



REPUBLIC OF KENYA



KENYA LAW
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**Mount Elgon Hardware Limited v Onyango (Civil Appeal
12 of 2020) [2023] KEHC 17548 (KLR) (19 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17548 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL 12 OF 2020**

DK KEMEL, J

MAY 19, 2023

BETWEEN

MOUNT ELGON HARDWARE LIMITED APPELLANT

AND

BEATRICE TAWA ONYANGO RESPONDENT

RULING

1. Before this court is the Appellant's notice of motion application dated 9th January 2023. The applicant has invoked the provisions of section 80 of the *Civil Procedure Act* and Order 45 Rules 1(I) (A) & (2) and 2 (2) of the *Civil Procedure Rules*. It seeks to review this Court's order of 26th September 2022, dismissing the appeal filed by the applicant for want of prosecution of its appeal.
2. The grounds founding the application are: that the appeal was filed on the 17th of January 2020 and subsequently served upon the respondent's counsel on 28th January 2020; that on 14th March 2020 the Deputy Registrar served the applicant's counsel with a letter dated 22nd February 2022; that on 17th March 2022 counsel for the applicant filed a response to that effect dated 15th March 2022; that on 14th December 2022, counsel for the respondent brought to the attention of the Applicant of the order dated 29th September 2022; that the applicant/appellant wishes to have the order given on 26th September 2022 reviewed and set aside and have the appeal reinstated; that there is an error on the record of the Court as the applicant/appellant had responded to the Notice dated 22nd February 2022 vide a letter dated 15th March 2022; that the interests of justice dictate that the order sought be granted; and that the applicant/appellant was made aware of the existence of the order given on 26th September 2022 on the 14th December 2022 hence the delay in filing this application.
3. The Respondent opposes the application through a replying affidavit sworn by one Cleveland M. Mwebi, on the grounds that: the respondent was served with the applicant's appeal filed on 17th January 2020; the respondent was in receipt of the letter from the Deputy Registrar dated 22nd February 2022;



the on 30th September 2022, the respondent made an application to have the appeal dismissed for want of prosecution; the respondent was informed that the appeal was dismissed vide an order dated 26th September 2022; the respondent filed party to party costs in the lower Court on 18th October 2022 and that the same was assessed at Kshs. 168, 715/= on 24th October 2022; the respondent proceeded to obtain a decree and attachment of the applicant/appellant's property; after the proclamation of the applicant/appellant's property, the applicant moved to this Court to stay execution based on the filed appeal; vide a replying affidavit sworn on 9th December 2022 the respondent indicated that there was no appeal pending; a perusal of the order issued on 26th September 2022 indicated that there is no error apparent on the face of the order to warrant a review; and that the respondent is highly prejudiced by this application and is in opposition to the same.

4. In response to the replying affidavit, the applicant filed a supplementary affidavit on grounds that: the entire respondent's replying affidavit is based on falsehood and that the same should be struck out with costs; the letter dated 22nd February 2022 was served upon the applicant on 14th March 2022; the applicant's counsel was served with the notice on 14th March 2022 from the Deputy Registrar and that the same was replied to on 15th March 2022 expressing the applicant/appellant's desire and willingness to proceed with the appeal thus the issue of prejudice as alleged by the respondent does not arise.
5. The application was canvassed by way of written submissions. It is only the Applicant who has filed submissions.
6. The Applicant submitted that, if it was true as alleged by the respondent that the order dated 26th September 2022 was communicated to all parties, why did her counsel proceed to file an application for dismissal of the appeal on 30th September 2022. It was argued that the applicant having filed a response to the dismissal notice vide a letter dated 15th March 2022 and which was received by the Deputy Registrar in compliance to the notice dated 22nd February 2022 and that the same was served upon the applicant on the 14th March 2022 should fall within the purview of the provisions of Order 45 Rule 1 (1) (a).
7. It was submitted that it was self-evident over the notice dated 22nd February 2022 by the Deputy Registrar viz-a-viz the applicant's letter dated 15th March 2022 that there is a clear error or omission. Counsel relied on the case of *National Bank of Kenya Limited vs Ndungu Njau* (1997) eKLR. Counsel for the applicant urged this Court to find merit in the application and allow the same.
8. I have considered the application, rival affidavits and submissions filed. There is no doubt that this Court has discretion to set aside an order dismissing an appeal for want of prosecution. The only issues for determination are whether the circumstances of this case warrant the exercise that discretion and who should bear the costs of this application?
9. In the case of *Shah v Mbogo & Another* (1967) EA it was held as follows:

