



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Ngari Rukungu (Deceased) (Civil Appeal
21 of 2017) [2025] KEHC 2195 (KLR) (30 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 2195 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 21 OF 2017
RM MWONGO, J
JANUARY 30, 2025**

BETWEEN

CHARLES MURAGURI MURA APPELLANT

AND

KENNEDY MWANGI MUHIHIA RESPONDENT

RULING

1. The Applicant's motion dated 30th November 2023, seeks the following orders:
 1. Spent;
 2. That the firm of Igati Mwai & Co. Advocates be granted leave to come on record on behalf of Maina Karingithi & Co. Advocates for the appellant;
 3. That the orders dismissing this matter be set aside and the appeal be reinstated for hearing;
 4. That there be a stay of execution of the judgment/confirmed grant issued on 09th May 2017 pending hearing and determination of this application; and
 5. Costs be in the cause.
2. The basis of the application, as expressed in his affidavit, is that he was not aware of the dismissal of his appeal having not been informed by his advocates, Maina Karingithi & Co. Advocates. He stated that he learned about the court's dismissal order in November 2023 after he perused the court file. Owing to his advocates' failure, he now seeks reinstatement of the appeal for hearing on its merits. He also seeks leave for his new counsel to come on record.
3. The applicant urged the court to allow the application because the mistakes of counsel should not be visited on him.



4. The application is opposed through a replying affidavit sworn by the respondent. He stated that the application is hollow, vexatious, bad in law and one meant to embarrass the court. He states that the trial court determined the matter 20 years after its filing, and the applicant did not take any steps to prosecute it. Further, it was the applicant's obligation to follow up on the case and ensure that the appeal is prosecuted. He pointed out that litigation must come to an end, this matter having been in courts for 27 years.
5. In his written submissions, the applicant stated that visited his advocate at his office, and on several occasions, and the advocate failed to inform him that the appeal had been dismissed. The Advocate told him that there were no hearing dates for the appeal. He went to peruse the court file himself and he learned about the dismissal. He urged the court to allow the application and overlook counsel's error.
6. On his part, the respondent relied on the case of *Ivita v Kyumbu* [1975] KEHC 4 (KLR) as cited in the case of *Ronald Mackenzie v Damaris Kiarie* [2021] KEHC 7123 (KLR) where the courts examined the issues of length and reason for delay in compliance. He pointed out that the applicant had never applied for typed proceedings from the trial court, thus never intended to prosecute the appeal. Relying on Order 42 Rule 13(4) of the Civil Procedure Rules he urged that it was necessary for the record of appeal be properly constituted and filed for the appeal to be properly before the court.
7. On delay, he argued that it was the applicant's responsibility to ensure that his advocate acted on his behalf. he cited the case of *Utalii Transport Company Limited & 3 Others v NIC Bank & Another* [2014] eKLR where it was held that if the delay was too long, it is inexcusable. This was also so held in the case of *Kiru Tea Factory Company Ltd v Evans Njiru Muchir & Josphat Kinyua Muchiri* [2020] KEELC 620 (KLR) where the court found that a 6-month delay was inexcusable.
8. The respondent argued that even if the court overlooked the delay, it should consider that the case took 20 years before the trial court, and the appeal has lasted 7 years in court yet it was not prosecuted. Such delay cannot be remedied through the court's discretion bestowed under Article 159(2)(b) of *the constitution*. On this he cited the case of *Ogola v Alila* [2022] KEELC 15006 (KLR).
9. The core issue for determination is whether or not the application should be allowed.
10. According to the court's record, the memorandum of appeal is dated 18th May 2017 and it was filed the following day. The court granted leave to the appellant to file a supplementary record of appeal since the one on record was incomplete and it did not have the trial court's proceedings. On 15th November 2022, the appellant was ordered to file and serve the record of appeal within 30 days of that date. The matter was scheduled to be mentioned on 20th March 2023 to confirm compliance with the court's order. On the mention date, the court noted that the record of appeal had not been filed. The court dismissed the appeal and granted leave to the judgment creditor to execute. This is the impugned order.
11. The Civil Procedure Rules lay out the requirements for granting the discretionary relief of stay of execution in Order 42 Rule 6(2) which provides that:
 2. No order for stay of execution shall be made under subrule (1) unless—
 - a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
12. It is trite that an application for stay must be made without unreasonable delay, and if there is a delay, the same must be satisfactorily explained. The applicant should also demonstrate that substantial loss



