



**Kilonzo & another v Muthaka (Civil Appeal 603 of 2018)
[2023] KEHC 19000 (KLR) (Civ) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19000 (KLR)

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

CIVIL

CIVIL APPEAL 603 OF 2018

JN NJAGI, J

JUNE 15, 2023

BETWEEN

BONIFACE KIILUKI KILONZO 1ST APPELLANT

RADHESHYAM RTANSPORT LIMITED 2ND APPELLANT

AND

MARY GATHONI WAINAINA MUTHAKA RESPONDENT

RULING

1. The Applicants/Appellants have filed an application dated August 22, 2022 seeking that this court be pleased to set aside its order made on July 22, 2022 dismissing the Applicants' appeal for want of prosecution. The application is premised on grounds on the face of the application and supported by the affidavit of the advocate for the Applicants, Mr. Philemon Morara. The advocate avers that the Applicants were never served with any Notice to Show Cause prior to the dismissal of the appeal on July 22, 2022. That the Applicants have not been indolent in prosecuting the matter as they filed the Record of Appeal on March 1, 2021 and requested the court to admit the appeal but got no response from the court. That in the circumstances the Applicants will suffer grave injustice if the application is not allowed as they will have been condemned unheard. Counsel urged the court to allow the application and admit the appeal.
2. The application was opposed by the Respondent vide her replying affidavit sworn on the November 9, 2022. The Respondent deposed that the Applicants were ordered by the court to file a Record of Appeal within 21 days vide a letter dated the June 19, 2020 failing which the appeal will be dismissed. That they did not do so until later on the March 24, 2021. That even after filing the same they failed to set it down for mention or hearing. Consequently, the court issued a Notice to them to show cause why the appeal should not be dismissed for want of prosecution. They failed to turn up in court on the July 22, 2022 and the appeal was dismissed for want of prosecution. That in the premises the application



is a mischievous ploy to deliberately attempt to evade, obstruct and/or delay the course of justice by denying the respondent the fruits of justice. The Respondent urged the court to dismiss the application with costs.

3. The application was canvassed by way of written submissions.

Applicants' submissions

4. The Advocates for the Applicants through their advocates submitted that there is no evidence that they were served with the notice to show cause. That after filing the Record of Appeal they wrote a letter to the Deputy Registrar seeking to have the appeal admitted and another letter enquiring whether the appeal had been admitted. The same were annexed to the application. That that shows that the Applicants have been keen to prosecute the appeal. That the dismissal of the appeal without a notice being served would constitute a great injustice to the Applicants. The Applicants relied on the case of *Key Freight Kenya Ltd v Mohammed Abdi*, Makueni HCCA No 32 of 2019 where Dulu, J invoked the requirements of fair hearing under Article 50 of the *Constitution* and for substantive justice under Article 159(2) of the *Constitution* and allowed an application of similar nature so as to give the parties a chance to argue the substantive appeal. The learned Judge further held that the respondent would not suffer any prejudice if the appeal was reinstated.
5. The Applicants also relied on the case of *Joseph Kinyua v G.O. Ombachi*, Meru HCCA No 82 of 2017, where Gikonyo J. held that:

However, as I stated dismissal is a draconian order which drives away a litigant from the seat of justice. Therefore, in spite of the gaps I have noted, I still think that justice would be served in reinstating the appeal but with strict conditions. No prejudice will be suffered by the Respondent in reinstating the appeal. Accordingly, I set aside the dismissal order and reinstate the appeal....."

Respondent's Submissions

6. The respondent through the firm of Eboso & Co. Advocates, submitted that the address on the Notices which was used by the court during the service of the Notices is the same address that was indicated by the Applicants in their pleadings. That the Applicants were therefore served with the Notice to show cause and have not given a plausible explanation for failure to attend court. The Respondents relied on the exposition in the case of *Ramadhan Salim Baka v Jitendra Popatilab Naranji*, Mombasa ELC No40 of 2013, where the court held that:

The courts have discretion generally to reinstate a suit which is dismissed for non-attendance but in all matters involving the exercise of the court's discretion, it must be exercised judicially based on facts and law. The Applicant must satisfy this court that he has good reasons why he failed to attend court. in this case, the Applicant has not given any reason why he failed to attend court with respect, the Applicant and his counsel adopted a casual attitude to this litigation and they have no one but themselves to blame if no indulgence is extended to them. the plea they make is that the order dismissing the suit be set aside and the same reinstated. however, they do not give the reason for non-attendance on 21st September, 2017 despite having been served by the Respondent

I am aware that dismissal of a case is a draconian judicial act which drives the Plaintiff away from the seat of judgment. It should be done sparingly and in cases where dismissal is the feasible and just thing to do. Therefore, courts should strive to sustain suits rather than dismiss them especially where justice would still be done and fair trial had despite the



delay. However, any explanation for the non-attendance and the delay should be given for evaluation by the court to see whether it is reasonable. That notwithstanding a court of law should not hesitate to decline to set aside an order dismissing a suit where no explanation or no reasonable reason has been offered.

7. The Respondent submitted that the Applicants do not warrant the court's exercise of its discretion as they have not given a plausible explanation for failure to appear in court.

Analysis and Determination

8. The Appeal herein was dismissed for want of prosecution under the provisions of Order 42 Rule 35 of the *Civil Procedure Rules, 2010*. The same provides as follows:-

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- (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. The Applicants deny that they were served with Notice to Show Cause (NTSC) prior to the dismissal of the appeal for want of prosecution. I have keenly examined the affidavit of service sworn by one Jackson Kanyoro on the July 12, 2022. The said person deposed that he handed over copies of the NTSC to the Court's Mail Registry for onward service to the last known address of the Applicants. Nobody from the Court's Mail Registry swore an affidavit of service to indicate that the NTSC was subsequently served on the Applicants. The fact of Jackson Kanyoro leaving the NTSC with the Mail Registry did not constitute service on the Applicants. This means that there was no evidence that the Applicants were served with the NTSC.
10. Besides the above, Order 42 rule 35(1) of the *Civil Procedure Rules* requires for the court to have given directions under Rule 13 before an appeal can be dismissed for want of prosecution. I have perused the court file and I do not find any evidence for such directions having been given by the court. The appeal was therefore not ripe for dismissal for want of prosecution.
11. In view of the foregoing, I find that the court wrongly and prematurely dismissed the matter for want of prosecution. In the premises I do hereby set aside the order of the court issued on July 22, 2022 dismissing the appeal herein for want of prosecution. The application dated August 22, 2022 is thus allowed as prayed and the appeal is reinstated for hearing.
12. I have perused the Record of Appeal filed herein. The appeal raises trial issues and is accordingly admitted for hearing.
13. In view of the fact that it is the court which was at fault in dismissing the appeal for want of prosecution, it is only fair that each party bears its own costs in respect of the application. It is so ordered.
14. The court will proceed to give directions on the hearing of the appeal.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF JUNE, 2023.



J. N. NJAGI

JUDGE

In the presence of:

Mr Mugambi for Applicants

Mr Eboso for Respondent

Court Assistant – Amina

30 days Right of Appeal.

