



**Wachuka v Kabuchu (Civil Appeal 682 of 2017)  
[2023] KEHC 4106 (KLR) (Civ) (5 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 4106 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 682 OF 2017**

**AN ONGERI, J**

**MAY 5, 2023**

**BETWEEN**

**NELLY WANJIRU WACHUKA ..... APPELLANT**

**AND**

**ROSE WANJIRU KABUCHU ..... RESPONDENT**

**RULING**

1. The application coming for consideration in this ruling is the one dated 7/7/2022 seeking setting aside of the order of this court made on 17/3/2022 dismissing the appeal herein for want of prosecution.
2. The application is based on the grounds on the face of it and supported by the affidavit of Laban Kipchirchir Kirui sworn on 7/7/2022 in which it is deponed the appeal herein was dismissed for want of prosecution. That the lower court file had not been availed and this caused a delay in filling the record of appeal on time.
3. It was averred that no notice was issued upon the parties before the dismissal of the appeal and the appellant is still interested in prosecuting the appeal on the merits. It was indicated that if the application is not allowed the appellant will suffer irreparable loss and that no prejudice will be occasioned to the respondent if this application is allowed.
4. The respondent opposed the application and filed a replying affidavit sworn on 14/3/2023 by Victor Nganga in which it is deposed the application herein is incurably & fatally defective, incompetent and bad in law and should be struck out for non-conformity with the rules of *Civil Procedure*. The Application is purportedly supported by the Affidavit of one Laban Kipchirchir Kirui but a close inspection of the same reveals that it is undated and hence should be rightly struck off the record.



5. That additionally, appellants have never been interested in pursuing this Appeal and have been indolent. The Appeal dates back to 2017 and 5 years down the line, they failed to set the same down for Hearing and are only now blaming the Court. It was stated that the appeal herein was rightly dismissed and should be maintained as such in the interests of justice.
6. The parties filed written submissions as follows; the appellant submitted that she tendered evidence that the delay to prosecute the appeal has been occasioned by the lower court's failure to supply proceedings. That On September 16, 2021 a letter was written to the executive officer requesting the file. She indicated that she was only aware of the dismissal when seeking a date for directions.
7. The appellant argued that the record of appeal dated March 28, 2022 before this court demonstrates the seriousness of the Appellant in prosecuting the Appeal. That the delay occasioned by the lower court in typing the proceedings and extracting the decree should not be visited upon an innocent litigant.
8. The respondent in her submissions reiterated what was contained in her affidavit dated March 14, 2023 and argued that the guidelines set for reinstatement have not been met by the appellant and consequently the application herein lacks merit.
9. The sole issue for determination is whether the appeal which was dismissed on 17/3/2022 should be reinstated.
10. The order sought is granted at the discretion of the court. The said discretion should be exercised judicially. In the case of *CMC Holdings Ltd v Nzioki* [2004] 1KLR 173 it was stated that;

“That discretion must be exercised upon reasons and must be exercised judiciously... In law, the discretion that a court of law has, in deciding whether or not to set aside an ex-parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle.”

11. I find that one year after the appeal was dismissed no record of appeal has been filed.
12. There is no seriousness in prosecuting this appeal.
13. I find that the application dated 7/7/2022 lacks in merit and the same is dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 5<sup>TH</sup> DAY OF MAY, 2023.**

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**A. N. ONGERI**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent

