



REPUBLIC OF KENYA



**Karanja v Molyn Credit Limited & another (Civil Appeal E071 of 2020)
[2023] KEHC 20254 (KLR) (Commercial and Tax) (17 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20254 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E071 OF 2020**

A MABEYA, J

JULY 17, 2023

BETWEEN

FLORENCE NJERI KARANJA APPELLANT

AND

MOLYN CREDIT LIMITED 1ST RESPONDENT

PETER NGOTHO 2ND RESPONDENT

RULING

1. Before Court is the applicant's Notice of Motion dated January 30, 2023. The same was brought pursuant to Article 50 & 159 of the *Constitution*, section 95 of the *Civil Procedure Act*, Order 12 rule 7, Order 42 Rule 21 and Order 50 Rule 7 of the *Civil Procedure Rules*.
2. The application sought the setting aside of the directions/orders issued by this court on November 11, 2022 that dismissed the applicant's memorandum of appeal dated November 24, 2020 and an order to reinstate the same for hearing. Further, it sought an extension of time within which to file a record of appeal and for the filed record of appeal dated December 5, 2022 to be deemed as duly filed in time.
3. The grounds for the application were set out in its body and in the supporting affidavit sworn by the applicant on January 30, 2023.
4. The grounds were that; judgment was delivered on November 6, 2020 in Milimani Chief Magistrate's Civil Case No 10931 of 2018 wherein the applicant's case was dismissed and the respondents' counterclaim was partially allowed. That aggrieved by the said judgement, the applicant lodged an appeal to this court vide a memorandum of appeal dated November 24, 2020. That thereafter, his advocates made efforts to set down the appeal for hearing and made a request for the certified copy of the judgment and proceedings from the lower court.



5. That on November 11, 2022, the Court made orders in the presence of the respondents' advocates and in the absence of the applicant's advocates whereby it directed the applicant to file a record of appeal within 14 days from November 11, 2022 and in default, the memorandum of appeal would stand dismissed.
6. The applicant stated that she was unable to fully comply with the said directions due to the strict timelines set and also the administrative delays experienced at the Milimani Chief Magistrate's Court in obtaining certified copies of the proceedings to enable the filing of the record of appeal. That consequently, the memorandum of appeal stood automatically dismissed. However, the applicant filed her record of appeal out of time on December 8, 2022.
7. The applicant contended that if her counsel was present on the said November 11, 2022, he would have informed the Court that the trial court's proceedings had not yet been obtained. That the Court would have given more accommodative directions and that the dismissal of the memorandum of appeal was draconian and threatened to drive the applicant away from the seat of justice.
8. The application was opposed by the 2nd respondent vide a replying affidavit sworn on February 7, 2022 by his advocate, Joseph Makumi. He averred that the Court issued fair and accommodative directions to the applicant since it indulged her by allowing her to file her record of appeal 14 days from November 11, 2022. That the applicant's memorandum of appeal dated November 24, 2020 was dismissed by Majanja J on September 27, 2022 for want of prosecution.
9. That instead of pursuing its reinstatement, she went ahead and filed a different matter in a different court being Thika ELC MISC APPL NO 54 of 2022 Florence Njeri Karanja v Peter Ngotho & another which was struck out with costs to the 2nd respondent which costs she has not paid.
10. Further, that the applicant had previously ignored court orders and as such she may ignore any of this court's directions. That she is not entitled to extension of time as of right but as an equitable remedy. That in seeking an equitable remedy, the applicant ought to do equity by paying costs as mutually agreed in the aforesaid Thika ELC MISC APPL NO 54 of 2022.
11. The 1st respondent also opposed the application through a replying affidavit sworn on February 23, 2023 by John Wamiti Njagi, its advocate.
12. He averred that the applicant is seeking to be accommodated for the third time which is unfair and prejudicial to the 1st respondent. That the 1st respondent's legitimate expectation is that the dismissal of the appeal herein for the second time had finally put this matter to rest. That the record indicates that the applicant has all along not been keen on prosecuting her appeal and she does not deserve the orders sought.
13. I have considered the record, the rival averments and submissions filed in this matter. The applicant was dissatisfied with the judgment of the lower court in Milimani Chief Magistrate's Civil Case No.10931 of 2018 and she preferred an appeal against it to the High Court through its memorandum of appeal dated November 24, 2020. The said appeal was dismissed for want of prosecution on September 27, 2022 by Majanja J.
14. The appeal was unconditionally reinstated on September 30, 2022 upon the applicant's application for reinstatement. However, as of November 11, 2022 the applicant had not complied with the condition to file the record of appeal within 30 days from September 30, 2022.



15. On November 11, 2022 when this matter came up before me, I directed the appellant to file her record of appeal within 14 days from November 11, 2022 and in default the memorandum of appeal would stand dismissed.
16. The applicant failed to file the record of appeal and consequently her appeal was dismissed. Her case is that she failed to file the record of appeal due to a delay in obtaining the record of appeal and the judgment of the lower court.
17. This Court takes judicial notice of the perennial problem and delays in obtaining proceedings from the Milimani Commercial Court due to shortage of typists. It is therefore not an unlikely occurrence that there would have been delay in obtaining the proceedings as was sworn by the applicant. That fact was not denied by any of the respondents. The filing of another matter in the Thika ELC in itself cannot be a bar to the extension of time sought.
18. Another issue is that I note that the applicant has since filed her record of appeal. That means that there would be no further delay. I would rather I give the applicant an opportunity of being heard at the pain of costs rather than forever barring her from the seat of justice. Any prejudice to be suffered by the respondents can be ameliorated by costs.
19. Accordingly, I allow the application as prayed. I set aside the order of dismissal of the appeal. I substitute therefor with an order extending the time for the filing of the record of appeal. The record of appeal herein is deemed to be filed within time. The costs to the respondents in any event.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JULY, 2023.

A. MABEYA, FCIArb

JUDGE

