



**Wangwe v Shitabule (Suing as the Legal Representative/Administrator
of the Estate of Isaac Nanjira Wakhulunya - Deceased) (Civil Appeal
E041 of 2023) [2024] KEHC 12172 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12172 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E041 OF 2023
S MBUNGI, J
OCTOBER 11, 2024**

BETWEEN

MILDRED NAFULA WANGWE APPELLANT

AND

HELLEN SHITABULE RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVE/ADMINISTRATOR OF THE
ESTATE OF ISAAC NANJIRA WAKHULUNYA - DECEASED**

RULING

1. The appellant filed an application under Certificate of Urgency and notice of motion dated 4th March 2024, seeking the following orders: -
 - a. The application be certified as urgent, and the same be heard ex parte in the first instance in respect to prayer (b).
 - b. That there be a stay in execution of the decree in Kakamega CMCC E054 of 2021 pending hearing and determination of the application.
 - c. That the court be pleased to reinstate this appeal for hearing and the security deposited in the joint interest earning account no. 886xxxxxx at NCBA Bank – Bungoma in the names of M/ S Mukisu & Company Advocates And Abok Odhiambo & Company Advocates be deemed to have been duly deposited out of time.
 - d. That upon grant of prayer (c) above the security of Kshs. 900,000/- deposited in a joint interest earning account no. 886xxxxxx at NCBA Bungoma Branch be preserved pending hearing and determination of this appeal.
 - e. That the costs of this application to abide the outcome of the appeal.



2. The application was opposed by a replying affidavit sworn on 12.03.2024.
3. The court directed that the application be canvassed by way of written submissions.

Appellant's Case.

4. The appellant submitted that the respondent did not oppose prayers(a), (b) and (d) of the motion. The appellant submitted that prayers (a) and (b) are since spent.
5. The appellant submitted that section 3A of the Civil Procedure Act gives the court wide discretion over matters and issues that are before it, including the question as to whether it should or should not reinstate a suit dismissed on account of unreasonable delay on the part of the parties to prosecute it.
6. The appellant submitted that the appellant complied with the directions on 26.10.2023 to file the record of appeal and submissions as was directed by the court. The record was filed on 15.11.2023 whilst the submissions were filed on 23.11.2023.
7. On the issue of whether the money was deposited as directed by the court, the appellant submitted that the appellant deposited the money with NCBA Bank on 26.11.2023 but due to procedural issues with the bank, the bank opened the account on 04.12.2023, about 6 working days from the date of deposit.
8. The appellant submitted that the delay was not inordinate, and further the delay was occasioned by circumstances beyond the appellant's control. The appellant submitted that the Relationship Manager at NCBA Bank swore an affidavit in support of the application, explaining the reasons for the delay.
9. The appellant stated that the mistake of the bank should not be visited upon the appellant, and beseeched the court to allow the application dated 04.03.2024, set aside the order dismissing the appeal and the same be reinstated for hearing on merit.

Respondent's Case

10. The respondent submitted that the application dated 04.03.2024 is unmerited as the applicant has not demonstrated what loss she stands to suffer should the stay orders not be granted, citing the case of *Jessikay Enterprised Ltd vs George Kahoto Muiruri*[2022]Eklr.
11. The respondent further submitted that as per the timelines deponed in the supporting affidavit, the instant application was filed after an inordinate delay on the applicant's part.
12. The respondent submitted that the court never made directions that the decretal sum be deposited in a joint account but instead, deposit the same in court, and that the purported account number in which the applicant deposited the sum was a non-existent bank account.
13. The respondent stated that the instant application was overtaken by events as the court already dismissed the appeal, effectively closing the file.
14. The respondent contended that the instant application merely amounts to a delay tactic on the side of the applicant, who is merely seeking to protract payment of costs to the respondent as ordered by the court.
15. The respondent submitted that the application should be dismissed with costs to the respondent.

Issues, Analysis and Determination

16. On 26.10.2023, the application dated 08.05.2023 was compromised as follows: -



- i. The appellant to deposit in court Kshs. 900,000/- within 30 days.
 - ii. The appellant to file and serve records of appeal and submissions within the same period.
 - iii. Once served, the respondent to file and serve submissions within 30 days.
 - iv. If there shall be a default, to effect the deposit or file record and submissions, the appeal shall stand dismissed on the date of default.
17. I have looked at the application dated 04.03.2024, the supporting affidavit and reply thereof by the submissions of the parties.
18. The main issue is whether the appellant / applicant has demonstrated any reason which makes this court to exercise its discretion in its favor for the power to reinstate a suit is purely discretionary to the part of the court as it was held in the case of Bilha Ngunyo Isaac Vs Kembu Farm Limited & Another & Another (2018) eKLR the court held as follows: -
- “...The discretion is intended so as to be exercised to avoid injustice or hardship resulting from 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...”
19. The appeal was dismissed on 26.11.2023 after the applicant failed to fully comply with the orders of the court given on 26.10.2023.
20. It is not disputed that the appellant did not fully comply with the orders of 26.10.2023. The appellant only complied with the order of filing record of appeal and the submissions but not complying with the order in depositing Kshs. 900,000/- in court. The appellant has tried to explain the cause of the delay, and cited an affidavit sworn by the Relationship Manager of NCBA Bank where he deponed that the cheque was duly deposited on time, but the bank account opening and verification process took time which went beyond the anticipated deadline.
21. The appellant has also contended that the extracted court order of 26.10.2023 showed that the money was to be deposited in court, whilst the handwritten court proceedings do not show that. I have looked at the extracted court order of 26.10.2023 and the handwritten proceedings. It is clear that the court ordered that the Kshs. 900,000/- be deposited in court within 30 days, but not to any bank account. The appellant chose to act contrary to the court order. This is not an excusable mistake. Neither was it an error. The court’s order was very clear. The order was extracted on the 10.11.2023 and collected by Hassan for Mukisu Advocate for the appellant on the same day. While the appellant claims that the amount was deposited in the bank on 26.11.2023, 16 days after collection. This court is not convinced that the actions of the appellant were not designed to delay the course of justice.
22. The upshot of the above is that the appellant/applicant has not demonstrated why I should exercise my discretion in her favor. The application dated 04.03.2024 is dismissed. Costs to the respondent.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 11TH DAY OF OCTOBER, 2024.

S.N MBUNGI

JUDGE

In the presence of :

Ms. Anono for the appellant – present



Mr. Abok for the respondent – present

Court Assistant – Elizabeth Angong'a

