



Angwenyi & another v Sangany Agencies Limited & another (Civil Appeal 133 of 2018) [2023] KEHC 20324 (KLR) (20 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20324 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 133 OF 2018
HK CHEMITEI, J
JULY 20, 2023**

BETWEEN

WILFRED AKENGA ANGWENYI & ANOTHER APPLICANT

AND

SANGANY AGENCIES LIMITED 1ST RESPONDENT

JOSEPH OCHIENG ONUNGA 2ND RESPONDENT

RULING

1. The Notice of Motion application by the applicant prays for orders that this court be pleased to set aside the orders of 1st February 2021 dismissing the appellants appeal herein for want of prosecution and reinstate the same and allow the same to be heard on merit. The applicant as well prayed for costs.
2. The application is based on the grounds thereof and the sworn affidavit of Emmah Oganga advocate sworn on 14th March 2022 together with the annexures therein.
3. The said counsel for the appellant deponed that the appellant was unable to process the appeal for hearing since the proceedings at the trial court had not been availed despite their formal request. She said that the orders dismissing the appeal was issued in their absence as there was a mix up of their files between those before honourable Justice Ngetich and Ngugi J (as he then was.)
4. She went on to deponed that by the time they realised, the matter had already been called out and the dismissal orders issued. It was therefore her case that this court still had discretion to reinstate the same as the respondents shall suffer no prejudice.
5. Victor Nganga advocate for the respondents objected to the application through his affidavit sworn on 20th May 2022. He deponed that the application was res judicata as a similar application had been filed and withdrawn by the applicant dated 10th February 2021. He said that they had already replied to the said application.



6. He said that the application was a blatant abuse of the court process and the same ought to be disallowed for the simple reason that what the applicants were doing was simply a knee jerk reaction.
7. The court directed the parties to file written submission which the court has perused together with the authorities cited.
8. Each of them obviously submitted in line with the issues raised in the respective rival affidavits.
9. The basic issue in my view is whether the application is merited considering the orders dismissing the appeal. It is not true that the application is res judicata for the reason that what was withdrawn was not adjudicated upon by the court. The applicants thought that the same had material errors and they withdrew before it was canvassed. This does not run contrary to the provisions of Section 7 of the Civil Procedure Act.
10. What then is the merit of the application.? I respectfully do not think that the court was in error when it dismissed the appeal. The issue of mix up of the files between the two courts as advanced by the applicants is a very flimsy reason to say the least. There is no evidence produced by the applicants in form of a cause list for the day.
11. Even more importantly is whether they were still interested with the appeal. The notice to dismiss the appeal was issued and orders dismissing the appeal was dated 1st February 2021 whereas the memorandum of appeal was filed on 7th September 2018. This was about three years after the judgement.
12. The attached letter requesting for proceedings dated 19th September 2018 was never followed up as there is no evidence to that effect. At the same time, as at drafting this ruling, there is no evidence of any step taken by the applicant to show any interest in the appeal. In short, I find that the applicants have been indolent with no interest at all in the appeal necessitating the court to issue the notice.
13. The case of *Shah v. Mbogo* (1967) EA 116 clearly stated that this court has the necessary discretion to ensure that justice is done without resulting into hardships and that excusable mistakes can be allowed,” but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”
14. In this case I find that it is the applicants who have obstructed the course of justice by failing to prosecute the appeal and leaving the court with no other option but to issue notice of dismissal. The three years’ period was inordinate in the circumstances. There is no evidence of any effort by the applicants to process the appeal or as found above follow up with the registry.
15. For these reasons, the application is declined with no orders as to costs.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 20TH DAY OF JULY 2023.

H K CHEMITEI

JUDGE

