



**Mogusu & another (Suing as the Legal Representatives of the Estate of Peter Isoe Oyugi) v Nganga & another (Civil Appeal 19 of 2019) [2023] KEHC 23817 (KLR) (17 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23817 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
CIVIL APPEAL 19 OF 2019  
AK NDUNG’U, J  
OCTOBER 17, 2023**

**BETWEEN**

**CALLEN KERUBO MOGUSU ..... 1<sup>ST</sup> APPLICANT**

**JOYCE MOKEIRA MANYANGE ..... 2<sup>ND</sup> APPLICANT**

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF PETER ISOE  
OYUGI**

**AND**

**SAMUEL WAWERU NGANGA ..... 1<sup>ST</sup> RESPONDENT**

**JOSPHAT TAMU ..... 2<sup>ND</sup> RESPONDENT**

*(Appeal from judgment dated 03/12/2019 in Nanyuki  
CM Civil Case No 55 of 2018 – Njeri Thuku, PM)*

**RULING**

1. This ruling concerns the application by notice of motion dated February 10, 2023 filed by the Applicants herein which seeks the main order that the court be pleased –  
  
“...to set-aside the *ex parte* ruling/order made on January 27, 2023 and to make an order reinstating the appeal herein dated December 17, 2019”.
2. By the said order of January 27, 2023, this court (Rayola J) dismissed the Appellant’s appeal for no cause was shown why it should not be dismissed for non-attendance of the parties.
3. The application is supported by an affidavit of Ocharo Ongeri, learned counsel for the Applicants. The grounds for the application on the face thereof include –



- i. That the Applicant's counsel logged into Nanyuki High Court portal according to the notice that was issued whereas the duty Judge was using a different link from Naivasha High Court.
  - ii. That the Applicant counsel learnt about the same after non-admittance to Nanyuki link and upon making a call to the registry at Nanyuki court.
  - iii. That non-attendance was not intentional but the counsel failed to attend court on the said date due to miscommunication from Nanyuki registry.
  - iv. That the application has been made expeditiously and counsel mistakes should not be visited upon the Applicants.
  - v. That no prejudice will be occasioned to the Respondents.
4. The Respondents herein did not file a replying affidavit despite being served.
  5. The Applicants filed written submissions and argued that Section 3A of the *Civil Procedure Act* gives this court inherent powers to grant orders sought herein as well as Order 12 Rule 7 of the *Civil Procedure Rules* which states that court can set aside judgment and order upon such term as maybe just. Furthermore, reinstatement is an act of discretion of the court as it was enunciated in the case of *Mbogo & Anor vs Shah* (1968) EA 93. Counsel urged the court to reinstate the appeal so that it can be determined on merit for the non-attendance was not intentional.
  6. The application at hand is stated to be brought under Order 45 Rule 1 of the *Civil Procedure Rules* which provides for applications for review of decrees or orders. The main argument is that the Applicants' counsel logged into the wrong link that is Nanyuki High Court link according to the notice that was issued by the Deputy Registrar whereas the duty Judge was using a different link from Naivasha High Court. Therefore, the order of dismissal ought to be set aside and the appeal reinstated for hearing.
  7. The record of the court provides the relevant background leading to the dismissal order of January 27, 2023. The appeal was lodged on December 17, 2019. The appeal was against a money decree passed on December 3, 2019. The matter was fixed for mention before the Honourable Judge on October 12, 2021 by the Applicants' counsel. On the said date, the Applicants' counsel did not attend court and the matter was marked SOG. On the said day, the Applicants' counsel fixed the matter for mention at the registry and the matter was fixed for mention on November 10, 2021. There are no proceedings for November 10, 2021 but the matter was mentioned before the Deputy Registrar on December 15, 2022 in presence of a counsel holding brief for the Applicant's counsel. The matter was set for hearing for notice to show cause why the matter should not be dismissed on January 27, 2022. From the court file, I have also seen several notices that were issued to show cause why the matter should not be dismissed.
  8. On the date under reference, the record shows that there was non-attendance of the parties and the Judge proceeded to dismiss the matter as no cause was shown why the matter should not be dismissed.
  9. The Applicants' counsel as noted earlier claimed that he logged into the wrong link as per the notice that was issued by the Deputy Registrar. He stated that he logged into Nanyuki High Court portal that was provided only to learn later that the court was using a different link. I have perused the notice attached by the Applicants' counsel and the notice clearly indicates that the matters listed were to be handled virtually from Naivasha High Court and the link was provided thereunder.
  10. It is strange therefore that the counsel logged into Nanyuki High Court whereas the notice clearly indicated that the matters were to be virtually handled from Naivasha. It is also strange that no other litigants have claimed that they were provided with the wrong links on the said date. This shows that



the counsel is just looking for an escape route to blame the court for his non-attendance to court on the said date.

11. However, dismissal is a draconian order which drives away the litigant from the seat of justice. The principles to be followed when a court is considering whether or not to reinstate a suit were outlined in the case of *John Nahashon Mwangi vs Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR 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.”

12. In the case of *Philip Chemowolo & Another vs Augustine Kubende*, [1982-88] 1 KAR 103 the court observed as follows 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 suffer the penalty of not having his case heard on merit ... 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 for the purpose of imposing discipline.”

13. Bearing in mind the above principles and buttressing the fact that the right of a party to be heard is a valued right, and there being no evidence of prejudice on the part of the Respondents, it is my considered view that this is a proper case for the reinstatement of the Appeal.

14. I make the following orders;

- a. The notice of motion dated February 10, 2023 is allowed.
- b. The Appeal be mentioned on 8.11.23 for directions.
- c. A formal notice be served on all the parties by the Deputy Registrar.
- d. Each party to bear its own costs of the application.

**DATED, SIGNED AND DELIVERED AT NANYUKI THIS 17<sup>TH</sup> DAY OF OCTOBER 2023**

**A.K. NDUNG’U**

**JUDGE**

