file the Record of Appeal. The applicant was allowed 14 days to file the record in default of which the appeal would stand dismissed.
9. The matter was mentioned on 14/03/2024, and the applicant's counsel informed the court that they had complied with the court orders. The advocates in an attempt to explain the delay faulted the trial court. The court was not convinced by the reason given by counsel for the delay and observed as follows:

“ [The] Court notes that the appellant was required to file and serve the ROA within 7 days from 22/2/24. By that time the LCF was already before court and as such that excuse cannot be the cause of the delay for filing the ROA.”
10. I have noted that in calculating the time when the period lapsed, I inadvertently used 7 days whereas I had indulged the applicant 14 days. This could have taken the applicant up to 13/03/2024. The appeal stood dismissed from 14/03/2024, the day when the appeal was filed.



11. The applicant admits that:

“On the 22nd February 2024, the said advocate attended court and directions were issued to file the record of Appeal within 7 [sic] days, despite several reminders from the client and his colleagues, he failed to file on time, and the record of appeal was filed on 13th March 2024 a day before the matter was to be mentioned for compliance.”

12. I find myself persuaded by the Court of Appeal’s observation in Nyeri in [Richard Nchapi Leiyagu V IEBC & 2 Others](#), CA No. 18 of 2013. The court observed that:

“The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the Courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality. ...

We are of the considered view that the learned judge ought to have reinstated the appellant’s appeal to give the parties herein an opportunity to be heard on the same and for the appeal to be determined on merit...”

13. I am equally reminded by the court in [Philip Chemowolo & Another V Augustine Kubede](#), [1982-88] KAR 103 at 1040 Apaloo, J.A. (as he then was), posited as follows:

“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.” (emphasis mine)

14. In weighing the delicate interests between the parties, as to whether the appeal by the 1st applicant ought to be reinstated, I further turn to Order 42 rule 21 of the *Civil Procedure Rules*. It provides for re-admission of appeals dismissed for default as follows:

“Where an appeal is dismissed under rule 20, the appellant may apply to the court to which such appeal is preferred for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing, the court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.”

15. I find it unfortunate that there has been inordinate delay and that this matter has been mentioned severally before this court on account of the missing trial court file. From the totality of the evidence on record, it appears that the file was finally found some time in February 2024. It has not been shown that the 1st applicant caused the delay in tracing the lower court file and I cannot therefore lay blame on that account. The record of appeal has finally been filed albeit on the morning that the matter was coming up for mention.

16. I have equally looked at the grounds of appeal contained in the record of appeal and I do note that the memorandum of appeal raises arguable grounds of appeal. Taking the queue from the decisions that I have cited, I also note that the applicant can be made to pay for the delay occasioned by them



in other ways. This may include being denied costs even in the event their appeal succeeds, as opposed to removing them from the seat of justice.

17. In any event, the court had awarded thrown away costs of Kshs. 40,000/= to the respondent. The 1st applicant does not deny the submission that the amount is yet to be paid.
18. Minded that dismissal is a draconian measure that removes the parties from the seat of justice, and having considered the totality of the circumstances herein plus the reason given for filing the record out of time, I find that it is in the interest of justice that this court exercises its jurisdiction and reinstates the appeal for hearing on merit at the earliest.
19. In the premises I allow the application dated 18/03/2024 and set aside the court order of 14/03/2024 dismissing the appeal only in as far as the 1st applicant is concerned.
20. The appeal shall only stand reinstated for hearing on merit on condition that the thrown away costs of Kshs. 40,000/= awarded to the respondent is paid and, in any event, not later than 7 days of this ruling. Parties shall take directions on the earliest disposal of the appeal by way of written submissions. The costs of the application shall be in the appeal.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 4TH DAY OF OCTOBER 2024.

F. MUGAMBI

JUDGE

