Westpointe Reality Limited & 2 others v Salat (Environment and Land Appeal E059 of 2021) [2025] KEELC 7294 (KLR) (28 October 2025) (Ruling)

Neutral citation: [2025] KEELC 7294 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL E059 OF 2021

JG KEMEI, J

OCTOBER 28, 2025

BETWEEN

WESTPOINTE REALITY LIMITED ..... 1ST APPELLANT

HASSCONSULT LIMITED ..... 2ND APPELLANT

HASSCONSULT REAL ESTATE ..... 3RD APPELLANT

AND

BASHIR BILLE SALAT ..... RESPONDENT

RULING

(In respect of Applicant's Notice of Motion dated 22/6/2025)

1. The application is stated to be brought under the provisions of Section 1A, 1B & 3A of the *Civil Procedure Act* as well as Order 45 of the Civil Procedure Rules. The Appellants substantially pray for orders that;

    a. The Court proceeds to review or set aside its ruling/orders given on 19/6/2025 dismissing the Appellants' appeal for want of prosecution.

    b. The Court do proceed to reinstate the Appellants' appeal and give directions on the same.

    c. Costs of the application be in the cause.

2. The application is premised on the grounds on the face of it and further supported by the Affidavit of Muriuki Mambo, the 2nd Appellant's Director, sworn on 22/6/2025. The deponent contends that although the court noted the Respondent's application was undefended, the Appellants had indeed filed a Replying Affidavit dated 16/6/2025 in opposition to the application as well as written submissions dated 17/3/2025. That the said documents were duly served upon the Appellants, as evidenced by the email print annexed thereto.

3. The Deponent maintains that the court did not, however, consider the Appellant's response in its Ruling. He argues that the Replying Affidavit raised relevant issues that, if taken into account, could have led to a different conclusion. The Appellant specifically contends that the Judgment of the Lower Court was incomplete; therefore, they were unable to file a record appeal in time, as they were still awaiting the trial court record from the lower court. Furthermore, the Respondent was fully aware of these steps, having been informed by the Court's Deputy Registrar.

4. He urges the court to grant the prayers sought in the application in the interest of justice and argues that the application has been filed in a timely manner without any delay.

The Respondent's Replying Affidavit

5. In response to the Application, the Respondent, Bashir Bille Salat, filed a Replying Affidavit sworn on 16/7/2025. The Respondent states that he filed an application dated 17/3/25 seeking the dismissal of the appeal. He further asserts that despite service of the application on the Appellants, they never filed any response to it. The matter was mentioned, but the Applicant did not attend court. Directions to file submissions were also issued, but the Appellants never complied. The Respondent contends that the Applicants' response and submissions were filed on 16/6/2025, contrary to the Court's directions that required the parties to file their responses and submissions by close of business on 18/4/25.

6. The Respondent further asserts that the Appellants have been indolent in prosecuting the appeal, as they have not been attending court. He contends that their indolence prejudices him by preventing him from enjoying the benefits of the Judgment, issued more than four years ago. He argues that the Appellants were given numerous opportunities to prosecute the appeal and defend the application, but they failed to do so. Moreover, the Appellants have not explained why they were unable to prosecute the appeal. He accuses the Appellants of failing to adhere to the overriding objectives, thereby delaying justice. On this basis, he urges the court to dismiss the Application with costs.

The written submissions

7. On 21/7/2025, the court directed that the application be canvassed through written submissions. The parties complied. The Applicants' submissions are dated 30/7/2025 and filed on the same day, while the Respondent's submissions are dated 30/7/2025 and filed on 28/8/2025.

8. The Court has had the opportunity to read through the submissions by the parties and considered them in its determination.

Analysis and Determination

9. I have reviewed the application, the grounds supporting it, the response, and the submissions. The issue for the court's determination is whether to allow review of the ruling issued on 19/6/2025.

10. The remedy of review is prescribed under Section 80 of the *Civil Procedure Act* as read together with Order 45 Rule (1) of the Civil Procedure Rules. Section 80 of the *Civil Procedure Act* provides that: -

> Any person who considers himself aggrieved—
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> a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

11. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides that:

> "(1) Any person considering himself aggrieved—
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> a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

12. Based on the foregoing, there are three grounds on which a party may establish entitlement to orders of review:

(a) discovery of new and important evidence that was not known to the applicant or could not have been produced at the time the orders were made;

(b) a mistake or error apparent on the face of the record; or

(c) any other sufficient reason.

13. The Court of Appeal explained the reason for the remedy of review in the case of Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited [2014] KECA 872 (KLR) as follows;

> "The basic philosophy inherent in the concept of review is acceptance of human fallibility and acknowledgement of frailties of human nature and sometimes possibility of perversion that may lead to miscarriage of justice. In some jurisdictions, courts have felt the need to cull out such power in order to overcome abuse of process of court or miscarriage of justice. In the High Court, both the *Civil Procedure Act* in section 80 and the Civil Procedure Rules in Order 45 rule 1 confer on the court power to review. Rule 1 of Order 45 shows the circumstances in which such review would be considered range from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High Court greater amplitude for review."

14. In the present case, the Applicants argue that there is an apparent error on the face of the Record, as the court did not consider their Replying Affidavit and submissions in its Ruling of 19/6/2025.

15. In the case of Nyamongo & Nyamongo –vs- Kogo [2001] EA 170, the court had this to say on an error apparent on the face of the record:

> "An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un definitiveness inherent in its very nature and it must be determined

judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal."

