



REPUBLIC OF KENYA



KENYA LAW
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**Obuya & another v Nikigwize (Civil Appeal E103 of 2023)
[2025] KEHC 4485 (KLR) (28 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 4485 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E103 OF 2023
M THANDE, J
MARCH 28, 2025**

BETWEEN

JUDITH AKINYI OBUYA 1ST APPELLANT

JUDITH OBUYA OMOLLO 2ND APPELLANT

AND

SAMWEL NIKIGWIZE RESPONDENT

RULING

1. Before this Court for determination is a Notice of Motion dated 8.3.24 seeking:
 1. That this application be certified urgent, service be dispensed with thereof and the same be heard ex-parte in the first instance.
 2. That pending the hearing and determination of this application there be an order of stay of execution of the Ruling of the Honourable Judge delivered/ issued on 6th March 2024 and all consequential orders and proceedings hereto be and is hereby issued.
 3. That pending the hearing and determination of this application there be an order of stay of execution of the judgment delivered on 6th June 2023 by Hon. S. D. Sitati at the Subordinate Court in Kilifi CMCC E408 of 2021.
 4. That the Application dated 1st February 2024 be and is hereby reinstated for hearing and determination on merit.
 5. That this Honourable Court do make any such further Order (s) and issue any other relief it may deem just to grant in the interest of justice.
 6. That the costs of the application be in the cause.



2. The Appellants seek the reinstatement of its application dated 1.2.24 which was on 6.3.24 dismissed for non-attendance. The reason for non-attendance was the inadvertent failure of devices after a power blackout at her advocates office. The Applicant's case is that it had complied with the conditions for stay of execution and had deposited the decretal amount in Court as directed, but that the Respondent's advocate misled the Court by asking for dismissal. The Appellants are now in danger of execution which will render the appeal nugatory and the Appellants stand to suffer irreparable loss and damage. They urged that it is only just and fair that the application dated 1.2.24 be reinstated for hearing.
3. The Respondent opposed the Application vide his replying affidavit sworn on 28.3.24. The Respondent's reply is that the Application is brought in bad faith and is meant to deny him the fruit of litigation, is bad in law, incompetent and is an abuse of the court process. Further that the Appellants had the onus to appear in Court on 6.3.24, a date they had fixed, and demonstrate that they had deposited the security but they went to slumber. Further that the Appellants have not produced a receipt for payment of the deposit of the decretal sum and are not remorseful for their faults. Further that there has been inordinate and inexcusable delay in filing present Application. The Appellants have not demonstrated the prejudice they will suffer if the orders sought are denied. The Respondent urged that it is in the interests of justice and fairness that the Application be dismissed with costs and that the Respondent be allowed to finalize the execution process which is his constitutional right.
4. Parties filed their written submissions which I have duly considered.
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 thus has wide discretion to grant orders on terms. The terms must however be just.
7. I have considered the circumstances of the case. The Appellants stated that reason for non-attendance on 6.3.24 was the inadvertent failure of devices after a power blackout at their advocates office. Further that they had complied with the conditions for stay of execution and had deposited the decretal amount in court as directed, but that the Respondent's advocate misled the Court by asking for dismissal.
8. The record does contain the receipt for the deposit of the decretal amount. The Appellants had in fact complied with the conditions of stay of execution. While it is noted that there was failure by the Applicant to attend court on the date set for directions leading to dismissal of the application, the Court takes judicial notice of the fact that unexpected power failure is not an uncommon occurrence in this country. Further, while the application in question was dismissed on 6.3.24, the present Application was filed timeously on 8.3.24. I do therefore find that the wider interests of justice require that the application be reinstated for hearing on merit.
9. In this regard, I associate with Odunga, J. (as he then was) who in *Robert Kimani Ndungú v Kenya Deposit Insurane Corporation (Being sued in its capacity as the receiver manager of Chase Bank Limited (In Receivership))* [2022] eKLR, stated:
 44. In these circumstances, what the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties



before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice.

10. I am also guided by the holding in *Patel v E.A. Cargo Handling Services Ltd* [1974] EA 75 at page 76 C and E where the Court of Appeal stated:

There are no limits or restrictions on the Judge's discretion to set aside or vary an ex-parte judgement except that if he does vary the judgement, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the rules.

11. The circumstances herein are such that the prejudice that will be suffered by the Appellants should the orders not be granted, far outweigh that to be suffered by the Respondent, should the orders be granted. In exercise of its discretion therefore, the Court opts for the lower rather than the higher risk of injustice, namely to reinstate the application for hearing on merit, on terms that are just.
12. The upshot is that the Application dated 8.3.24 is merited and allowed on the following terms:
1. The application dated 1.2.24 is hereby reinstated for hearing on merit.
 2. The stay of execution granted shall remain in place.
 3. The Appellant shall file and serve submissions by 11.4.25. In default, the application dated 1.2.24 shall stand dismissed.
 4. Mention for compliance on 7.5.25.
 5. The Respondent shall have costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 28TH DAY OF MARCH 2025

M. THANDE
JUDGE

