



REPUBLIC OF KENYA



KENYA LAW
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**Jeremiah & Brothers Contractors & 2 others v Ogutu (Civil Appeal
17 of 2019) [2023] KEHC 23126 (KLR) (4 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23126 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 17 OF 2019
HM NYAGA, J
OCTOBER 4, 2023**

BETWEEN

JEREMIAH & BROTHERS CONTRACTORS 1ST APPELLANT

BARCA EXPRESS LTD 2ND APPELLANT

BENSON WANJAU KAHIU 3RD APPELLANT

AND

EZEKIEL OKOTH OGUTU RESPONDENT

RULING

1. *Vide* a Notice of Motion dated May 26, 2022, brought under Sections 1A,1B,3A and 95 of the [Civil Procedure Act](#), Orders 45 Rule 1, 42 Rule 6, 42 Rule 21, 50 Rule 6 and 51 Rule 1 of the [Civil Procedure Rules](#), 2010, the Appellants seeks the following orders:
 1. Spent
 2. That pending the hearing and determination of this Application there be an order of stay of execution of the Ruling of the Honourable Judge delivered on December 14, 2021 and all consequential orders and proceedings thereto.
 3. That there be an order of stay of execution of the judgement delivered in Nakuru CMCC No 1058 of 2013 on 18th December, 2018 pending the hearing and determination of this application.
 4. That there be an order of stay of execution of the judgement delivered in Nakuru CMCC No 1058 of 2013 on 18th December, 2018 pending the hearing and determination of the Appeal.
 5. That this Appeal being Nakuru HCCA No 17 of 2019 be reinstated for hearing and determination on merit.



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 this Application be in the cause.
2. The Application is premised on the grounds on its face and supported by an affidavit of Joyce Chichi, Appellants' Advocate sworn on the even date.
3. She deponed that on December 14, 2021 the Appellants' Appeal was dismissed for failure to file their record of appeal as was directed by this Honourable Court on September 23, 2021.
4. That the failure to file the record of appeal was not deliberate but inadvertent as they were not able to get the certified copies of the proceedings, judgement and decree from the court to enable them compile and file their record of appeal.
5. She averred that failure to file the record of appeal was occasioned by the court's staff who has on numerous occasion informed them that they are understaffed hence the delay in getting the typed proceedings.
6. She deposed that they have now prepared their record of appeal less typed proceedings as the proceedings are not yet ready and pray for court's assistance in obtaining proceedings so that they can prepare their Supplementary Record of Appeal.
7. She averred that the reason for filing this application at this time is because they have been unsuccessfully following up on the typed proceedings so as to compile their record of appeal.
8. It was her averment that unless the application is certified urgent and heard immediately and orders sought herein granted, the respondent will proceed with execution and this appeal and application will be rendered nugatory.
9. She deposed that the Appellants are desirous on prosecuting the appeal and that the mistake of counsel if any should never be visited upon the appellants.
10. It was her deposition that in the interest of justice the appeal should be reinstated and the same be heard to a logical conclusion.
11. She averred that if the orders sought are granted it will not occasion any prejudice to the respondent or any damage that cannot be compensated by way of costs.
12. The Respondent, Ezekiel Okoth Ogutu, opposed the Application via his replying affidavit dated July 15, 2022.
13. He averred that the application is bad in law, made in bad faith, inept, lacks merit, an afterthought and otherwise amount to an abuse of the court process.
14. He averred that the when the matter came up on December 14, 2021 both parties were present and the appellants having failed to give reason for failure to file the record of appeal, the honourable court dismissed the appeal for want of prosecution.
15. He faulted the Appellants for taking more than 5 months to file the present application and believes this is evidence of lethargy and inertia on the part of the Appellants.
16. He contended that the appellants have not given any plausible reason why the appeal should be reinstated.



17. He believes the appellants are not entitled to any stay orders and their only obligation at the moment is to pay costs due to him as was ordered by the court on December 14, 2021.
18. He averred that he has already commenced execution process and he will be grossly prejudiced if the applicants application is allowed.
19. He prayed that the appellants' application be dismissed with costs to him.
20. The application was disposed off through written submissions.

Appellants' Submissions

21. The appellants reiterated the averments contained in their supporting affidavit in their submissions and urged this court not to oust them from the seat of justice.
22. They referred this court to the case of *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR where the court held that the right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law hence the reasons the courts have inherent jurisdiction to dismiss suits which should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and ensures that ultimately there should be proportionality.
23. The Appellants argued that courts exist to serve substantive justice for all parties to a dispute before. In buttressing their submissions, the Appellants cited the case of *Philip Chemowolo & Another vs Augustine Kubede*, [1982-88] KAR 103 at 1040 Apalo, JA (as he then was), posited as follows:

“Blunder 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 heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, 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 the parties and not the purpose of imposing discipline.”
24. The appellants also relied on the case of *John Nahashon Mwangi vs Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR where the court stated that 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.
25. The appellants urged the court to allow the application.

Respondent's Submissions

26. The respondents submitted that on September 23, 2021 the court ordered the Appellants to file and serve the record of appeal within 60 days failure to which the appeal was to stand dismissed.
27. He argued that the Appellants failed to comply and when the matter came up for on December 14, 2021 the Appellants advocate did not advance any plausible reason for non-compliance with court directions and the court dismissed the Appeal for want of prosecution.
28. The Respondent submitted that prior to dismissal of the appeal there was no communication made to court for failure to comply with the court' directions.



