

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
HCCA NO. E044 OF 2020

UCHUMI INTERNATIONAL AGENCIES LTD.....1ST
APPELLANT

JOHN NJUGUNA NDUATI.....2ND
APPELLANT

MONICA WANJIRU KARANJA.....3RD
APPELLANT

VERSUS

SYNERGY INDUSTRIAL CREDIT LTD.....1ST
RESPONDENT

AUTOHOUSE IMPORTS LTD.....2ND
RESPONDENT

KELVIN MWANGI MUCHIRI.....3RD
RESPONDENT

LUCY WANJIKU MUCHIRI.....4TH
RESPONDENT

RULING

1. The court made the following order on
30.7.2024: -

**“Supplementary record of appeal be filed and
served within 14 days. I/D [In default] the
appeal shall stand dismissed.”**

2. The appellants/ applicants applied under **Section 80 of the Civil Procedure Act** and **Order 45 Rule 1 of the Civil Procedure Rules** for review or setting aside of the said order and reinstatement of the appeal through the notice of motion dated 16.8.2024.
3. They also sought that the time for compliance with the said order be extended by 30 days within which they should file their supplementary record of appeal.
4. The application is supported by the affidavits sworn by the appellants' erstwhile advocate, **Andrew Ombwayo** on 16.8.2024 and 29.8.2024. The application was canvassed through written submissions dated 30.9.2024 and 13.5.2025.
5. The 1st respondent opposed the application through grounds of opposition dated 28.8.2025 and written submissions dated 30.7.2025.

Applicants' case

6. The primary ground in support of the application is that it was impossible for the appellants to comply with the order of 30.7.2024 because they were unable to obtain the certified and typed proceedings in **CMCC No. 5892 of 2018** as the file was unavailable.
7. The appellants stated that the file was active and had a ruling date slated on 19.6.2024 for 16.8.2024. They submitted that the inability to obtain the proceedings and to comply with the timeline for filing the supplementary record was not their fault.
8. The appellants further intimated that the judicial staff at the High Court registry received the lower court file on 11.3.2024, however, misfiled it and were only able to retrace and retrieve the same on 24.4.2025. Thereafter, the proceedings were typed and certified on 25.4.2025 and forwarded to their advocate on 29.4.2025 who prepared the supplementary

record of appeal and filed it on CTS on 30.4.2025.

9. The appellants contended that the appeal is against a ruling dated 28.9.2020 not the judgment and decree in the case and therefore, dismissing their appeal because the proceedings had not been filed is draconian.
10. The appellants highlighted that the failure to meet the timeline was not for lack of trying. They also stated that the respondent had equal duty to file the supplementary record but did not.
11. They faulted the respondents for seeking dismissal of the appeal while its two applications for execution are pending before the trial court.
12. The appellants asserted that the respondents shall not suffer any harm if this application is allowed. That however, they stand to be prejudiced as they would have been shut out from accessing justice.

13. The appellants relied on **section 1A (1) of the Civil Procedure Act** on the overriding objective to facilitate just, expeditious, proportionate and affordable resolution of civil disputes. They also relied on **John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation) [2015] eKLR** in enunciating the principles which should be considered in reinstatement of a suit and on **Meme v Maroo [2022] KEHC 15942 (KLR)** on the reinstatement of an appeal.

14. The appellants submitted that there is a recognized need to reinstate and retain litigants' cases in the interest of substantive justice and to guard litigants' rights to be heard where procedural lapses have been caused by the judicial staff. They relied on **Hassan Nyanje Charo v Khatib Mwashetani & 3 others [2014] eKLR, Intercounty Importers and Exporters v**

**Teleposta Pension Scheme Registered
Trustees & 5 others [2021] eKLR**

Response

15. The 1st respondent raised four grounds of opposition, being: -

- (1) The appellants' application has no merit, is incurably defective, misconceived and an afterthought that is procedurally improper before the court.
- (2) Considering the orders issued on 30.7.2024, this court is *functus officio* as it has no jurisdiction over the issues raised.
- (3) The application does not meet threshold for review as the appellants have neither alleged nor established any mistake or error apparent on the face of the record and no discovery of new and important matter or evidence as required.
- (4) The application is bad in law, brought in bad faith and an abuse of court process.

16. The 1st respondent relied on **Nasibwa Wakenya Moses v University of Nairobi & Another [2019] eKLR** where the court set out the grounds for review.

17. The 1st respondent contended that the appellants have not established sufficient reason for review as they are guilty of lethargy and inertia. It emphasized that the appellants filed this appeal on 19.9.2020 and did nothing for 1 year and 9 months.