will result if the stay order is denied. In the present case, the appeal arose out of a succession cause, thus the provision for security is inapplicable. The impugned order was made on 20th March 2023 while the application herein was filed on 05th December 2023; about 10 months later. Yet, notably, the substantive appeal was filed in 2017. Hence, there is certainly a delay in filing the application for stay. The pertinent question is whether the applicant participated in creating the delay. This also means considering the action taken by the applicant, if any, to avert the delay.

13. In this case, the applicant stated that the delay occurred because his former advocate failed to inform him of the impugned orders. In the case of *Rajesh Rughani v Fifty Investments Limited & Kembi & Muhia Advocates* [2016] KECA 829 (KLR) the Court of Appeal held that the advocate cannot be wholly blamed for the delay stating:

“The period between these two dates needs explanation as this is the period of delay. Our re-evaluation of the record shows that no satisfactory explanation for the delay between 24th October 1998 and 7th April 2005 has been given; all that is stated is that the delay is due to inaction by the appellant’s former advocate on record. There is no evidence on action taken by the appellant as the litigant and owner of the suit; all the appellant did was to change advocates in May 2005 after the delay; there is no explanation for inaction on the part of the appellant himself as the litigant who took the risk that his suit could be dismissed for want of prosecution.”

14. In my view, the 10-month delay has not been explained to the satisfaction of the court. The applicant has not deposed or submitted on what substantial loss he is bound to suffer if the order for stay is denied. In my view, given the age of the matter and the conduct of the applicant, that prayer fails.
15. As to whether the appeal should be reinstated, the court offered an opportunity to the appellant to file the record of appeal within a specified time as indicated hereinbefore. The applicant took the opportunity to file the Memorandum of Appeal in 2017, but the same remained unprosecuted until the appeal was dismissed, 7 years after its filing. As correctly submitted by the respondent, Order 46 Rule 13 of the Civil Procedure Rules provides the requirements for accompaniments to the memorandum of appeal. The documents listed therein are important to enable the court to consider the merits of the appeal. It is upon the appellant to file the necessary documents before the matter can be heard. The appellant herein was granted ample accommodation by the court but he did not comply with the order to file the supplementary record of appeal.
16. It is trite that Orders of the court are meant to be obeyed. Disobeying parties are sanctioned and may be held in contempt. In *Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County Ex Parte Stanley Muturi* [2018] eKLR it was held that:

“Court orders are not meant for cosmetic purposes. They are serious decisions that are meant to be and ought to be complied with strictly.”

Similarly, in *B. V. Attorney General* [2004] 1 KLR 431 it was held that:

“The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.”



Conclusions and disposition

17. In light of all the foregoing, my view is that in as much as the mistakes of counsel should not be visited upon the client, there is a delay of 7 years since lodging the appeal and its dismissal. The appellant failed to demonstrate his active intention to prosecute the appeal within that period, until it was dismissed. On this prong the application fails.
18. Equally, the prayer for reinstatement of the appeal fails because there is insufficient explanation for non-compliance with the court order. This gave the applicant the opportunity to redeem himself.
19. Ultimately, prayers 3 and 4 of the application seeking reinstatement and stay of execution hereby fail.
20. Prayer 2 of the application allowing counsel to come on record is hereby allowed.
21. Given that this is a family matter, no order as to costs is made.
22. Orders accordingly

DELIVERED VIRTUALLY AT KERUGOYA HIGH COURT 'THIS 30TH DAY OF JANUARY 2025

R. MWONGO

JUDGE

Delivered in the presence of:

Igati for Appellant/Applicant

Mwangi for Respondent

Francis - Court Assistant

