

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMABAY
ENVIRONMENT AND LAND COURT LAND APPEAL NO.

E008 OF 2024

ALEXANDER OKUMU

OJANO.....APPELLANT

VERSUS

NAHASON ODER

ORIMBA.....RESPONDENT

RULING

(on reinstatement of an appeal struck out for want of
compliance)

1. By way of a Notice of Motion dated 25th August 2025 seeking
the following orders;

1) ...Spent

2) ...Spent

**3) That the Honourable court be pleased to grant
leave to the firm of Juliet Kokeyo & company
advocates to come on record for the
Appellant/Applicant.**

4) ...Spent

**5) That this Honourable Court be pleased to issue
interim orders of Stay of execution of the
proceedings of the bill of cost dated 14th July 2025**

pending the hearing and determination of this Application

6) That the order of this Honourable court made on the 3rd day of July, 2025 by Hon. Justice Fred Nyagaka(J) dismissing the Appellant's Appeal dated 12th July 2024 be set aside and the Appeal reinstated and set down for hearing.

7) That upon grant of prayer 6 above, this Honourable Court be pleased to issue an Order for Stay of execution of the judgment delivered on 7th April, 2024 in Homabay ELC NO. E003 of 2023 by HON. ONZERE E.M. pending the hearing and determination of the Appeal.

8) That cost of the Application be provided for.

- 2.** The application is expressed to be brought pursuant to Section 1A, 1B, 3A of the Civil Procedure Act, Order 40 of the Civil Procedure Rules 2010, and all other enabling provisions of the law.
- 3.** The application is premised on the grounds on the face of it and the averments in the Affidavit of Juliet Alexander Okumu Ojani. He deponed that he filed a Memorandum of appeal

appealed against the decision of Hon. Onzere in ELC No. E003 of 2023 delivered on 7th April 2024. He gave instructions to his previous counsel Samuel Okumu Odingo & Company Advocates to represent him in the appeal. On 3rd July 2023 the Appeal was set down for hearing before the court and his counsel on record refused/ignored/neglected to address the court despite having instructions and his appeal was struck out.

- 4.** He urged that he has been diligent in all court sessions in this matter and the dismissal was thereby not occasioned by himself but by his counsel on record. On 19th August 2025, he was served with a letter from the Lands office instructing him to appear on the suit property on 27th August 2025 for purposes of subdivision of the suit property. He annexed and marked as AOO-1 a copy of the letter. Further, that the Respondent is in the process of execution of the lower court judgment and decree. He urged the court to consider and reverse its decision in the order issued on 3rd July 2025 and reinstate this Appeal.
- 5.** The deponent averred that no loss will be occasioned to the Respondent if this appeal is reinstated. He pleaded with the

court not to visit the mistakes of counsel on him as he stands to suffer irreparable harm if not granted an opportunity to pursue his appeal.

6. The Respondent filed a replying affidavit sworn 4th September 2025 in response to the application. He averred that the Applicant's Application is frivolous, scandalous, vexatious and an abuse of the court process. Further, that the Application is brought in bad faith to deny him the fruits of his rightfully obtained judgment. He stated that the provisions upon which this Application is brought is not mandatory but discretionary.
7. The deponent averred that the applicant lodged this appeal against the respondent and on 4/3/25 this court gave directions in which the applicant herein was ordered to rearrange his record of appeal. That on 23/4/25 when parties appeared before the judge for compliance, the orders of the court issued on 4/3/25 had not been complied with. On the very day, an Advocate who introduced himself as Omwenga who appeared virtually indicated an intention of coming on record to act for the applicant. He made an application to have the matter adjourned to enable him put his house in

order and the said application was allowed. The Learned judge directed said Mr. Omwenga Advocate to file his notice of appointment and equally extended the timelines for the applicant to file the proper record of appeal within 7 days of the said date. The learned judge categorically stated that in the event the said orders will not have been complied with by the next date which was slated for 3.7.25, for hearing of the appeal, the appeal would stand dismissed with costs to the respondent.

8. The deponent averred that on the 3/7/25 the file was mentioned at 12.48 p.m. but Mr Omwenga Advocate who had just addressed court in another case being HOMA BAY MISC NO. E024 of 2025 failed to answer. By virtue of non-compliance on the part of the respondent the appeal was dismissed with costs to the respondent. He urged that the applicant contends that he instructed the firm of SAMUEL OKUMU ODINGO & CO. ADVOCATES to represent him in his appeal who neglected to address the court on his behalf despite having instructions culminating the dismissal of the appeal. The said allegations by the applicant can only be described as hot air as there was no notice of appointment

lodged by the said firm. That the applicant did not equally file any documents, that is, an Instruction Form from the alleged firm to exhibit that indeed he had instructed the said firm and or at all.