16. Mativo J [as he then was] in Republic –vs- Medical Practitioners & Dentists Board & Another & another; MIO1 on behalf of MIO2 [a Minor] & another [Interested Party]; Kingángá [Exparte] [2021] KEHC 298 [KLR], cited with approval the Supreme Court of India's holding in the case of the case of Aribam Tuleshwar Sharma v. Aribam Pishak Sharmal, [SCC p. 390, para 3] 1 [1979] 4 SCC 389: AIR 1979 SC 1047 to the effect that;

> 'an error apparent on the face of record must be such an error, which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions. The rationale behind this reasoning is that there is a distinction between a mere erroneous decision and a decision which could be characterized as vitiated by 'error apparent'. A review lies only for patent error where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out.'

17. The learned judge concluded that,

> " The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1. To put it differently an order or decision or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision."

18. At paragraph 7 of the Ruling delivered on 19/6/2025, the Court noted that;

> " Despite service, the Appellants failed to file any response to the motion by close of business on 18/4/2025 and contrary to the directions given by the Court on 4/4/2025. The application is therefore undefended."

19. From the E-filing system, commonly called the Case Tracking System CTS, the Appellants filed their response and submissions on 16/6/2025, contrary to the Court's directions. The Appellants cannot, therefore, blame the court for not considering their pleadings that were filed out of time and in clear disobedience of the court's orders and directions. The proper approach to the court was to seek leave to admit the documents out of time, rather than sneak them in and claim entitlement to the court's attention.

20. In the case of Abraham Mukhola Asitsa v Silver Style Investment Company Limited [2020] eKLR the Court stated:

> " However, I am not persuaded that there is any justification for the party to seek leave an appeal, and thereafter go to sleep. An appeal is not filed for the sake of it. It should not be left parked at the appeals registry for times on end, without any action being taken. I believe a party that makes an appeal and goes to sleep and takes no action on it for a long time, cannot hide behind the provisions and argue that since directions had not been taken, then the appeal cannot be dismissed. An appeal should not be left to hang over the head of a respondent endlessly, where the appellant is unwilling to act on it. Justice demands that the same be resolved one way or the other. I believe dismissal of such stale appeals is one of the resolutions. There is no point of populating appeals registries with appeals that are not being prosecuted, yet the Courts are being told that they cannot dismiss them before directions are taken. This creates unnecessary backlog. If parties are not moving their cases, the Courts should dismiss them. There is no reason for them to clog the system. It is an untenable position. I believe there is inherent power to dismiss such appeals."

20. Flowing from the above decision, this court finds that ideally, the said documents ought to be struck out and that the court was right in dismissing the appeal for want of prosecution.

21. Though the Appellants filed their replying affidavit and submissions well after the deadline set by the court, I have pondered whether this court can still do justice to the parties in the circumstances.

22. Having said that , Article 159(2)(d) of *the Constitution* of Kenya 2010 requires courts of law to administer justice "without undue regard to procedural technicalities." In Raila Odinga & 5 Others v. Independent Electoral & Boundaries Commission (2013) eKLR, the Supreme Court explained the flexibility of the said article and the need to determine each case on its own merits while considering the unique circumstances of each case.

23. Similarly, on the principles governing dismissal for want of prosecution, the Court in Mwangi S. Kimenyi v Attorney General & Another, Civil Suit Misc. No. 720 of 2009 held that: -

> " When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the Court may in its discretion dismiss the act straight away. However, it should be understood that prolonged delay alone should not prevent the Court from doing justice to all parties- the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties. In variably, what should matter to the Court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues;
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> 1) whether the delay has been intentional and contumelious;
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> 2) whether the delay or the conduct of the plaintiff amounts to an abuse of the Court;
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> 3) whether the delay is inordinate and inexcusable;
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> 4) whether delay is one that gives rise to a substantial risk to a fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the defendant; and

5) What prejudice will the dismissal cause to the plaintiff? By this test, the Court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties."

24. Evidently, this appeal was filed in 2021, about four years earlier. The respondent's case is that the delay in prosecuting the appeal to its conclusion is prejudicing him because he is unable to enjoy the fruits of his judgment. The appellants, on the other hand, have raised concern about the delay in obtaining the trial court record to enable them to file the record of appeal.

25. I have perused the appeal record before me and note that this matter was raised before the Deputy Registrar multiple times, to the extent that on 14/3/24, the Hon Deputy Registrar ordered as follows;

> " The proceedings in the lower court file show that the judgment is incomplete. Therefore, the lower court files are to be taken back to the Magistrates' court so that the complete judgment is available. Mention before this court to confirm compliance on 23/4/24"

26. I agree with the applicant that the respondent was aware of this fact, and therefore, in the circumstances, I find that the applicant has explained the delay in prosecuting its appeal. Guided by the provisions of Art 159 (2) (d) of *the Constitution*, which commands this court to deliver substantive justice without undue regard to technicalities, and in the interest of justice, I find that the appropriate course of action is to give the applicants the opportunity to prosecute their appeal on its nerits.

27. In any event, it has not been demonstrated that the Respondent will suffer harm or prejudice that damages cannot compensate. I will make the final orders in conclusion.

28. Final orders for disposal

In view of the foregoing, I hereby exercise my discretion and allow the Appellants' application 22/6/2025 in the following terms;

a. The application dated 22/6/25 is hereby allowed.

b. The ruling delivered on 19/6/2025 herein and the orders resulting from it are hereby set aside, and the appeal filed through the memorandum of appeal dated 17/8/21 is hereby reinstated.

c. The appellants/applicants are directed to file their record of appeal within 60 days from the date of this Ruling; in default, the orders herein shall lapse automatically.

d. The Appellants/Applicants shall pay throw-away costs in the sum of Kshs 30,000/- in favour of the respondent.

29. It is so ordered

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF OCTOBER 2025 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered Online in the presence of:

1. Mr Onindo for the Appellants

2. Mr Hassan for the Respondent

3. CA- Ms Yvette Njoroge