



**Great Rift Express Shuttle v Mungai & another (Suing as the Legal Representative of the Estate of the Late Peter Gichuki Karanja) (Civil Appeal 39 of 2019) [2023] KEHC 22462 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22462 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL 39 OF 2019  
SM MOHOCHI, J  
SEPTEMBER 22, 2023**

**BETWEEN**

**GREAT RIFT EXPRESS SHUTTLE ..... APPELLANT**

**AND**

**JACKLINE WAMBUI ..... 1<sup>ST</sup> RESPONDENT**

**STEPHEN KARANJA MUNGAI ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE  
PETER GICHUKI KARANJA**

**RULING**

1. This Appeal was filed on March 19, 2019 vide Memorandum of Appeal dated March 7, 2019. The Appeal arises from the judgment delivered on February 19, 2019, by Hon S. Wahome, Chief Magistrate in Molo CMCC No. 153 of 2018.
2. The Appeal was dismissed on January 25, 2023 under the provisions of Order 42 Rule 35(2) of the [Civil Procedure Rules](#) for want of prosecution. The Court issued a Notice to Show Cause why the Appeal could not be dismissed and the appellant did not give reasons why the same could not be dismissed.
3. The appellant moved this court vide Notice of Motion dated January 31, 2023 seeking the following orders: -
  - a. Spent
  - b. Spent
  - c. Spent



- d. That there be an order of stay of execution of the judgement delivered in Molo CMCC No. 153 of 2018 on 27/08/2019 pending the hearing and determination of the Appeal
  - e. That this Appeal being Nakuru HCCA 39 of 2019 be and is hereby reinstated for hearing and determination on merit.
  - f. That this Honourable Court does make any such further orders and issue any other relief it may deem just in the interest of justice.
  - g. The costs of the Application be provided for in the cause
4. The appellant's Application is premised on the grounds that the appellant had already filed their record of Appeal dated January 18, 2023 and were in the process of fixing a hearing date for the Appeal. The delay in filing the Record of Appeal was occasioned by the Court registry as the appellant had been constantly on numerous occasions pursuing the typed proceedings.
  5. The appellant urges this court to exercise its discretion and restore the Appeal to be determined on merit and the mistake of counsel should not be visited upon an innocent litigant.
  6. The appellant is apprehensive that if the orders sought are not granted, the appellant stands to suffer irreparable damage and in any event if the Application is allowed the respondent will not suffer prejudice or any damage that cannot be compensated by way of costs.
  7. The said Application was supported by the affidavit sworn by Joyce Chichi. In the supporting affidavit, the advocate contents that the delay was occasioned by the registry personnel claiming to be understaffed hence the delay in getting the typed proceedings. She annexed JC2 as proof of several letters written to Court requesting for copies of typed proceedings, list of exhibits, judgment and decree. She also annexed CJ1 as proof of filing the Appeal.
  8. The respondent in opposing the Application filed a Replying Affidavit sworn by Jackline Wambui. She avers that no steps had been taken to by the appellant herein to prosecute the Appeal and when the Appeal was listed on 25<sup>th</sup> January for Notice to Show Cause why the same should not be dismissed for want of prosecution, counsel, Miss Mwangi for the appellant showed up in Court but never advanced reasons as to why the Appeal should not be dismissed.
  9. The respondent also contends that the Application is res judicata since it had already been dealt with conclusively on 25<sup>th</sup> January, 2023. The respondent is Apprehensive that she will suffer prejudice since she has waited for 5 years to enjoy the fruits of her judgement, that the Appeal is just on quantum and there is no plausible justification for the delay in prosecuting the Appeal.
  10. The Application was canvassed by way of written submissions. The appellant did not file submissions.
  11. The respondent's written submissions dated March 31, 2023, contends that this is an abuse of the Court process since the Application has not met the threshold for granting the prayers sought. Heavy reliance was on the case of *Ivita vs Kyumbu* [1984] KLR 441 as to the reason for delay and whether the delay is prolonged and inexcusable and if justice can be done despite the delay.
  12. That issue of the notice to show cause was already dealt with and that the appellant was supposed to Appeal the decision and not bring it back to the Court that made the decision.
  13. The respondent also submitted that the Application was brought under Orders 42 and 45 of the *Civil Procedure Rules* but has failed to meet the statutory requirements. That the Application is an abuse of the court process and finally that justice delayed is justice denied.



14. I have carefully considered the appellant's Application for stay of execution pending the hearing and determination of the Appeal and reinstatement of Appeal to be heard and determined on merit. I have also examined the affidavits, annexures, the filed record of Appeal and submissions.
15. The issues for determination in my view are whether
  - i. Whether the Appeal should be reinstated;
  - ii. Whether this court should grant stay of execution; and
  - iii. Who bears the costs of the Application?

