REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. E160 OF 2023

SOLOMON MIRITI ……..
…….....APPELLANT

VERSUS

FRANKLINE JOHN SANGA ……..……...…….....RESPONDENT

R U L I N G

1. Before this Court for determination is a Notice of Motion dated 18.3.25, seeking the following orders:
    1. ***Spent***
    2. ***Spent***
    3. ***THAT this Honourable Court be pleased to review, set aside/vary the terms of the ruling delivered on 13th March, 2025 dismissing the appeal herein and in its place, an order setting down the appeal for hearing on priority basis.***
    4. ***THAT the costs of this application be provided for.***

2. The Applicant states that there is an error on the face of the record in the ruling of 13.2.25; that there is new information that was not available to the Court at the time of the ruling; that the Appellant had complied with the stay conditions by depositing the decretal amount in court; that the record of appeal was filed and served on 7.3.24 as directed by the Court; that on 13.3.24 when matter was set for mention, the Judge was away attending to a 3-Judge bench matter and mention was set for 6.5.24; that counsel inadvertently mis-diarized the mention for 6.6.24; that matter was mentioned in the Appellant's absence and a new date set for 13.5.24; that the Respondent did not serve the Appellant with the new date; that the Appellant was not present when the Court gave directions for the filing of submissions; that the Respondent did not serve notice on the Appellant as directed; that the Appellant subsequently attended Court on 19.9.24 and 14.11.24 but the Court was not sitting and they could not find out the status of the matter.

3. It was further stated that counsel had inadvertently failed to have their firm mapped on the Case Tracking System that would enable them to see court directions in real time and only did so on 13.3.25 when counsel attended Court to take directions on disposal of appeal having complied by filing the record; that the Court having admitted the appeal and given directions

for the filing of written submissions, it is only fair and just for the Court to hear the appeal without the Appellant's submissions, as submissions are merely persuasive; that the Respondent should have filed submissions when the Appellant failed to file his submissions. The Appellant urged the Court to grant the orders sought.

4. The Respondent opposed the Application through a replying affidavit sworn on 27.3.25 by his counsel, Geoffrey Kilonzo. He averred that the appeal was dismissed for non-compliance of the court orders of 13.5.24 directing the Appellant to file submissions by 27.5.24; that having moved the Court, the Appellant had a duty to prosecute the suit and abide by the Court's directions; that the appeal was filed on 2.11.23 and after more than a year, no steps have been taken to prosecute the appeal and the Court was at liberty to dismiss the same for want of prosecution; that no plausible reason has been given for failure to comply with the court's orders; that the Application is a calculated delaying tactic which goes against the timely, cost effective and proportionate dissolution of disputes; that the Appellant was aware of the date, the cause list having been published at least 7 days before the hearing date; that the Appellant is wasting the Court's time and is frustrating the Respondent from enjoying the fruits of his judgment. The Respondent urged that the Application be dismissed with costs.

5. 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.***

6. 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 is required to exercise its discretion and grant orders on terms that are just.

7. The circumstances herein are that the Court gave directions for the filing of the record of appeal by 11.3.24 and parties were to return to Court on 13.3.24. As the Court was away, the matter was mentioned before the Deputy Registrar in the presence of both parties, who gave a mention date for 6.5.24. On that date, the Appellant was absent and the Respondent prayed that the appeal be dismissed. The Court however gave a further mention for 13.5.24. The Appellant was again absent. Directions for filing of submissions were given and the Appellant was to file by 27.5.24. The matter was fixed for 19.9.24 and later for 14.11.24 but the Court did not sit. When the matter came up on 13.2.25, the Court noted that the Appellant had still not filed submissions and proceeded to dismiss the Appeal for non-compliance.

8. The Appeal belongs to the Appellant. After filing the same on 2.11.23, he had a duty to follow up on the hearing of the same. It is not the Respondent's duty to keep the Appellant appraised on court proceedings.

9. The Appellant has not demonstrated the efforts he made in seeking to know the status of his appeal. He has also not shown that he attempted to fix the matter for mention for directions before the Court. Similarly, the Appellant has not stated why he did not attend Court on 6.5.24, a date given by the Deputy Registrar in the presence of both parties. He has also not demonstrated the efforts he took to find out what transpired on that date. The Appellant has been indolent.

10. The Court notes the Appellant's submission that it should have heard the appeal without his submissions, as submissions are merely persuasive and that the Respondent should have filed submissions when the Appellant failed to file his. This is a rather bizarre argument. It is trite that appeals are ordinarily heard by way of submissions. Without submissions, there cannot be a hearing. While the Court can consider submissions without the highlighting of the same, the Court cannot consider an appeal that has no submissions. The Appellant's contention in this regard are a mere deflection, given his failure to comply with the Court's directions to file submissions and amounts to an abuse of the court process.

11. 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.***

12. The circumstances herein are that the appeal was dismissed for non-compliance with the Court's directions. To date, the Appellant has not filed the said submissions and no reason has been given for failure to comply.

13. The conduct of a party is key in any matter where the jurisdiction of the Court to exercise its discretionary powers is invoked. On this point I associate with Gikonyo, K. who in **Moses Mwangi Kimari v Shammi Kanjirapparambil Thomas & 2 others [2014] eKLR,** stated:

> ***We should not only look at the delay of six months since the direction of 8th November, 2012, we should look also at the entire conduct of the Plaintiff; it is negligent and tinctured a don't-care attitude towards court orders. This is not unfair indictment of the Plaintiff; it is simply an atonement of serious disobedience of court orders which no serious court of law should countenance.***

14. The Appellant's conduct of disobeying the Court's directions, failing to attend Court and indolence should not be countenanced. By his conduct, 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 his conduct.

15. In the end and in view of the foregoing, the Court finds that the Application dated 18.3.25 lacks merit and the same is dismissed. The Respondent shall have costs.

DATED, SIGNED and DELIVERED at Malindi this 24th day of April 2026

M. THANDE

JUDGE