Ali v Ali (Civil Appeal E024 of 2020) [2026] KEHC 5251 (KLR) (24 April 2026) (Ruling)

Neutral citation: [2026] KEHC 5251 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL APPEAL E024 OF 2020

M THANDE, J

APRIL 24, 2026

BETWEEN

KHADIJA SHEE ALI ..... APPELLANT

AND

MOHAMED HASSAN ALI ..... RESPONDENT

RULING

1. Before this Court for determination is a Notice of Motion dated 3.4.25 seeking the setting aside of the orders of 7.12.22 dismissing the appeal for want of prosecution and reinstating the same for hearing.

2. The grounds upon which the Application is premised are that the appeal and an application for stay were filed on 4.6.2020. When the matter was placed before the Judge on 8.9.2020, parties were absent as the Appellant was not notified of the hearing. The matter was given a mention date for 24.11.2020 but the same was adjourned as the file had not been assigned to the Judge. On 18.2.21, the matter was adjourned as the Judge was not sitting. The Application for stay was heard on 17.3.21 and allowed by a ruling delivered on 6.7.21. Thereafter the file went missing and it was not possible to fix the appeal for hearing. The appeal was subsequently dismissed on 7.12.22 for want of prosecution yet notice to show cause was never issued. The Appellant contends that the dismissal was premature as directions under Order 42 Rule 13 had not been given. Additionally, that notice to show cause why appeal should not be dismissed was not served upon the Appellant. It was further stated counsel's office followed up the file at the registry but has all along been informed that the court file is missing. The Appellant stated that the appeal involves the inheritance of a number of beneficiaries who have been denied their inheritance and that it is in the interest of justice that the same be heard and determined on merit.

3. The Respondent opposed the Application through a replying affidavit sworn by his counsel, Patrick Shujaa Wara who averred that the record shows that the Appellant did not take any steps to prosecute the appeal since 6.7.21 when the ruling was delivered on the application dated 6.11.2020; that contrary to the claim by the Appellant, directions for the filing of the record of appeal and submissions within 14 days were given on 16.6.2020; that although the record and supplementary record of appeal were

filed, the Appellant did not file submissions within the stipulated time; that at the time the appeal was dismissed, the Appellant had not filed and served written submissions; that the Appellant has not demonstrated steps taken to prosecute the appeal; that there has also been inordinate delay in filing the instant application. The Respondent urged that the Application be dismissed.

4. The law relating to setting aside judgment or dismissal is found in Order 12 Rule 7 of the Civil Procedure Rules, which provides:

> 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.

5. The Orders sought by the Applicant are discretionary. The rule does not provide the conditions that must be met for reinstatement of dismissed suits. The Court thus has wide discretion to grant orders on terms that are just.

6. The Appeal was filed on 4.6.2020. The Appellant's application for stay of execution was heard on 17.3.21 and allowed by a ruling delivered on 6.7.21. Thereafter, the Appellant went into a deep slumber. The appeal was dismissed for want of prosecution on 7.12.22. The Appellant awoke from slumber 2 years and 4 months later and filed the present Application on 7.4.25.

7. The Appellant says that the file went missing and that counsel had been following up with the registry. No evidence by way of letters to the registry have however been exhibited to support this claim. Additionally, where a file goes missing for an extended period, a conscientious and diligent party would file an application for reconstruction of the same. This was not done. The Appellant has clearly been indolent.

8. The law enjoins parties to assist the court by ensuring that court directions are complied with and that justice is dispensed expeditiously. In the case of Tana Teachers' Cooperative and Credit Society Limited v Andriano Muchiri [2018] eKLR, the Court of Appeal considered an appeal from an order dismissing an appeal for non-compliance with directions of the court and had this to say:

> 13. On the whole therefore, the first appellate court was right in finding that the appellant had been indolent and this court has been given no reason to interfere with that finding. We are mindful of the fact that the original suit giving rise to these proceedings was filed in 1994. The respondent has yet to enjoy the fruits of her judgment 24 years down the line. Although parties are always in haste to invoke the "overriding principle" when seeking favourable exercise of discretion by the courts or covering up for some infractions they may have committed, they tend to forget that Section 1A (3) *Civil Procedure Act* as well as section 3A *Appellate Jurisdiction Act* enjoins them to assist the court in ensuring that court directions are complied with and that justice is dispensed expeditiously. A party cannot egregiously fail or refuse to comply with directions of the court claiming that the said directions were salutary and not accompanied by any sanctions and hope to seek refuge in the overriding principle. That in our view amounts to gross abuse of court process. There must be an end to litigation and it behoves this Court to tell the appellant that its journey ends at this point.

9. The circumstances herein are that when the appeal was dismissed, the Appellant had not complied with the directions of the Court. To date, the Appellant has not filed her submissions as directed and no reason has been given for failure to comply.

10. In her submissions, the Appellant relied on the case of National Bank of Kenya Limited v Attorney General & another (Commercial Case 104 of 2012) [2024] KEHC 12400 (KLR) (Commercial and Tax) (4 October 2024) (Ruling) where Mwangi, J. stated:

15. This Court's jurisdiction to review and set aside its decisions is wide and unfettered. In the case of Shah v Mbogo & another [1967] EA 116, the Court of Appeal of East Africa held as follows –

> This discretion (to set aside ex parte proceedings or decision) is intended so to be exercised to avoid injustice or hardship resulting from accident, 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. (Emphasis added).

16. It is now well settled that in dealing with an application seeking to set aside ex parte proceedings, an applicant has a duty to demonstrate sufficient cause to warrant the Court to exercise its discretion in his/her favour. This was the holding by the Court in the case of Wachira Karani v Bildad Wachira [2016] eKLR where it was held that –

> Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause... (Emphasis added).

12. With respect, the cited case is not helpful to the Appellant. The Appellant has not demonstrated that her case is one of accident, inadvertence, excusable mistake or error. The Appellant has also failed to discharge her duty to demonstrate sufficient cause to warrant the Court to exercise its discretion in her favour.

11. By her conduct therefore, the Appellant derogated from the overriding objective of the expeditious, fair, just, proportionate and economic disposal of the matter herein. This Court should therefore not provide succour and cover to the Appellant given her conduct. It would therefore be a travesty of justice for the Court to exercise its discretion in favour of a party who has failed to prosecute her own appeal which she filed on 4.6.2020.

12. I accordingly find that the Application dated 3.4.25 lacks merit and the same is dismissed. Due to the indolence on the part of the Appellant, I award costs to the Respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 24TH DAY OF APRIL 2026

M. THANDE

JUDGE