29. The respondent submitted that the Appellants are guilty of lethargy and inertia and they are authors of their own misfortune.
30. The respondent submitted that there is no evidence in support of the Appellants' contention that the court staff informed them that they are understaffed.
31. The respondent argued that the appellants personally took no step to have their appeal prosecuted and urged this court not to allow the appellants to benefit from their indolence.
32. The respondents submitted that there was inordinate delay in prosecuting the appeal from the time it was filed until when it was dismissed contrary to the provisions of Order 42 Rule 13 and 35 of the *Civil Procedure Rules*.
33. The respondents argued that the appellants were granted stay of execution in the judgement in Nakuru CMCC 1058 OF 2013 and have enjoyed the same to his detriment. He urged the court to dismiss the appeal with costs.

Analysis & Determination

34. The issue for determination is whether the appeal should be reinstated for hearing on merit.
35. On September 23, 2021 the court directed the Appellants to prepare the Record of Appeal within 30 days.
36. On December 14, 2021, the parties appeared before my brother Justice Chemitei to confirm compliance with the above direction and learned Judge after hearing the Appellants' Counsel, dismissed the Appeal for want of prosecution with costs to the Respondents.
37. I have looked at the application. It is basically providing reasons that the applicants ought to have presented at the time the matter was fixed for the notice to show cause.
38. In bringing this application, the applicants are asking me to litigate over an issue already dealt with by the court, albeit differently constituted.
39. It is uncontroverted that the Appeal herein was listed mention to confirm compliance with court order issued on September 23, 2021 on December 14, 2021. The Counsel for the Appellants only told court that he was informed that the Record of Appeal was filed. The court was not satisfied and proceeded to dismiss the Appeal.
40. I note on the said date of December 14, 2021 the Record of Appeal had not been prepared. The appellants now claim that failure to file the record of appeal was not inadvertent as they were unable to obtain the certified copies of proceedings, judgement and decree from the court to enable them compile and file the same.
41. It is not clear why the aforesaid ground was not raised when the matter was heard on December 14, 2021. I believe this was an issue which was within the knowledge of the Appellants then and if it was backed by concrete evidence the court would have considered it. Therefore, there is no justifiable ground to set aside and or stay the orders of the court issued on December 14, 2021.
42. Re-instatement of an appeal/suit is a matter of discretion, which must be exercised judiciously and if this Court is to exercise its discretion in favour of a party, the party is obliged to place before it some material to justify the exercise of that discretion.



43. I respectfully agree with the principles governing reinstatement of suits restated in the case of *John Nabashon Mwangi vs Kenya Finance Bank Limited (In Liquidation)* (supra) (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 act 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.”

In *Bernard Muthee & another v Anita Kamba Mwiti* [2021] eKLR, the court observed thus;

“Concerning the reasons advanced of difficulties in obtaining the record of typed proceedings from the court registry, this court recognizes that there is an avenue to file an initial record of appeal and thereafter file a supplementary record once the proceedings are obtained. This would have been the best course to take and would be more convincing bearing in mind that it was over a period of 8 months between the date when the appellants were ordered to file their record of appeal on December 5, 2019 and when the order confirming the dismissal was made on July 27, 2020. The appellants have also failed to annex evidence in form of correspondence or otherwise to confirm what efforts, if any, they made to secure the said typed proceedings. It is not enough to make mere averments devoid of supporting evidence.”

44. The appellant have attached a letter dated June 15, 2021 addressed to Nakuru executive officer requesting for typed proceedings, certified copy of the Judgement and Decree. This was one and a half years after the appeal was filed.
45. It is clear from the date of the aforesaid letter to September 23, 2021, when the appellants were directed to prepare the record of Appeal not a single step was taken to show an intention of pursuing the appeal. On December 14, 2021 when the matter was dismissed, the appellant did nothing to show the court of the progress taken to prosecute the appeal. The appellant had a chance to show the court that it had delivered reminders to the court requesting for typed and certified proceedings in order to comply with the court orders. The Court does not, and ought not to be seen to make Orders in vain. The total inactivity between the aforesaid periods demonstrates lack of seriousness on the part of the Appellants.
46. I am alive to Article 159 of the *Constitution* and the overriding objective which decries undue regard to technicalities. However, it is equally an important principle of the *Constitution* that justice must be dispensed without undue delay. As the Supreme Court emphasised in *Raila Odinga and 5 Others vs IEBC & 3 Others* [2013] eKLR and in *Nicholas Kiptoo arap Korir Salat vs IEBC & 7 Others* [2014] eKLR, Article 159 is not a panacea in each and every instance of breach of procedure. It avails only in deserving cases.



47. As can be seen, the Appellants filed their Appeal on January 22, 2019 and without any sufficient cause failed to follow up on the same for close to two years before it was dismissed on December 14, 2021. This was plain indolence and dilatoriness, which is not excusable.
48. The Record of Appeal filed on November 16, 2022 was an exercise in futility as there was no appeal in existence at the time, having been dismissed way back on December 14, 2021. The said record does not contain proceedings, so the question is why wasn't it filed when the court ordered the appellant to do so? This is a case of too little, too late.
49. From the foregoing, it is my opinion that applicants slept on their rights and cannot blame anyone else but themselves.
50. An appellate court must be wary of appellants who file appeals and never take steps to prosecute them, placing successful parties in the lower court in a state of anxiety, not knowing what to do next. Litigation must surely, at some point, come to an end.
51. In conclusion, I find no merit in the application and proceed to dismiss it with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 4TH DAY OF OCTOBER, 2023.

H. M. NYAGA

JUDGE

In the presence of;

C/A Jeniffer

Sitati for Respondent

Mr. Njuguna for Kabita - Appellant

