



REPUBLIC OF KENYA



KENYA LAW
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**Gatua v Gatua & another (Family Appeal E005 of 2024)
[2024] KEHC 12847 (KLR) (23 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12847 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
FAMILY APPEAL E005 OF 2024
LM NJUGUNA, J
OCTOBER 23, 2024**

BETWEEN

JOHN BOSCO NJIRU GATUA APPLICANT

AND

JOHNSON LENSON MBOGO GATUA 1ST RESPONDENT

PASQUALINA MUTHONI GATUA 2ND RESPONDENT

RULING

1. The applicant filed notice of motion dated 2nd August 2024 premised on the grounds set out on its face and in the supporting affidavit, seeking orders that:
 1. Spent;
 2. This honourable court be pleased to set aside and/or review the orders issued on 30th July 2024 dismissing the applicant's appeal and closing the file;
 3. The appeal be reinstated;
 4. Stay of execution of judgment delivered on 22nd September 2022 in Runyenjes Succession Cause No.185 of 2013 be granted pending hearing and determination of this application; and
 5. The costs of this application be in the cause.
2. The court issued an order on 30th July 2024 dismissing the appeal for the applicant's failure to have it prosecuted within 90 days as had been previously ordered. The applicant deposed that he was still keen on prosecuting the appeal and he urged the court to give him a chance to do so. Through a ruling delivered on 23rd February 2024, the applicant was allowed 21 days to file the record of appeal and they produced a receipt to show that the same was filed on 03rd April 2024.



3. He deposed that the timeline of 90 days to prosecute the appeal as ordered started running as soon as the record of appeal was filed and it ended on 03rd July 2024. That the court gave directions on 30th July 2024, outside the allowed period, thus the 90-day period could not be achieved since the applicant was awaiting the court's direction. He stated that it was drastic for the court to dismiss the appeal and close the file in the circumstances since the distribution of the estate by the trial court is disadvantageous and it benefits people who shouldn't benefit. He urged that the delay in prosecuting the appeal is inadvertent and excusable.
4. Through a replying affidavit, the 1st respondent stated that the orders sought herein would amount to requiring this court to sit on appeal in its own decision. That there is no appeal on record since the same was already dismissed and the court has since become functus officio. He urged that since there is no pending appeal, litigation herein should come to an end.
5. The court directed the parties to file their written submissions but only the applicant complied.
6. In his submissions, the applicant stated that he had complied with the previous court orders to file the record of appeal but when the matter was brought up for directions, the court was away on leave and by the time the directions were being given, the 90-day period had elapsed. He urged that if the orders sought herein are not granted, the applicant will suffer prejudice since his father's estate was distributed in a manner that is disadvantageous to him. He relied on the cases of *Shah v. Mbogo & Another (1967) EA* and *Simon Gachoki Ayub v. Kabare Farmers Cooperative Society Ltd (2019) eKLR*.
7. From the foregoing, I am faced with the question of whether or not to review the orders of this court issued on 30th July 2024.
8. On the said date, the parties had appeared before the court to take directions on the appeal and they agreed to canvass it by way of written submissions. The court stated that "on the 04th March 2024, the court vide a ruling directed that the appeal be prosecuted within 90 days from the date of filing the Record of Appeal. The Record of Appeal was filed on 28th March 2024. The appeal was not prosecuted as ordered by the court. There is no pending appeal. File marked as closed."
9. Purely in the interest of justice and while applying the court's discretion, the court issued the following orders through its ruling delivered on 23rd February 2024:
 - a. The applicant is hereby granted leave to file the appeal out of time and the same to be filed within 14 days from the date of this ruling;
 - b. Execution of the judgment and subsequent orders in *Runyenjes Succession Cause No. 185 of 2013* delivered on 22nd September 2022 is hereby stayed pending hearing and determination of the appeal;
 - c. The appeal to be prosecuted within 90 days of filing the record of appeal; and
 - d. There shall be no order as to costs.
10. Following these orders, the applicant filed a record of appeal on 03rd April 2024, being 40 days after the court order on filing of the same. He produced a copy of the filing fees receipt for it. On 16th May 2024 the applicant was in court when the court noted that it would be away in the month of June and so the matter was scheduled to be mentioned for direction on 30th July 2024. The applicant did not raise the issue of prosecution of the appeal urgently given the timeline ordered, and the court took the matter out on that day. The next thing was that the court issued the impugned order herein.



11. Review is provided for under Section 80 of the Civil Procedure Act as follows:

“Any person who considers himself aggrieved—

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

Similarly, Order 45 Rule 1 of the Civil Procedure Rules provides:

(1) Any person considering himself aggrieved—

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

12. From the foregoing, there are only 3 factors for the court to consider before reviewing its findings, these are:

1. That there has been discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed; or
2. That there has been some mistake or error apparent on the face of the record; or
3. Any other sufficient reason.

13. Equity aids the vigilant. In this case, the court has already conditionally extended the time to appeal and the applicant was expected to have been vigilant enough to meet the conditions set. The court dismissed the appeal since the conditions set were not met yet the applicant had opportunities to move the court to extend its orders to prioritize hearing of the appeal by giving an earlier date. Clearly, the review sought herein is not based on discovery of any new evidence nor is it based on a mistake or error apparent on the face of the record.

14. The rights of the applicant to appeal were measured against the rights of the respondents to their judgement, which is why the court issued a temporary stay of execution. Through this application, the applicant still seeks stay of execution, which prayer I hold to be res judicata, having been canvassed through the ruling of this court delivered on 23rd February 2024.

15. That being said, the third limb of the requirements under Order 45 of the Civil Procedure Rules provides that the court may review its order for any other sufficient reason. Given the circumstances of the case, it is my view that the court can review its orders, noting that this does not in any way undermine the rights of the respondent herein. In light of Articles 159 and 48 of the Constitution, the application will be allowed, strictly in the interest of justice.



16. Therefore, the following orders shall issue:

1. The order of the court issued on 30th July 2024 dismissing the applicant's appeal and closing the file is hereby reviewed and set aside;
2. The appeal is hereby reinstated and the same to be prosecuted expeditiously; and
3. The applicant to pay the respondent costs of Kshs.10,000/= within 7 days of the date of this ruling.

17. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 23RD DAY OF OCTOBER, 2024.

L. NJUGUNA

JUDGE

