



**Nkirote v M’Kwaria (Suing as the legal representative and administrator of the Estate of Gladys Ncoro Ayub (Deceased) (Environment and Land Appeal E113 of 2021) [2024] KEELC 13884 (KLR) (18 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13884 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E113 OF 2021  
CK NZILI, J  
DECEMBER 18, 2024**

**BETWEEN**

**JUDITH NKIROTE ..... APPELLANT**

**AND**

**RACHAEL NGUGI M’KWARIA (SUING AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF GLADYS NCORO AYUB (DECEASED) ..... RESPONDENT**

**RULING**

1. What is before the court is an application seeking reinstatement of an appeal that was struck out for non-compliance and non-attendance. The reasons offered by the applicant are that the notice for admission of the appeal and the directions to file the record of appeal within 60 days from the date of admission or attendance during the mention had not been communicated her. The application is opposed by the respondent on the basis that the application was filed after an inordinate delay of nine months, it lacks merits, the applicant was aware of the directives and the mention dates and there are no good reasons for the reinstatement of the appeal otherwise the reinstatement will be prejudicial to her.
2. Order 42 Rule 11 of the *Civil Procedure Rules* provides that an appellant must take action on his appeal after directions are given. In this application, the dismissal resulted from an omission by the appellant to file the record of appeal within the time frame that the court had ordered. The considerations in determining whether or not to reinstate a dismissed appeal were considered in *Ivita vs Kyumbu* (1975) E.A 441. The court observed that the test is whether the delay is prolonged and inexcusable and if justice can still be done despite such delay and that it was upon the respondent to satisfy the court that the delay will prejudice it.
3. In *Leonard Mutura vs Peter Gathenya Mwariri* (2019) eKLR, the court observed that it had powers to dismiss an appeal where it was satisfied that the appeal was filed in bad faith; with no intention of



- ever prosecuting it; or where the appellant seemed to have abandoned the same and lastly; where its pendency amounted to a clog on the wheels of justice.
4. The applicant herein blames the court for non-communication over the directions following the admission of the appeal. The orders dismissing the appeal for non-compliance was a culmination of a litany of non-compliance of previous orders. In *Jomo Kenyatta University of Agriculture and Technology vs Joseph Mutuura Mberia & others* (2015) eKLR, the court held that a lawyer could not plead ignorance and consequential inaction and such a mistake cannot be excused.
  5. In *Bains Construction Co. Ltd vs John Mzare Ogowe* (2011) eKLR, the court held that though mistakes of counsel should not be visited upon an innocent litigant, a counsel was an agent of the principal whom the client has vested him with authority and if the agent does not perform, the principal should bear the consequences of the inaction. See *Mbago vs Obel & another*, ELC E003 of 2023 (2024) KEELC4163 (KLR) (23<sup>rd</sup> May 2024) (Ruling).
  6. The Practice Direction No. 43 of the *Environment & Land Court practice directions*, gazette No. 5178 it provides that an appeal can be dismissed for want of compliance with court directives.
  7. Order 42 Rule 21 of the *Civil Procedure Rules* provides that the court may re-admit a dismissed appeal where sufficient reason for inaction is provided or availed. The discretion is to be exercised judicially and for sound reasons as to why there was non-compliance with court directions. In *Richard Ncharpi Leiyagu vs IEBC & others* (2013) eKLR, the court observed that the discretion is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error, but not to assist a litigant who deliberately seeks to obstruct the court of justice.
  8. In this matter, it took the applicant nine months to apply for reinstatement of the appeal. The delay has not been explained. An appeal belongs to a party who should make a follow-up to know its progress. There is no evidence by way of correspondence or follow-up made by the applicant after her appeal was filed. In *Mwangi S. Kamenyi vs Attorney General & another* (2019) eKLR, the court took the view that the law has not defined what inordinate delay is but it depends on the circumstances the subject and the nature of the case; an explanation for the delay and lastly; whether the delay is beyond the acceptable limits in the prosecution of cases.
  9. As to prejudice to the opposite party, the court in *Mwangi S. Kaimenyi (supra)* held that the respondent has to demonstrate how he has suffered some additional prejudice as a result of the delay, such as impeding a fair trial, which has caused him aggravated costs and or where he has incurred some specific hardships. In *John Harun Mwau vs Standard Ltd & others* (2017) eKLR, the court cited *Ivita vs Kyumbu (supra)* that the respondent must show that justice will not be done in the case due to the prolonged delay and the nature of the subject matter which required expeditious prosecution of the case.
  10. In this application, the applicant levels the blame on the court and shoulders none for the indifference or lack of action to follow up on the appeal. See *Bernard Muthee & another vs Anita Kamba Mwiti* (2021) eKLR. In *Gikuru vs Orokise Sacco Society Ltd* (Civil Appeal 651 of 2017) (2024) KEHC 3230 (KLR) (Civ) April 4<sup>th</sup> (2024) (Ruling), the court cited *Equity Bank Ltd vs West Link Mbo Ltd* (2013) eKLR, that a court exists to administer justice and in doing so it must of necessity, balance between the competing rights and interests of different parties but within the confines of the law to ensure that the ends of justice are met.
  11. The applicant has not disclosed what she did for close to a year to follow up on the appeal. It is not enough to hide under the mistakes of advocates. A party must also take responsibility to show interest in and to follow up on their cases even if represented by lawyers as was held in *Habo Agencies Ltd vs*



Wilfred Odhaimbo Musingo (2015) eKLR. A mistake by counsel may be excusable. However, where a litigant knowingly and willingly condones such negligence or exhibits a careless attitude to his case, a court will not exercise discretion in favor of such a litigant as was held in *Mwangi vs Kariuki* (1999) LLR 2632 (CAK).

12. Parties and their advocates have to assist the court to further its overriding objective to deliver justice expeditiously as was held in *Osbo Chemicals Ltd vs Tabitha Wanjiru Mwaniki* (2018) eKLR. The applicant chose to sleep on her rights. She demonstrated scanty regard for the progress of her appeal. The court is not a packing bay for appellants who file appeals and wait endlessly and indefinitely to prosecute them. The appeal had laid dormant for some time. Even after the dismissal, the applicant waited for another nine months. The applicant came too late and with too little. The prejudice to the respondent is evident. I decline to allow the application. It is dismissed with costs.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 18<sup>TH</sup> DECEMBER, 2024**

In presence of

C.A Kananu

Mugo for the respondent

**HON. C K NZILI**

**JUDGE**

