



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Nyaga v Tiras & another (Civil Appeal 28 of 2022)
[2023] KEHC 19879 (KLR) (12 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19879 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL 28 OF 2022
LM NJUGUNA, J
JULY 12, 2023**

BETWEEN

NJAGI TIRAS NYAGA APPLICANT

AND

JANE WANJIRA TIRAS 1ST RESPONDENT

ROSE RUGURU TIRAS 2ND RESPONDENT

RULING

1. A Notice of motion dated 30 November 2022 has been lodged by the Appellant/ Applicant before the court for determination, being supported by the grounds set out on the face of the application as well as the facts deposed in the Applicant's Advocate's supporting affidavit. The orders sought are as follows:
 - a. That the orders issued by this Honourable Court on November 24, 2022 be set aside upon such terms that are just;
 - b. That the appeal be reinstated; and
 - c. That the costs of this Application do abide the outcome of the Appeal.
2. The Application is based on sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya and order 12 rule 7 of the *Civil Procedure Rules 2010*.
3. The Appellant lodged an appeal to this court vide the memorandum of appeal dated the May 16, 2022. The same was admitted and set for hearing on November 24, 2022. On the date of the hearing, the court noted that even though the date was taken in the presence of the appellant, none of the parties attended court, leaving the court with no option but to dismiss the appeal for non-attendance.
4. Following the court's order issued on November 24, 2022, the Appellant/ Applicant, through Counsel, filed the present application in which he states that on the material day he indeed attended



court physically and heard the matter being called out by the court clerk. He thought that it was for purposes of confirming whether the litigants were present in court, since he had already logged in virtually and was waiting in the lobby to be admitted into the session.

5. That, by the time he was admitted in the virtual session, the matter had already been called out and the court confirmed that none of the parties were present or represented, thereby necessitating the orders. In his affidavit, the Appellant/Applicant's Advocate depones that himself, his client and the respondents were all present in the physical courtroom prepared to proceed with the appeal. Further that, upon inquiry in open court on the same day, the Judge advised him to peruse the court file, wherein he learned of the order that had been made dismissing the appeal for non-attendance.
6. The 1st Respondent filed a replying affidavit on behalf of both respondents wherein it is averred that the application is an abuse of the court process and should be dismissed with costs.
7. The Motion was dispensed with through written submissions. The Appellant/ Applicant relied on the case of *Wachira Karani Vs Bildad Wachira* [2016] eKLR in which the Honourable court quoted the Court of Appeal of Tanzania in the case of *The Registered Trustees of the Archdiocese of Dar es Salaam Vs The Chairman Bunju Village Government and Others* wherein the issue of sufficient cause was discussed. The court stated:

“It is difficult to attempt to define the meaning of the words ‘sufficient cause’. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant” (Emphasis added)”

8. In the same case, the court also referred to *Patel Vs East Africa Cargo Handling Services* where Duffus,VP stated;

“The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication"

9. The Appellant/Applicant submitted that the non-attendance was not deliberate and is to be treated as an inadvertence. Towards this argument, he drew the court's attention to the case of *Philip Chemwolo & another Vs Augustine Kubende* [1986] eKLR where Apaloo, JA (as then was) stated:

“....Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits.”

10. On the issue of whether the appeal should be reinstated, the Appellant/ Applicant cited Article 50(1) of the *Constitution of Kenya 2010* on the right to a fair hearing. It is asserted that the appeal was dismissed at a very early stage and if it is not reinstated, then the Appellant/Applicant's right to a fair hearing would be infringed. He also stated that the subject of the instant application falls within the purview of procedural technicalities which should be resolved under Article 159(2) of the *Constitution of Kenya 2010*.



11. The Respondents filed joint submissions. They argued that the application is an abuse of the court process and that it should be dismissed with costs. It is their submission that the Appellant/Applicant and his Counsel are not being truthful to the court. They also insist that they were not served with court processes except for this application.
12. Order 12 Rule 7 of the [Civil Procedure Rules 2010](#) empowers the court to apply its discretion in this matter. However, it must be understood that the discretion of the court cannot be applied arbitrarily. In saying this, I make reference to the case of [Selina Vukinu Ambe Vs Cyllus Godfrey Onyango](#) [2020] eKLR wherein the court cited the case of [Odoyo Osodo Vs Rael Obara Ojuok & 4 others](#) [2017] eKLR in which the following statement was made:

“.....The discretion of the court cannot be exercised whimsically but ought only to be exercised judicially and judiciously. A basis for the exercise of discretion has to be laid by the party inviting the court to exercise its discretion.....”
13. Further, the court while addressing the issues in the case of [Julius Kibiwott Tuwei Vs Reuben Argut & 7 others](#) [2022] eKLR stated as follows:

“This discretion has to be exercised judiciously, as was stated the case of Shah Vs Mbogo (1979) EA 116 quoted with approval in the case of John Mukuha Mburu Vs Charles Mwenga Mburu [2019] eKLR, where that court held thus:
“.....this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.””
14. The affidavit in support of the application is sworn by an Advocate of the High Court of Kenya. It cannot be disputed that an advocate owes a duty of care to his client. Where a litigant is represented by Counsel, the Advocate must ensure that his client’s interests are well protected and further, that the client is well guided on the procedures, virtual or otherwise.
15. That said, on the first order sought by the Appellant/ Applicant, I will now address the issue of whether or not the non-attendance was occasioned by sufficient cause. From my analysis of the application and supporting affidavit, the reason for non-attendance by counsel for the applicant is plausible. The court takes judicial notice that counsel was waiting in the open court and he mentioned the matter by which time the matter had already been dealt with virtually and dismissal order made.
16. This court will also apply itself on the issue as to whether the application was brought in good time, given the circumstances. The order to dismiss the appeal was given on 24 November 2022 while the application in question was filed on 01 December 2022. In the case of [Magunandu Company Ltd Vs Joyce Wairumu Ngugi & another](#) [2020] eKLR the court referred to [Ivita Vs Kyumbu](#) (1984) KLR 441 the court stated:

“...the test as to whether a suit should be reinstated is whether there is delay that is prolonged and inexcusable and if justice will be done despite the delay....”
17. In the instant case I find that the application was brought within one week and there was no unreasonable delay.



18. On the issue as to whether the respondents stand to be prejudiced should the appeal be reinstated; the respondents had an opportunity to respond to the application. There is nothing in their responses and joint submissions indicating to the court that they stand to be prejudiced if the appeal is reinstated. In addition, on the respondents' argument that they were never served with hearing notices, I found that there is sufficient proof in the court file that they were sufficiently served with the court processes.
19. In conclusion, having taken into account the submissions by both parties and the relevant case laws, I find that it is proper to exercise the discretion of this court in favour of the Appellant/ Applicant. This court will not punish the Appellant/ Applicant for the mistakes of his Counsel.
20. Accordingly, I hereby set aside the orders given by this court on 24 November 2022 and do order reinstatement of the appeal to be heard on its merit. The Respondents shall have the costs of this Application assessed at Kshs 5,000/= to be paid within ten (10) days from the date of this ruling failing which the orders made herein shall stand vacated.
21. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 12TH DAY OF JULY, 2023.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondents

