



REPUBLIC OF KENYA



Mwiti v ZKN (Suing as father and next friend of TK) (Civil Appeal E020 of 2022) [2023] KEHC 2255 (KLR) (16 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2255 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E020 OF 2022
TW CHERERE, J
MARCH 16, 2023**

BETWEEN

ADAMS MWITI APPELLANT

AND

ZKN (SUING AS FATHER AND NEXT FRIEND OF TK) RESPONDENT

RULING

Background

1. By notice of motion application dated January 21, 2023, the Appellant/Applicant has moved the court seeking for the following orders for:
 - i. Stay of execution in Nkubu PMCC NO 97 of 2019 pending the hearing and determination of this application
 - ii. Setting aside of order dated January 19, 2023 dismissing the appeal.
 - iii. That costs of this application be in the cause.
2. The application is supported by an affidavit sworn by Emmaculate Hyimo, advocate for the Applicant on January 21, 2023 is premised on the ground that counsel was attending other matters at High Court in Chuka and magistrate's court Nkubu and appeared in court virtually long after the appeal was dismissed.
3. The application is opposed vide a replying affidavit sworn by Respondent on March 09, 2023 who states that the delay in concluding the appeal is denying him the fruits of his judgment.

Analysis and Determination

4. Indeed, both the dismissal of this appeal for want of prosecution and its reinstatement are acts of the exercise of this court's discretionary power. (See *Mbogo & Anor v Shah* [1968] E A 93).



5. This application was filed timeously on January 24, 2023 which was only 5 days after the dismissal order. Whereas the Applicant's counsel has not denied that he was aware that the appeal was listed for hearing on January 19, 2023, it should be the court's last resort to deny a party a chance to be heard on merit.
6. In any case, the door of justice is not closed because a mistake has been made by a person of experience who ought to have known better as counsel in this case ought to have known (See *Belinda Murai & 9 others v Amos Wainaina* [1979] eKLR).
7. Applicant has already deposited with the court ½ of the decretal sum pending hearing of the appeal and it has not been demonstrated that Respondent stands to suffer any prejudice if the appeal is reinstated for hearing on merit.
8. Consequently, I find that the interest is in favour of reinstating the appeal for hearing. The notice of motion application dated January 21, 2023, is allowed and the order made on January 19, 2023 dismissing the Appellants' appeal is set aside and the appeal is hereby reinstated for hearing.
9. Before I pen off, I note that the record of appeal has to date not been filed inspite of two previous court orders direction the Applicant to file the same.
10. It is hoped that the record of appeal will have been filed and served and submissions by both parties also filed and served when the matter comes up for compliance on July 13, 2023. In the meantime, there shall be stay of execution of judgment in Nkubu PMCC NO 97 of 2019 pending the hearing and determination of this appeal. Costs shall be borne by the Applicant

DATED IN MERU THIS 16TH DAY OF MARCH 2023

T W CHERERE

JUDGE

Appearances

Court Assistant - Morris Kinoti

For Appellant/Applicant - Ms Hyimo for Kimondo Gachoka & Co Advocates

For Respondent - Mr Kaimba for Kaimba Peter & Co Advocates

