



REPUBLIC OF KENYA



KENYA LAW
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**Bala v Ochieng (Environment and Land Appeal E033 of 2022)
[2024] KEELC 665 (KLR) (15 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 665 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E033 OF 2022
AY KOROSS, J
FEBRUARY 15, 2024**

BETWEEN

TIMOTHY OLUOCH BALA APPELLANT

AND

SAMUEL JASPER OCHIENG RESPONDENT

RULING

Appellant's Case and Submissions

1. The subject of this ruling is a notice of motion dated 25/02/2023 in which the appellant prays for the following reliefs from this Court:
 - a. That the honourable court be pleased to review, vary and/or set aside the order issued on 30/01/2023 by Hon. Lady Justice A. Y. Koross dismissing the appeal together with other consequential orders.
 - b. That the appeal filed on 3/10/2022 be reinstated for hearing.
 - c. That the costs of the application be provided for.
2. The motion is based on grounds set out on its face and on the supporting affidavit of the appellant Timothy Oluoch Bala deposed on even date.
3. According to the appellant, although he was privy the court had directed that he files a supplementary record of appeal, none was filed since the legal clerk of his counsel on record M/s. Okello Adipo & Co. Advocates, was erroneously issued with an order instead of a decree.
4. Further, the appellant avers that the appropriate decree has since been extracted, a draft supplementary record of appeal tendered and since he is aggrieved by the lower court judgment and the motion filed



timeously, the motion should be allowed. The appellant did not file his written submissions despite directions from the court.

Respondent's case and submissions

5. The motion is strenuously opposed by the respondent's affidavit which he deposed on 25/10/2023. In it, the respondent avers the motion lacks merit because the appellant has always failed to attend court despite service and it is on that basis, the appeal was dismissed.
6. Further, the issue of erroneous extraction of an order instead of a decree had earlier been raised by his counsel and therefore, the appellant is guilty of mischief and ultimately urges this court to dismiss the motion.
7. As directed by the court, the respondent filed written submissions dated 25/10/2023 in which his counsel on record Dola Magani & Co. Advocates affirms 3 issues as arising for determination; (a) whether the court ordered the appellant to file a supplementary record of appeal upon an objection being raised (b) whether the appellant could not differentiate between an order and a decree and, (c) whether costs of the motion should be provided for.

Issues for determination, analysis and determination.

8. Having carefully considered the motion, affidavit and submissions, the issues that fall for determination are (a) whether this court should grant the orders sought and (b) what about costs.
9. Although the appellant has sought an order for review, the grounds and affidavit do not advance such a prayer. My understanding of this is that the appellant is only keen to set aside or vary the order dismissing the appeal. When faced with such an application, the court exercises its discretion judiciously and the appellant has to tender sufficient cause.
10. The principles for setting aside an ex parte judgement or order are settled and the Court of Appeal decision of *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR summarized them as thus: -

“We agree with those noble principles which go further to establish that the court's discretion to set aside an ex parte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.”

11. Foremost, from the record, the appeal was dismissed on 30/1/2023 and the instant motion filed on 1/03/2023. It is the considered view of this court that in the circumstances of this case, this period of two months is not inordinate.
12. Accordingly, this court has to interrogate the reason offered by the appellant regarding his failure to comply with the directions of the court and establish whether it constituted an excusable mistake, an error of judgment regarding counsel's court clerk's failure to obtain appropriate proceedings from the lower court or if it was meant to deliberately delay the cause of justice.
13. The appellant blames his counsel's clerk for extracting erroneous orders of the trial court instead of a substantive decree. I have scrutinised the document attached to the appellant's affidavit and clearly, the lower court extracted the final disposal order that emanated from its court as “orders” instead of a “decree” and in addition, it does not disclose the prayers that had been sought before it. This explains why the said lower court, correctly so, rectified the anomaly and issued the appropriate decree.



14. Mistake is described in the case of *Belinda Murai & others v Amoi Wainaina*, [1978] LLR 2782 (CALL) Madan, J.A. (as he then was) which is cited in the case of *Richard Ncharpi Leiyagu* (*Supra*) thus: -

“A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of Junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule...”

15. This court having scrutinised the “order” and “decree”, it is not lost to it that the mistake emanated from the trial court and not from counsel’s court clerk as alluded to by the appellant.
16. This notwithstanding, neither the appellant’s counsel nor the appellant have explained why they failed to attend court on two instances despite notices being issued to them. Had they attended court and explained the obtaining circumstances, this court would obviously not have dismissed the appeal for want of compliance.
17. It follows it is the responsibility of the appellant who had initiated appellate proceedings to ensure that he follows up with the progress of the appeal he had filed in court to its logical conclusion. Consequently, even if the lower court blundered in extracting an order instead of a decree, the appellant is also guilty of laches.
18. Having considered the lower court’s slipup which unquestionably caused hardship upon the appellant and barred him from filing his supplementary record of appeal timeously but bearing in mind the conspicuous absence of the appellant and his counsel from participating in these proceedings prior to dismissal of the appeal, the order that commends itself to be issued is for the motion to be allowed with costs being awarded to the respondent. In addition, and in the circumstances of this case, the inconvenience caused to the respondent shall be compensated with costs.
19. Utmost and for the reasons set out above, this court hereby issues the following disposal orders: -
- a. The order dismissing the appeal is hereby set aside and the appeal is hereby reinstated.
 - b. The appellant is hereby directed to file and serve his supplementary record of appeal within fourteen (14) days from the date of this ruling.
 - c. The appellant to pay the respondent thrown away costs of kshs 20,000 within 14 days from the date of this ruling.
 - d. That in failing to comply with orders (b) and (c) above, the appeal shall automatically stand dismissed.
 - e. In any event, costs of the motion are awarded to the respondent.
 - f. Matter shall be mentioned for directions on 13/03/2024.

It is so ordered

DELIVERED AND DATED AT SIAYA THIS 15TH DAY OF FEBRUARY 2024.



HON. A. Y. KOROSS

JUDGE

15/2/2024

Ruling delivered virtually through Microsoft Teams Video

Conferencing Platform in the Presence of:

N/A for the appellant

Mr. Indidis for the respondent

Court assistant: Ishmael Orwa

