



REPUBLIC OF KENYA



KENYA LAW
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**Mantai v South Nyanza Sugar Co Ltd (Civil Appeal 111 of 2021)
[2023] KEHC 24048 (KLR) (20 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24048 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL 111 OF 2021
RPV WENDOH, J
OCTOBER 20, 2023**

BETWEEN

SALOME LEINA MANTAI APPELLANT

AND

SOUTH NYANZA SUGAR CO LTD RESPONDENT

RULING

1. The appellant' filed an application dated 26/1/2023 seeking the following orders:-
 - a. That this court be pleased to set aside its orders dated 6/12/2022 dismissing the appellant's appeal.
 - b. That upon grant of prayer (a) above, this court be pleased to reinstate the appeal and the same be scaled for hearing on merit.
 - c. Costs be in the cause.
2. The application is based on the grounds on its face and the supporting affidavit Mr. Samuel Odingo, Counsel who has conduct of this appeal. Counsel deposed that on 6/12/2022 this appeal got dismissed at the instance of this court; that on the same date, he was attending a matter before the Deputy Registrar Appeal Case Nos. 120 of 2012 and 127 of 2018; that when he came before this court, the matter had already been called out and dismissed. Counsel deposed that the dismissal was occasioned by himself and the mistake of Counsel should not be visited upon an innocent litigant. He urged this court to find that the appeal is meritorious and this application should be allowed as prayed.
3. The application is opposed. Mr. Maurice Omondi Ng'ayo the Legal Services Manager/Ag. Company Secretary of the respondent swore an affidavit dated 20/2/2023. Counsel deposed that the motion was filed on 27/1/2023 and there is no explanation for the delay of filing since the appeal was dismissed on 6/12/2023; that the orders of 6/12/2023 were extracted and served upon the appellant's Counsel



- on 14/12/2023; that on 10/11/2022 being a month before the proceedings of 6/12/2023, this court served all the parties with notice to show cause why the appeal should not be dismissed for want of prosecution by email and physical service; that there was no replying affidavit or other response to the notice to show cause.
4. Counsel further stated that he is advised by his Counsel Marvin Odera that he was in court on 6/12/2022 until 11.30 a.m. and by that time Counsel for the applicant had not arrived in court; that if Counsel appeared in court after the matter had been called, he would have requested for the file to be recalled; that Counsel has admitted he knew that this matter was coming up for want of prosecution but he chose to appear before the Deputy Registrar who is a judicial officer below the rank of this court. It was further deposed that Counsel should have made arrangements for alternative representations which he did not thus Counsel and his Client are not genuinely interested in the appeal. The respondent urged this court to dismiss the application to avoid unnecessary litigation.
 5. This court directed on 22/5/2023 that the application be canvassed by way of written submissions. It is only the respondent who complied and I have duly considered the submissions.
 6. The facts giving rise to the instant application are straightforward. The trial court rendered its judgement on 28/10/2021. The applicant preferred an appeal against the judgement and decree of Hon. Obiero (PM) by filing a memorandum of appeal dated 15/11/2021. The applicant did not file a record of appeal despite the original trial court record having the typed proceedings and all other relevant documents ready.
 7. On 8/9/2022, this court sent an email to the parties to appear before the Deputy Registrar on 5/10/2022 to confirm the filing of the record of appeal. On that date, the court record indicates that none of the parties appeared. Subsequently, another notice was sent to all Counsel via email dated 7/10/2022 informing the parties that the matter has been fixed for Notice to Show Cause before this court. The applicant did not attempt to file a response to the notice to show cause.
 8. There is further evidence through an affidavit of service sworn on 7/11/2022 by Michael Cleophas O. Odongo a process server, deposing physical service of the mention notice of the Notice to Show Cause on the firm of Counsel for the appellant. Annexed to the return of service, is the copy of the mention notice which clearly shows that the firm of Counsel for the applicant, endorsed its stamp dated 2/11/2022 on the face of the mention notice. On 6/12/2022, Counsel for the appellant failed to appear in court.
 9. There is a consistent pattern by Counsel for the applicant of failing to appear in court. Even before this court, after taking directions on the hearing of the applicant's application, on 5/7/2023 and 20/7/2023 Counsel for the appellant failed to appear in court.
 10. Further to the foregoing, there is no explanation which has been advanced by the applicant on why she failed to prosecute her appeal almost a year later after filing the record of appeal. Order 17 Rule 2 (1) of the *Civil Procedure Rules* allows the court to issue a notice to the parties to show cause why their suit should not be dismissed where no action has been taken for one year.
 11. Further, the application to reinstate the appeal was filed on 26/1/2023 more than a month after dismissal orders were issued and served upon Counsel for the appellant. Counsel for the applicant stated that on the date when the appeal was dismissed by this court, he came to court late. This being an event within his knowledge, he should have at least filed an application for reinstatement the following day. Instead, the application was brought a month later. The delay in my view is inordinate, inexcusable and unexplainable. To confirm the fact that the appellant or counsel is not interested in prosecuting this appeal, even after the court ordered that parties file their submissions on the instant application,



the applicants counsel did not do so . By the conduct of the applicant to reinstate this appeal will be a waste of judicial time. The applicant has demonstrated that she is not interested in prosecuting the appeal. The respondent will be prejudiced with the reinstatement as litigation must come to an end.

12. In *Mwangi S. Kimenyi v Attorney General & another* (2014) eKLR the court held:-

A party should always take steps to progress his case to logical conclusion. That is a requirement of justice and the overriding objective in assisting the court to attain expeditious and just disposal of cases which follows after the long standing adage; justice delayed is justice denied. So where the plaintiff commits acts of inordinate delay in prosecuting his case, he occasions injustice on the Defendants.”

13. The upshot therefore is that the application dated 26/1/2023 is not merited and it is hereby dismissed with costs to the respondent.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 20TH DAY OF OCTOBER, 2023.

R. WENDOH

JUDGE

Ruling delivered in the presence of;

Mrs. Omwenga for the Appellant.

Mr. Odero for the Respondent.

Emma & Phelix Court Assistants.

