



REPUBLIC OF KENYA



**Mbagara v Owino (Suing as the legal representative of the Estate of Joackim Henry Owino)
(Civil Appeal 162 of 2018) [2023] KEHC 22602 (KLR) (20 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22602 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 162 OF 2018
HM NYAGA, J
SEPTEMBER 20, 2023**

BETWEEN

JOSEPH NDUNG’U MBAGARA APPELLANT

AND

**EUNICE ADHIAMBO OWINO (SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF JOACKIM HENRY OWINO) RESPONDENT**

RULING

1. The Application for determination is the Notice of Motion dated 27th January 2023. The Appellant/Applicant seeks the following orders;
 1. That this application be certified urgent and be heard on priority basis.
 2. That the Honourable Court be pleased to reinstate this Appeal and the Appellant be allowed to prosecute the Appeal.
 3. That cost of this application be provided for.
2. The Application is propped by the grounds set out therein and is supported by the applicant’s Affidavit sworn on 27th January, 2023.
3. In a nutshell, the applicant states that he was previously represented by the firm of Kimatta and Co. Advocates whose proprietor passed on some time in 2021. That his current advocates took up the conduct of the matter and filed High Court Civil Appeal No. 134 of 2020, not aware that the firm of Kimatta & Co. Advocates had already filed this Appeal. That the confusion arising from the 2 Appeals was not resolved and subsequently, the respondent’s advocate also passed on and it became difficult to serve the respondent physically.
4. The applicant further states that the proceedings in CMCC No. 655 of 2017 have never been typed.



5. It is further averred that the Notice to Show Cause in this matter was sent to the firms of Kimatta & Co. Advocates and N. K. Bichanga & Co. Advocates which were undergoing administration after the demise of their respective proprietors.
6. The applicant further states that on the material day the Notice to Show Cause was listed for directions, the court began its session at 8:35a.m. and when counsel the applicant logged in at 9:00 a.m. the matter had already been disposed off in the absence of the parties.
7. The Applicant thus seeks a chance to prosecute the Appeal.
8. The Respondent opposed the Application through a Replying Affidavit sworn on 7th March 2023.
9. The respondent states that firstly courts begin at 9:00 a.m. and not as alleged by the applicant and if the matter had been dealt with counsel had a right to have the file recalled as is the usual practice in such cases.
10. The respondent further avers that the firm of Kairu Maina came on record on 19/9/2019 and therefore had conduct of the matter since then.
11. The respondent denied knowledge of the Appeal file. That this court file has always been available for action to be taken. That the Notice to Show Cause was properly served on the current advocates representing the appellant and had even been served with a previous one in 2022.
12. The respondent's position is that the application is meant to delay her enjoyment of the fruits of the judgment of the lower court.
13. I had asked the parties to file their respective Submissions but at the time of writing this Ruling, only the respondent has complied with the directions.
14. The respondent submits that this matter has been listed for Notice to Show Cause on several occasions; On 1st March 2021, 18th May 2021, 25th July 2021, 18th October 2021, 1st November 2021, 14th February 2022, 21st March 2022, 30th March 2022 and lastly on 23rd January 2023.
15. The respondent further submit that there are inconsistencies in the applicant's case. It is stated that the current advocate was working for the firm of Kimatta & Co. Advocates when the Memorandum of Appeal was filed in 2018. That the other Memorandum of Appeal filed in 2020 bears a different signature of the said counsel while the present Application bears the same signature as the first Memorandum of Appeal filed in 2018.
16. It is further submitted that what the applicant is seeking is discretionary order of the court and for it to find favour of the Applicant, sufficient cause has to be shown. In this case, no sufficient cause has been shown since the applicant had demonstrated inexcusable laxity in prosecuting the Appeal. Thus, it is argued substantive justice favour, the respondent and this application ought to be dismissed with costs.
17. Counsel cited the following authorities to buttress their position;
 - a. *Shah vs Mbogo* [1969] EA 116.
 - b. [*Rachel Njango Mwangi vs Hannah Wanjiru Kiniti & Another*](#) 2021 eKLR.
 - c. [*Wachira Karani vs Bildad Wachira*](#) [2016] eKLR.
 - d. [*Gideon Sitelu Konchella vs Daima Bank Ltd.*](#) [2013] eKLR which cited Mobil Kitale Services Limited vs Mobil Oil Kenya Limited.
 - e. [*Bilha Ngonyo Isaac vs Kembu Farm & Another*](#) [2018] eKLR.



- f. [*Njue Njagi vs Ephantus Njiru & Another*](#) [2016] eKLR.

Analysis and Determination

18. As has been stated by the Respondent. The orders sought are discretionary in nature. Every discretionary order of the court must be exercised judiciously, in order to do justice to the party(ies). That position was aptly stated in the well known case of *Shah vs Mbogo* (supra).
19. As to what amounts to sufficient cause, the court has to look at every case on its own merits. In *Wachira vs Karani vs Bildad Wachira* (supra), the court described sufficient cause as follows;
- “Sufficient cause” is an expression which has been used in large number of statutes. The meaning of the word “sufficient” is “adequate” or “enough”, in as much as may be necessary to answer the purpose intended. Therefore the word “sufficient” embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, “sufficient cause” means that party had not acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been “not acting diligently” or “remaining inactive.” However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously.”
20. I have noted that the applicant has gone to great lengths to explain himself on the events of 23rd January 2023, when the Appeal was dismissed for want of prosecution. However, counsel for the applicant has conveniently omitted to state that he had appeared in this particular case from way back on 1st March 2021. On that day, the counsel asked for time to sort out the issue of the 2files namely this Appeal and High Court Civil Appeal No. 134 of 2020. The court gave a mention date of 18th May, 2021 and come that date, he sought 30 days to enable him comply and take a date for hearing.
21. It is important to note that the firm of Kairu Maina, who filed the present application, have never filed a Notice of Change of Advocates, to take over the firm of Kimatta and Co. Advocates. This may explain why the court sent the Notices to Show Cause to the firm of Kimatta and Co. Advocates despite his demise.
22. Without the Notice of Change of Advocate, it follows that the firm of Kairu Maina & Co. Advocates are not properly on record. When Mr. Maina appeared before the court, he did not state if he had taken over from the firm of Kimatta and Co. Advocates. It is stated by the respondent that Mr. Maina had been working in the said firm, an averment not rebutted by the Advocate. His appearance in the case then seemed to be on behalf of Kimatta and Co. Advocates, until he filed the current application. He ought to have filed a Notice of Change of Advocate and without such a Notice, the Application is deemed to have been filed by a stranger.
23. Consequently, the Application dated 27th January, 2023 is struck out with costs to the respondent. That said, I do not see the need to go into the merits of the Application.
24. The advocates have a right to file a fresh Application once they are properly on record.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 20TH OF SEPTEMBER, 2023.

H. M. NYAGA

JUDGE



In the presence of;

C/A Jeniffer

Ms Murunga for state

Ms Otokoma for Kairu Maina for Appellant/Applicant