“...the court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the course of justice.” (Emphasis added).
10. Similarly, in *Wilson Cheboi Yego v Samuel Kipsang Cheboi* Civil Appeal (Application) No. 2 of 2017 the Court of Appeal of Kenya stated that:

“...we find that in the circumstances of this application, sufficient reason has been given for the applicant's counsel's non-attendance on 4th December, 2018. The applicant has



therefore complied with the requirements for the grant of an order reinstating his appeal. Further, the appeal relates to a land dispute and the applicant will therefore be granted an opportunity to ventilate his case in the appeal...”

11. The applicant’s main grouse in its application is that their advocate only learnt about the Court order issued on the 26th September 2022 on 14th December 2022 when counsel for the Respondent served them with the same. Counsel for the applicant further argued that the delay in filing the application had been occasioned by the fact that the order dismissing the appeal was done ex-parte.
12. In the leading authority of *Ivita v. Kyumbu* (1984) KLR 441 Chesoni J as he then was aptly stated:

“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 the defendant, so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents and, or witnesses may be wanting and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however, satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff’s excuse for the delay, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time”. (Emphasis added).
13. Order 45 rule 1 of the Civil Procedure Rules gives the High Court discretionary power to allow review on the three limbs therein stated. An applicant may bring an application for review upon discovery of new and important matter; where there is a mistake or error on the face of the record or for any other sufficient reason. The appellant’s application was hinged on the last ground, that there existed sufficient reason or cause to warrant the Court not to order dismissal of the appellant’s suit for want of prosecution. Sufficient reasons meant under the said order and rule have been the subject of discussion in several authorities. For instance, in *Pancras T. Swai v Kenya Breweries Limited* [2014] eKLR, this Court quoted with approval the case of *Wangechi Kimata & Another vs. Charan Singh* (C.A. No. 80 of 1985) (unreported) wherein this Court held that;

“any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the Court by Section 80 of the *Civil Procedure Act*; and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous.”
14. The sufficient reasons according to the appellant are varied according to its affidavits as well as written submissions. According to Counsel for the applicant, his client, only became aware of the Court order dismissing the appeal ex-parte vide a letter from the respondents dated 14th December 2022. According to the applicant’s counsel, he filed a reply to that effect dated 15th March 2022 addressing the Deputy Registrar. He elaborately noted that his client was ready to pursue the appeal but were unable to prepare and file the respective record of appeal due to the fact that the proceedings were yet to be supplied and that the appeal was yet to be admitted as the file was yet to be placed in the record. It was submitted that the delay in prosecuting the appeal is therefore excusable.
15. Further, in my view, the applicant has an arguable appeal as it touches on apportionment of liability and award of excessive general damages.



16. Looking at the case in its entirety, I find and hold, that the applicant was placed in circumstances where it had no control over the prosecution of the case. In these circumstances, justice demands that they be accorded the opportunity to ventilate their case on appeal. The prejudice, if any, suffered by the respondent can be compensated with costs, should the appeal be unsuccessful. Indeed, the applicant had already responded to the letter by the Deputy Registrar as to whether it was ready to take further step towards prosecuting the appeal. I find the response by the applicant to the Deputy Registrar was sufficient for purposes of showing cause why it had delayed in setting the appeal down for hearing. Hence, the dismissal of the appeal on 26/9/2022 was in error. This warrants a review of the said order. No prejudice will be suffered by the respondent as she will have an opportunity to challenge the appeal during the hearing and that the costs of the application can be paid to her.
17. In light of the foregoing, I find merit in the appellant's application dated 9/1/2022 and filed on 16/1/2023 is allowed in terms of prayer (b) thereof. The costs hereof are awarded to the Respondent. The appellant is directed to proceed and set in motion the processes of setting the appeal down for hearing on priority basis within the next sixty (60) days from the date hereof failing which this appeal shall stand dismissed with costs to the respondent for want of prosecution.
18. Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 19TH DAY OF MAY 2023

D. KEMEI

JUDGE

In the presence of:

Miss Mutunga for Appellant/Applicant

No appearance for Mwebi for Respondent*

Peter Court Assistant

