



**Ngumbi & another v Mimshak Bay Services Ltd & another (Civil Appeal  
120 of 2019) [2023] KEHC 22535 (KLR) (20 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22535 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL 120 OF 2019  
HM NYAGA, J  
SEPTEMBER 20, 2023**

**BETWEEN**

**FRANCIS NGUMBI ..... 1<sup>ST</sup> APPELLANT**

**UNDUSU MAKUNGU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MIMSHAK BAY SERVICES LTD ..... 1<sup>ST</sup> RESPONDENT**

**SELLA OYIKA AGUWASU ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Coming up for determination is the Application dated July 25, 2022. It seeks the following orders;
  1. That this application be certified urgent, service be dispensed with thereof and the same be heard *ex-parte* in the first instance.
  2. That pending the hearing and determination of this application inter-partes, there be an order of stay of execution of the Judgment of the Honourable Judge delivered/issued on June 28, 2019 in Nakuru CMCC 583/2012 and all consequential orders and proceedings hereto be and are hereby issued.
  3. That pending the hearing and determination of this application inter-partes, there be an order of stay of execution of the order/directions of the Honourable Judge delivered/issued on July 25, 2022 dismissing the Appeal and all consequential orders and proceedings hereto be and are hereby issued.
  4. That this Appeal being NAKURU HCCA NO 106 OF 2019; Francis Ngumbi & Undusu Makungu Vs Mimshak Bay Services Ltd Sella Oyika Aguwasu, be and is hereby reinstated for hearing an determination in the normal way.



5. That time be and is hereby enlarged to enable the Applicants file their Supplementary Record of Appeal.
  6. That this Honourable Court do make any such further Order(s) and issue any other relief it may deem just to grant in the interest of justice.
  7. That the costs of the application be in the cause.
2. The Application is based on the grounds set out on the face of it and is supported by the Affidavit sworn by Joyce Chichi on July 25, 2022.
  3. The Applicant's averments can be encapsulated as follows. She avers that the appellants filed a Memorandum of Appeal dated July 11, 2019 against the whole of the Judgment of Hon Oide in Nakuru Civil Suit No 583 of 2012 delivered on June 28, 2019, delivered on June 28, 2019. That the said Appeal was dismissed for want of prosecution on July 25, 2022. That on the material day, counsel for the applicant had trouble in logging into the court's link and by the time she logged in, the court session had ended and upon making inquiries, she was informed of the dismissal of the Appeal.
  4. The applicants further aver that they are exposed to the risk of execution. That they have an arguable appeal that ought to be heard on merit to a logical conclusion. That they have filed a Record of Appeal but have not filed the lower court proceedings owing to unavailability of the same. That they have deposited Kshs 1,101,292/= into a joint account as security pending determination of the Appeal.
  5. The applicants state that they delay in prosecuting the Appeal is not attributable to them and this court ought to invoke Article 48 and 159(2) of the Constitution to ensure justice is done. That they are keen on prosecuting the Appeal.
  6. The Respondents opposed the application. They filed a Replying Affidavit sworn by Daniel E Kisilah on October 3, 2022. He avers that the Appeal filed herein was only in respect to quantum of damages. That the applicants have not demonstrated the steps they have taken to prosecute the Appeal and did not prior to filing the present Application provide any explanation why the Record of Appeal was not filed. That the delay in prosecuting the Appeal was inordinate and highly inexcusable. That allowing the Application would be reward indolence.
  7. Pursuant to the court's directions. The parties filed Submissions which I have considered and will incorporate them in this ruling.
  8. The only issue for determination is whether there are sufficient grounds preferred to convince the court to exercise for inherent jurisdiction and reinstate the Appeal. Like any discretion, such discretion is meant to avoid hardship occasioned by inadvertence or excusable error or mistake. Every law practitioner recalls the wise words states in *Shah vs Mbogo (supra)* to the effect that;  

“This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”
  9. From the court record, it is clear that the Memorandum of Appeal was filed on July 19, 2019. No action was taken until September 21, 2020, when the appellants moved the court vide the Application dated 18<sup>th</sup> September, 2020, in which they sought inter alia a stay of execution and enlargement of time to comply with the trial courts orders issued on December 13, 2019 to the effect that they deposit half the decretal sum in a joint interest earning account in the name of the advocates. That application was



disposed of by this court vide its Ruling delivered on July 1, 2021. The applicants were given 21 days to comply with the orders of stay of execution.

10. Thereafter, the Respondents herein moved the court with the Application dated February 18, 2022, which sought to inter alia, have the Appeal dismissed for want of prosecution. The court also issued a Notice to Show Cause why the Appeal should not be dismissed dated July 4, 2022. The Notice was listed for hearing on July 25, 2022. It is on this date that the Applicant's advocate states that she was not able to log into the court's virtual link due to a mix up of the links. I am not sure I understand what she meant by this, but on July 25, 2022, the counsel was not present. Counsel for the Respondents was present and the Appeal was dismissed.
11. I note that on July 20, 2022, 5 days before the Notice to Show Cause was to be heard, the appellants filed a Record of Appeal which does not have the court proceedings. Counsel for the appellants states that they intend to file a further Record of Appeal once the proceedings are availed to them.
12. It is also noted that I have already issued orders that 75% of the decretal sum deposited in the joint account be released to the respondent. I believe that what the court needs to do is to ensure that no party is unduly prejudiced for long again.
13. In exercise of my discretion, I will allow the Application and reinstate the Appeal. The appellants are to file the Supplementary Record of Appeal within 30 days. To save time and since the lower court record will be called for, the Supplementary Record of Appeal need not have the proceedings but it should have the Judgment delivered.
14. This matter will be listed for directions on the Appeal on a day I will give shortly. In default of compliance with the above orders, this Appeal will stand dismissed without further reference to the court.
15. The respondent shall have costs of the Application.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 20<sup>TH</sup> OF SEPTEMBER, 2023.**

**H. M. NYAGA**  
**JUDGE**

