



**Loopa & another (Suing as the administrators of the Estate of Stephen Ngolia (Deceased)) v
Technoplast Ltd (Civil Appeal E016 of 2021) [2023] KEHC 20193 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20193 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E016 OF 2021
EM MURIITHI, J
JULY 13, 2023**

BETWEEN

JACKSON LOOPA 1ST APPELLANT

FLORENCE KEBO 2ND APPELLANT

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF STEPHEN NGOLIA
(DECEASED)**

AND

TECHNOPLAST LTD RESPONDENT

RULING

1. By a Notice of Motion under certificate of urgency dated 28/11/2022 pursuant to Order 10 Rule 11, Order 22 Rule 22 of the *Civil Procedure Rules*, sections 1A, 1B and 3A of the *Civil Procedure Act* and all other enabling provisions of the law, the appellants seek that:
 - a) This court be pleased to set aside the orders dated November 9, 2022 dismissing this suit.
 - b) This court be pleased to reinstate the appeal.
 - c) The draft supplementary record of appeal annexed to this application be deemed to have been duly filed upon reinstatement of the appeal.
 - d) Costs of this application be provided for.
2. The grounds upon which the application is premised are set out in the application and supporting affidavit of Jackson Loopa, one of the appellants herein, sworn on even date. As far as he knows, his advocates had earlier filed the record of appeal and the only thing that was lacking was the certified copy of the decree. Upon court's directions of 6/10/2022 that his advocates file a supplementary



record of appeal containing the relevant documents, they wrote to the trial court on 7/10/2022 and 17/10/2022 to supply them with the said decree for purposes of preparing the record of appeal. It was not until 21/11/2022 when the trial court sent his advocates the said decree, during which time the 14 days period set by the court had already lapsed. The failure in complying with the court's orders was not of their own making, but it was occasioned by the trial court's delay in issuing them with the decree. They have a strong appeal with chances of success which can only be argued if the appeal is reinstated. He avers that their advocates have now prepared the supplementary record of appeal and it is within the powers of this court to set aside its own orders and reinstate the appeal. The application was filed promptly without undue delay and the respondent will not suffer any prejudice if the appeal is reinstated. Their advocates have also filed submissions on the appeal and it is only fair that the application is allowed.

3. The respondent has opposed the application vide its replying affidavit sworn on 7/12/2022 by Gad Gathu, its advocate. He avers that allowing the application would just increase the expenses on the part of the respondent when the failure to prosecute the appeal was as a result of the appellants' indolence. He is certain that the appellants have had a lot of time to get the certified copy of the decree from the lower court since the filing of their record of appeal on 13/7/2021. There is no record of follow up on the certified copy of the decree prior to the ruling dismissing the appeal, save for the appellants' letters of 7/10/2022 and 17/10/2022. He accuses the appellants' of having come to court with unclean hands and therefore undeserving of the orders sought. He avers that the application ought to be dismissed with costs as it has been brought with bad intent and made in bad faith.

Submissions

4. The appellants urge that the delay in filing the supplementary record of appeal was not their fault, and cite *Joseph Moilo v University of Nairobi* [2016] eKLR. They urge that they are victims of an accident who are seeking justice for the voiceless dependants of the deceased estate, and justice will only be served if the appeal is reinstated.
5. The respondent relies on *Ivita v Kyumbu*[1984] KLR 441, *Bilba Ngonyo Isaac v Kembu Farm Ltd & another* [2018] eKLR and *Mobile Kitale Service station v Mobil Oil Kenya Limited & another* [2004] eKLR, which settled the principles upon which an application can be reinstated. It urges that since there has been negligence, laxity and indifference on the part of the appellants, the application ought to be dismissed with costs.

Determination

6. The singular issue for determination is whether the appeal ought to be reinstated.
7. On 9/11/2022, the court issued orders that:
 - “ 1) The appellant to file and serve a Supplementary Record of Appeal annexing the necessary documentation within fourteen (14) days from the date hereof in default of which the appeal shall stand dismissed.
 - 2) Costs of the application to abide the outcome of the appeal.”
8. The appellants contend that they were not able to obtain a copy of the certified decree from the lower court until 21/11/2022, despite having requested for it on 2 occasions. The court notes the appellants' letter dated 7/10/2022 and received by the court on the same day together with the copy of decree dated 17/11/2022 and certified on 29/11/2022.



9. Order 10 Rule 11 of the [Civil Procedure Rules](#) provides for setting aside judgment as follows:

“Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”
10. Order 42 Rule 21 provides for re-admission of appeal dismissed for default as follows:

“Where an appeal is dismissed under rule 20, the appellant may apply to the court to which such appeal is preferred for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing, the court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.”
11. The principles governing reinstatement of suits were restated in the case of [John Nabashon Mwangi v Kenya Finance Bank Limited \(in Liquidation\)](#) [2015] eKLR by (F. Gikonyo J) as follows:

“The fundamental principles of justice are enshrined in the entire Constitution and specifically in article 159 of the [Constitution](#). Article 50 coupled with article 159 of the [Constitution](#) on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the court. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such acts are comparable only to the proverbial “Sword of the Damocles” which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated.”
12. The reason advanced here why the supplementary Record of Appeal was not filed within the 14 days period ordered by this court is the delay in obtaining the certified copy of the decree from the trial court.
13. The considerations to be made in determining whether or not to dismiss matters for want of prosecution and whether to order reinstatement were considered in the case of [Ivita v Kyumbu](#) [1975] EA 441, 449, where Chesoni J. (as he then was) held as follows:

“...So the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay.....The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced...”
14. The court is alive to the fact that re-instatement of an appeal is a matter of discretion, which ought to be exercised judiciously.
15. The appellants cannot be said to be undesirous of prosecuting the appeal as they already filed the record of appeal and they have prepared the supplementary record of appeal ready for filing. Upon obtaining the certified copy of the decree on 21/11/2022, the appellants lodged this application on 29/11/2022 to have their appeal reinstated.
16. In the spirit of article 159(2)(d) of the [Constitution](#) and the overriding objectives stated under section 1A and 1B of the [Civil Procedure Act](#), this court considers it just to reinstate the appeal.



Orders

17. Accordingly, for the reasons set out above, and in line with the policy of the court not to drive a litigant away from the seat of justice without a hearing, unless there is inexplicable inordinate want of prosecution, the application dated 28/11/2022 is allowed in the following terms:

1. The orders of 9/11/2022 are hereby set aside.
2. The appeal is hereby reinstated.
3. The appellants are hereby directed to file and serve a Supplementary Record of Appeal within 7 days from the date hereof.
4. Directions on the hearing of the appeal shall be taken on a date to be fixed in consultation with counsel.
5. The costs of the application shall abide the outcome of the appeal.

Order accordingly.

DATED AND DELIVERED THIS 13TH DAY OF JULY, 2023.

EDWARD M. MURIITHI

JUDGE

APPEARANCES

M/S Simiyu Opondo Kiranga & Co. Advocates for the Appellant/Applicant.

M/S Mucheru Law Advocates for Respondent.

