



REPUBLIC OF KENYA



KENYA LAW
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**Yaa v Kilifi Coral Blocks Limited (Civil Appeal 38 of 2019)
[2023] KEHC 823 (KLR) (13 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 823 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 38 OF 2019
SM GITHINJI, J
FEBRUARY 13, 2023**

BETWEEN

FIKIRI CHARO YAA APPLICANT

AND

KILIFI CORAL BLOCKS LIMITED RESPONDENT

(An Appeal from the Judgement of Hon. Ms. L.N.Juma – Resident Magistrate at Kilifi made on 31st day of January, 2017 in Kilifi Senior Principal Magistrate’s Court Civil Suit No.424 of 2010)

JUDGMENT

1. On February 5, 2020, this appeal was dismissed for want of compliance and prosecution. This prompted the applicant to file the current notice of motion dated September 23, 2021. The application is brought under article 159(2) of the [Constitution](#) of Kenya, section 1A, 1B, 3A and 63 of the [Civil Procedure Act](#), and order 42 rule 35 (1), (2), order 51 rule 1 of the [Civil Procedure Rules](#), 2010. The applicant seeks the following orders:
 1. Spent.
 2. That this honourable court be pleased to discharge the *ex-parte* orders issued on February 5, 2020 for non-prosecution.
 3. That this honourable court be pleased to reinstate the appeal dated June 25, 2019 for mention for purposes of taking directions on merit on a date to be specified by the honourable court.
 4. That costs of this application be in the cause.
2. The application is premised on the grounds carried on the face of it and supported by the affidavit sworn on the even date by Kitti L George, counsel for the applicant. Mr. Kitti deposed that the applicant dissatisfied with the judgment delivered on January 31, 2017 at the Kilifi Magistrates Court,



filed a memorandum of appeal dated June 25, 2019 before this court. The appeal was slated for mention for directions on October 29, 2019 when counsel informed court that the parties were in the middle of negotiations for an out of court settlement.

3. The appeal was again to be mentioned on November 29, 2019 to confirm progress of the said negotiations. The court did not sit on that particular date and another mention date for January 22, 2020 was issued. Mr Kitti added that the respondent then fixed the appeal for mention on February 5, 2020 when the matter was eventually dismissed. That no notice to show cause was issued and one year had not lapsed since the matter was last in court. According to Mr Kitti, the procedure for dismissal for want of prosecution was not followed.
4. Expectedly, the respondent opposed the application. It filed grounds of opposition dated October 25, 2021, stating that the application is fatally defective, bad in law and an abuse of the court process as it offends the provisions of section 1A, 1B and 3A of the *Civil Procedure Act* and that the orders sought cannot be sustained by the cited provisions; and that the application has been filed after an inordinate delay.
5. The application was canvassed by way of written submissions which I have carefully considered and the issue it raises for determination is whether the applicant has established sufficient cause to justify the exercise of this court's discretion in his favour by allowing the application as prayed.
6. Upon perusal of the court record, I note that when the appeal was first listed for mention on October 29, 2019, parties were directed to file a settlement within 30 days from that date. On November 29, 2019 when the matter was to be mentioned to confirm a settlement, the court did not sit and the matter was slated for mention on January 22, 2020. On that date, the applicant failed to attend court and the court directed that notice to show cause be issued.
7. The appellant's appeal was consequently dismissed on February 5, 2020 under order 42 rule 35 (2) of the *Civil Procedure Rules* on the premise that he had been served with a notice to show cause via EMS and he had failed to provide a satisfactory response thereto.
8. Order 42 rule 35 governs dismissal of appeals for want of prosecution. It states as follows:
 - “(1) Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.
 - (2) If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.”
9. It is evident from the court record that the dismissal fell in the scenario contemplated in order 42 rule 35 (2) above. A close reading of this rule reveals that for an appeal to be lawfully dismissed under this rule, the court through its Deputy Registrar must give notice to the parties regarding the intended dismissal. The rationale for the above requirement in my view is to accord the parties, particularly the appellant, an opportunity to be heard before the court makes its decision whether or not to dismiss the appeal as proposed. This is because in the event the court decides to dismiss the appeal, the appellant would no doubt be adversely affected.
10. In this case, the applicant has through his advocates denied that he was ever served with a notice to show cause. I have perused the court proceedings of February 5, 2020; I note that the learned Judge



Nyakundi J indicated that there was evidence of service of the notice to show cause through EMS. Indeed, a copy of the Notice to Show Cause in the file indicates as much.

11. In an application such as the current one, the court weighs whether there are reasonable grounds to warrant reinstatement of the appeal. Having done so, I find no reasonable ground to warrant this court to exercise its discretion in favour of the applicant.
12. The upshot is that the application dated September 23, 2021 is unmerited and is hereby dismissed with cost to the respondent.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 13TH DAY OF FEBRUARY, 2023.

S.M. GITHINJI

JUDGE

In the absence of;

Mr Kitti for the applicant

Mr Mutune for the Respondent

They be notified.

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S.M. GITHINJI

JUDGE

13.2.2023