- 9.** He stated that it is only one Mr Omwenga Advocate who addressed court on one occasion as described above and despite the alleged Advocate having addressed court purporting to be acting for the appellant/applicant, he never filled any document in court to exhibit that he did was representing the applicant. In fact, the court only allowed the alleged Advocate to address court out of mercy as the alleged advocate was devoid of locus to address the honourable court by virtue of having failed to lodge their notice of appointment as required by law and or at all. In any event, even if the applicant had instructed counsel which is denied, the responsibility of a case does not solely rest on the Advocate; rather it remains with the litigant and it is incumbent upon the party even after engaging an Advocate to monitor the progress of their case.
- 10.** He urged that the applicant has failed to show that they had made any verifiable effort to check on the status of their

case with the alleged Advocate i.e. making visits to the said office.

11. He stated that the applicant ought to have acted promptly upon learning the dismissal of the suit on 3.7.25 however, it is clear that the applicant has just woken up from slumber at the wake of execution by the respondent having been served with a letter from the land's registry on the 19th August, 2025 1 month and 2 weeks after dismissal of the appeal. He stated that the applicant has not demonstrated the reasons as to why stay should be granted, the applicant has failed to provide evidence showing that substantial loss or irreparable harm would occur if the stay is not granted. Further, that the prayer for stay has been made way out of time, the judgment herein was entered on the 7/2/2024, only for the applicant to move the honourable court for stay orders 1 year, 6 months later with no justifiable reason whatsoever

12. The deponent averred that the applicant has not provided adequate justification for their inability to actively pursue the appeal and in any event equity aids the vigilant and not the indolent. He urged the court to dismiss the appeal.

13. The parties were directed to file submissions on the application.

Applicant's submissions

14. Counsel submitted that the firm of Juliet Kokeyo & Company Advocates under order 9 rule 9 of the Civil Procedure Rules seeks to come on record, owing to the fact that there was a previous counsel on record representing the Appellant in the trial court.

15. On the issue of stay of execution, the Appellant urged that he has met the threshold for grant of stay of execution as provided In Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR.

16. On the issue of reinstatement, he urged that the failure to attend court for the proceeding was occasioned by mistake of counsel who took instructions from the appellant being a lay person, addressed court promising to come on record and further addressed court in subsequent court dates but during the hearing on 3rd July 2023, he failed to address court

having been on the platform on that date addressing court in another matter.

17. He urged that reinstatement of a suit dismissed for want of prosecution and non-attendance is discretionary. The discretion is couched under Order 12 Rule 7 of the Civil Procedure Rules that provides that, where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just. He placed reliance on the case of Shah versus Mbogo (1967) EA 116 in this regard.

18. Counsel urged that placing reliance on the principal of natural justice that no litigant should be condemned unheard. Further, that the Appellant/Applicant submitted that he stand to suffer irreparable prejudice and harm if the application is not allowed and that they have demonstrated that the mistake of the counsel should not be visited on the litigant. Reliance was placed on the case of James Mwangi Gathara & Another versus Officer Commanding Station Loitoktok & 2 Others [2018] eKLR.

19. Counsel urged the court to give him a chance to argue his appeal on merit and further, that the respondent will not stand to suffer any prejudice if the suit is reinstated and it is fair that any inconvenience that may be suffered by the defendant/respondent can be cured by an award of costs. He prayed that the application be allowed with costs.

Respondent's submissions

20. Learned counsel for the respondent laid down the background of the events leading up to the dismissal of the suit and urged that ensuring compliance with court orders has never been about protecting a judge's feelings , ego or dignity and court orders are not to be issued in vain. It is to safeguard the rule of law and its supremacy. Counsel cited the in *Ratnam vs. Cumarasamy* (1964) 3 ALL ER 933 and *Mugo vs. Wanjiru* (1970) EA 481, 483 in this regard.

21. Counsel submitted that in the instant matter the applicant blames counsel for the inaction culminating in the dismissal of the appeal. It is however clear from the record that the applicant has been prosecuting this matter in person. The said allegations by the applicant can only be described as "hot air" as there was no notice of appointment lodged by

the alleged firm of Advocates, Samuel Okumu Odingo & Co. Advocates as required by law to the effect that they are indeed in conduct of the matter. The applicant did not equally file any document i.e. instruction form if any from the alleged firm to exhibit that indeed he had instructed the said firm.

22. In any event, even if the applicant had instructed counsel which is denied, the responsibility of a case does not solely rest on the Advocate; rather it remains with the litigant and it is incumbent upon the party even after engaging an Advocate to monitor the progress of their case. He cited the case of Rajesh Rughani Vs. Fifty Investment Ltd & Another (2005) eKLR and Habo Agencies Ltd vs Wilfred Odhiambo Musingo (2015) eKLR among other authorities in this regard.