18. The 1st respondent also drew attention to the fact that the court listed the appeal *suo moto* for notice to show cause why it should not be dismissed for want of prosecution scheduled for hearing on 3.6.2024. At the hearing, the appellants were granted leave to file a proper record of appeal. The record of appeal dated 12.9.2022 had not fulfilled the prerequisites and the appellants were granted leave to file a supplementary record of appeal.

19. According to the 1st respondent, the appeal came up for mentions on several times to confirm filing of the supplementary record of appeal during the period of 24.6.2022 to 30.7.2024 when ultimately, the court ordered that the supplementary record be filed within 14 days therefrom which failing the appeal would stand dismissed. according to the respondents, the appellants failed to comply and the Deputy Registrar confirmed that the appeal stood dismissed in accordance with the orders of 30.7.2024.

20. The 1st respondent argued that the appellants' explanation of unavailability of the lower court file is a lame excuse and faulted them for not providing any evidence to show the efforts they made towards obtaining the proceedings. It added that the appellants should not benefit from this court's discretion as they intend to obstruct the course of justice.

Analysis and Determination

Issue

21. The issue for determination is whether the court should review the order of 30.7.2024 and reinstate the appeal.

22. The instant appeal was dismissed for want of prosecution on 30.7.2024 pursuant to **Order 42 Rule 35 (2) of the Civil Procedure Rules**.

23. The court may review or set aside its own orders under **section 80 of the Civil Procedure Act** and **order 45 rule 1 of the Civil Procedure Rules** for a sufficient reason, among others.

24. However, the court's discretion is exercised based on principles according to the unique circumstances of a case.

25. In the peculiar circumstances of this case, "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 the Defendant...” **Ivita v Kyumbu [1984] KLR 441**

Is there prolonged and inexcusable delay?

26. The impugned order was issued on 30.7.2024 and the instant application is dated 16.8.2024. This is about 17 days or 13 weekdays. This is not a prolonged period as the court gave the applicant 14 days to comply by filing its supplementary record of appeal.

27. The applicant’s explanation for the delay is that; the lower court file could not be traced as it was active and was slated for a ruling on 19.6.2024 for 16.8.2024. That the High Court registry received the lower court file on 11.3.2024, however, misfiled it and were only able to retrace and retrieve the same on 24.4.2025. Thereafter, the proceedings were typed and certified on 25.4.2025 and forwarded to their advocate on 29.4.2025 who

prepared the supplementary record of appeal and filed it on CTS on 30.4.2025.

28. The applicants exhibited a copy of the letter bespeaking proceedings dated 30.7.2024. The applicants also filed the supplementary record of appeal dated 30.4.2025.

29. Although the delay may look inordinate, but the explanations provided are plausible and satisfactory. I am satisfied that the appellants have given a plausible explanation for the delay.

Has the 1st respondent shown prejudice due to the delay?

30. The rules of natural justice require that a party to a case is given a reasonable opportunity of appearing and presenting its case. **Mwangi & 2 others v Mwangi [2025] KEHC 5730 (KLR)**

31. The ruling that is the subject of this appeal was in respect of an application to set aside an *ex parte* decree given on 17.12.2025.

32. Therefore, in the circumstances of this case, it is in the interests of justice to reinstate the appeal for the court to hear and determine the matter substantively.

33. Thus, the court finds that the applicants have demonstrated a sufficient reason for the review of the orders of 30.7.2024.

34. I do note the lamentations by the 1st respondent on the delay herein which are justified. Nonetheless, despite the time that has passed by, the respondent will not suffer prejudice in the reinstatement and hearing of the appeal. The appellants and the respondents will be afforded full opportunity to argue their respective cases, thus, rendering credence to the statement “Justice is justice to both the Plaintiff and the Defendant...” **Ivita case (supra)**

35. Any prejudice caused by the delay can be ameliorated through an award of costs.

36. Accordingly, the scales of justice tilt in favour of allowing the application.

37. In the upshot, the application dated 16.8.2024 is allowed. Costs of the application are awarded to the 1st respondent.

38. To avoid any further delay in the hearing of the appeal, the court gives these directions befitting the circumstances of the case. The appellant shall file and serve written submissions on the appeal within 21 days of today. Upon service, the respondents shall file and serve submissions within 21 days of service. Time is of the essence.

**Dated, signed and delivered through
Microsoft Teams online application this 29th
day of January, 2026**

F. Gikonyo M

Judge

In the presence of: -

Nakhono for Appellant

Meme for Respondent

CA - Kinyua