**Whether the Appeal should be reinstated:**

16. The Advocates for the appellant was served with the Notice to show cause and appeared in court on January 25, 2023, when the same came up for hearing.
17. The court observes from the appellant's advocate's annexures, there is evidence of vigilance from the advocates in getting typed proceeding from the court. The Advocates for the appellant started prompting the Executive officer in letters dated March 18, 2020, January 27, 2021, July 15, 2021, November 17, 2021. The said advocates in the letters impressed upon the Executive Officer of the court's order to file the Record of Appeal within a specific period as directed by court on September 27, 2019.
18. The typed proceedings judgment and decree after a long wait were then availed to the appellant. It is not clear from the record the specific dates since print out is faint but nevertheless the Advocates filed the record of Appeal on January 19, 2023 and on the same date wrote to the Deputy Registrar requesting for a mention date to take directions on the Appeal.
19. There were persistent trials and there was speed in filing the instant Application. It does therefore seem that the appellant had not lost interest in prosecuting the Appeal.
20. When the Notice to Show cause came up for hearing on January 25, 2023, learned counsel could have pointed out that the record of Appeal had been filed. This was a mistake that costs the appellant.
21. In *Belinda Murai & others v Amoi Wainaina* [1978] KLR 2782 Madan J (as he then was) described what constitutes a mistake

“A mistake is a mistake. It is no less of a mistake because it is an unfortunate slip. It is no less pardonable because it is committed because it is committed by a senior counsel, though in the case of a junior counsel the court may feel compassionate more readily.

A blunder on a point of law can be a mistake. The door of Justice is not closed because a mistake has been made by a lawyer of experience who ought to have known better. The court may not condone it but ought to certainly do whatever is necessary to rectify it if the interest of Justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in the interpretation of laws and adoption of legal point of view which Courts of Appeal sometimes overrule.”
22. The respondent counsel submitted that, the appellant abused the opportunity given to it to show cause. There was failure of the appellant's advocate to advance reasons why the Appeal should not be dismissed for want of prosecution or file anything to the effect. The appellant's advocate also committed a blunder by failing inform the court that it had already filed the Record of Appeal.



23. In *Philip Chemwolo & another v Augustine Kubede* [1982-88] KAR 103 at 104. Aplolo JA (as he then was) held that:

“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 not have his case heard on merit.

I think the broad equity approach to this matter is that unless there is fraud on intention to over each other there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of parties and not the purpose of imposing discipline.”

24. This court cannot oust the appellant from the seat of justice for an outcome that was not its fault. On the other hand, the respondent too was not at fault and deserves justice as well. The respondent has a legitimate expectation that she will enjoy the fruits of the judgment that was entered in her favour. I must therefore weigh the repercussions and prejudice that is likely to be suffered if the Appeal is not reinstated.

25. I find that in the circumstances of this case bearing in mind that the record of appeal was already filed, the Notice to show Cause had already been overtaken by events. It is my considered view that the dismissing the Appeal would be an injustice of graver magnitude.

26. For the above reasons, I exercise my discretion and allow the appellant’s Application for Reinstatement and set aside the Order for dismissal dated January 25, 2023.

#### **Whether this Court should grant stay of execution**

27. This court has established that it was not the appellant’s fault that there was some in adverted delay and in deed by the time the Appeal was being dismissed on January 25, 2023 the Record of Appeal had already been filed on January 18, 2023. The Applicant had actively engaged the lower Court it is therefore only fair that the stay of execution be granted. Accordingly, I grant the Order for stay of execution of the decree in the lower court pending the hearing and determination of this Appeal

28. In in the upshot I order as follows;

a. That the Appeal, is hereby reinstated for hearing and determination on merit.

b. An Order of stay of execution, of the judgement delivered in Molo CMCC No. 153 of 2018 on August 27, 2019, pending the hearing and determination of the Appeal is hereby issued.

c. The appellant, shall serve the respondent with the Record of Appeal within 30 days from the date hereof.

d. That the Deputy Registrar of the High Court, do call for the re-submission of the lower court file to this Court within 14 days from the date hereof where the file shall be placed before this court for re-consideration under section 79B of the *Civil Procedure Act*.

e. That the appellant, shall pay the respondents costs of this Application to be mutually agreed to or taxed and paid forthwith.

It is So Ordered.

**SIGNED, DATED AND DELIVERED ON 22ND SEPTEMBER, 2023**

**MOHOCHI S. M**

**JUDGE OF THE HIGH COURT**