23. Counsel urged that the appeal herein was dismissed on 3rd July 2025, only for the applicant to move the court on 25th August 2025. The applicant ought to have acted promptly upon learning of the dismissal of the suit if indeed he was keen on prosecuting the appeal herein. He stated that there is nothing in the motion to its supporting affidavit to indicate

the steps undertaken by the applicants to ensure that they became aware of the dismissal of the appeal or made enquires with the alleged Advocate on the appeal's progress until when the bill of costs and a letter from the lands registry was served upon them. That is when they woke up from slumber. The applicants have also not shown what steps they took to ensure the appeal is prosecuted and as such the applicant's application must fail.

24. On the issue of stay, counsel submitted that there has been inordinate delay in filing this application, the judgement which is the subject of this appeal was delivered on 7th February 2024, only for the applicant to move the honourable court for stay orders 1 year, 6 months later at the wake of execution with no justifiable reason whatsoever. That the applicant has equally failed to demonstrate what substantial loss he risks suffering. The application has not fulfilled the conditions set out under Order 42 Rule 6 and as such the application must fail.

Analysis and Determination

25. The following issue arises for determination: **Whether the court should reinstate the applicants' appeal.** The

attendant one is **who to have the costs of the application.**

26. In regard to the urgency in moving the courts, Sections 1A and 1B, of the Civil Procedure Act, Cap 21, Laws of Kenya, are relevant. The overriding objective of the civil procedure Act and the Rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. Regarding matters dismissed for want of prosecution, especially appeals as envisaged under Order 42 Rule 35 of the Civil Procedure Rules, Section 3A of the Act is relevant with regard to reinstatement because the Rules do not provide for and how one moves the court in that respect. Section 3A of the Civil Procedure Act gives the court wide discretion over whether it should or should not reinstate a suit dismissed on account of unreasonable delay on the part of the parties to prosecute the same. Section 3A reads:

“ 3A. Saving of inherent powers of court. Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be

necessary for the ends of justice or to prevent abuse of the process of the court.”

27. The factors taken into account or consideration for the purpose of reinstatement of suits were addressed **in Ivita vs. Kyumbu [1984] KLR 441 (Chesoni J)**, where the court stated:

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for

want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”

28. The discretion to reinstate a suit ought to be exercised judiciously as was held in **Bilha Ngonyo Isaac vs. Kembu Farm Ltd & another & another [2018] eKLR ((JN. Mulwa J)**, which echoed the decision of the court in **Shah vs. Mbogo & Another (1967) EA 116 (Harris J)**, where the court stated on the matter of discretion:

“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.”

29. In the instant application I must first point out that the applicant seeks to have the order of this court made on 3rd July 2025. The orders issued on the said date were not the

Orders that struck out the Appeal. The orders by which the appeal was struck out were issued on 23rd April 2025 wherein there was a default clause which when it was not complied with the appeal stood struck out.

30. It is trite law that parties are bound by their pleadings and therefore, it would seem, that the application is a nullity ab initio as it seeks to set aside the wrong orders as per the application. This court has been asked to set aside orders which are not relevant.

31. The above notwithstanding, I shall still deliberate on the main issue, which is the reinstatement of the appeal that was dismissed vide the orders of 23rd April 2025. When the appeal was initially before this court on 4th March 2025, it was noted that the record of appeal filed was not in compliance with Order 42 Rule 13 of the Civil Procedure Rules. The appellant was directed to file a fresh record of appeal. When the matter came up for mention on 23rd April 2025, Counsel on record for the appellant pleaded with the court for an opportunity to comply and the same was granted, in default of which the appeal would be struck out with costs. On 3rd July 2025, Counsel on record for the

appellant, was before this court on the very day he even addressed the court on another matter. He however refused to or did not address the court and therefore, the court, finding that the record of appeal was not filed, upheld the decision of 23rd April 2025.

32. I have considered the conduct of the appellant and his counsel on record and it is my considered view that the appellant has not given this court any reason to exercise discretion in his favour. Orders of the court are not to be issued in vain and to disobey the same is an abuse of the court process. Additionally, I reiterate that the application as drafted seeks to set aside the wrong orders and therefore, is defective and lacks merit.

33. In the circumstances, the application is dismissed with no order as to costs.

Ruling dated, signed and delivered virtually via the /teams Platform 16th day of December 2025.

**HON. DR. IUR FRED NYAGAKA
JUDGE**

In the presence of, from 2:05 PM,

Ms. Lumumba Advocate for the appellant/ Applicant

Ms. Oyala Advocate for the Respondent