



REPUBLIC OF KENYA



KENYA LAW
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**Nyamu v Nyabikari (Civil Appeal 306 of 2023)
[2025] KEHC 4128 (KLR) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 4128 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 306 OF 2023
FN MUCHEMI, J
MARCH 27, 2025**

BETWEEN

MARY MUTHONI NYAMU APPELLANT

AND

ADEPHINE NYABIKARI RESPONDENT

RULING

1. This application dated 15th August 2024 seeks to set aside orders made on 27th November 2023 dismissing the appeal. The applicant further seeks for reinstatement of the appeal.
2. The respondent filed a Replying Affidavit dated 22nd August 2024 in opposition to the application.

The Applicant's Case

3. The applicant states that on 27th November 2023, the court made orders dismissing this appeal for want of prosecution with costs to the respondent
4. The applicant avers that she was neither well represented nor served with the proceedings and hearing date on record at that time. It is further stated that the motor vehicle registration number KBT 958R did not belong to the applicant at the time of the accident.
5. The applicant states that she has a right to a fair hearing and seeks for leave to be granted leave to file defence out of time.
6. The applicant argues that her memorandum of appeal raises weighty issues of law and facts which ought to be ventilated by this honourable court.



The Respondent's Case

7. The respondent states that there is no notice of change of advocates filed by the current counsel taking over from the previous counsel. Further, the respondent states that the motion is improperly before the court as the same was filed without the leave of the court yet the High Court was on vacation. The application therefore, contravenes clear statutory provisions of Rules 17, 18 and 19 of the High Court of Kenya Organizational & Administration Rules 2016 and is for striking out.
8. The respondent avers that she is currently in the process of execution of the decree from the trial court by way of Notice to Show Cause which is a lawful process.
9. The respondent states that in the event the court grants the orders sought, it should direct that the applicant deposit the decretal amount currently at Kshs. 895,243.42/- and the taxed costs at Kshs. 195,163.86/- in a joint interest earning account held by both firms of advocates.
10. Directions were issued that the application be canvassed by way of written submission and from the record only the respondent complied by filing her submissions on 26th August 2024.

The Respondent's Submissions

11. The respondent submits that on 27th November 2023, the court allowed her chamber summons application dated 22nd May 2023 which sought the dismissal of the appellant's memorandum of appeal dated 12th March 2021 for want of prosecution. On 8th August 2023 the Deputy Registrar had directed that the application be served upon the appellant in person which was after her counsel withdrew from acting.
12. Pursuant to those directions, the appellant was duly served with the mention notice and the application via whatsapp on her usual telephone number 0722xxxxxx. An affidavit of service dated 11th August 2023 was filed on 17th August 2023 confirming service. Despite service, the appellant did not attend court to oppose the application for dismissal.
13. The respondent submits that a taxation notice for the party and party bill of costs was equally served upon the respondent on 8th March 2024, which was ignored as well. The bill was taxed on 30th April 2024 at Kshs. 143,642.80/-.
14. The respondent submits that the applicant finally woke up from her slumber when the application for execution dated 30th July 2024 seeking her arrest was served upon her.
15. The respondent submits that the instant application was filed during the High Court vacation period without a chamber summons application supported by an affidavit seeking for orders that it be heard during the vacation and giving reasons hereto. Thus it ought to be dismissed.
16. The respondent argues that setting aside an order is purely discretionary which ought to be exercised on a case by case basis considering the peculiar circumstances of a case. The respondent submits that the applicant was personally served with every court process and she failed to take any action. Thus the respondent argues that the applicant is indolent. The dismissal order having been made on 27th November 2023, the applicant filed this application nine (9) months later following receiving warrants of her arrest for defaulting in settling the decretal amount in the original file.
17. The respondent further submits that in the event the court opts to apply its discretion in favour of the applicant, she ought to be ordered to deposit the entire decretal amount in court.

The Law



Whether the applicant is entitled to an order setting aside dismissal of the appeal for want of prosecution.

18. The law concerning dismissal of an appeal for want of prosecution is contained in Order 42 Rules 35(1) & (2) of the Civil Procedure Rules which provides as follows:-

Unless within three months after the giving of directions under Rule 13 the appeal shall be set down for hearing, the respondent shall be at liberty to either set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.

If within one year after service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.

19. It is trite law that the court's discretion to set aside an order dismissing the appeal for want of prosecution is unfettered. In *Richard Ncharpi Leiyagu vs IEBC & 2 Others* [2012]eKLR, it was held that the court's discretion to set aside an ex parte order or judgment 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.

20. In an earlier case of *CMC Holdings Limited vs Nzioki* (2004) eKLR 173 the court held that:-

The discretion must be exercised judiciously.....In law, the discretion that a court of law has, in deciding whether or not to set aside exparte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong in principle.....the answer to that weighty matter was not to advise the appelland of the recourse open to it as the learned magistrate did here. In doing so, she drove the appelland out of the judgment seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appelland.

21. The record shows that the applicant lodged her appeal namely Kiambu HCCA No. E037 of 2021 on 15th March 2021 vide date shown on the memorandum of appeal. On 5th May 2022, the said appeal was admitted for hearing and the Honourable Judge directed that the appelland files and serves the Record of Appeal and written submissions within 45 days from the date of service of the said order and the respondent files written submissions within 30 days after service by the appelland. The matter was scheduled for mention to confirm compliance and further directions on 20th September 2022. The matter came up for mention that date and later on 13th December 2022 and 14th March 2023 but the appelland had not complied with the said directions. Notably, the court found that the appelland was not served on the two occasions of 20th September 2022 and 14th March 2023. On the three occasions the appelland did not attend court or make any effort to follow up his appeal. The matter was scheduled for mention to take a judgment date on 4th May 2023 whereof the appelland had notice of the said date but still failed to attend court. The respondent then filed an application dated 22nd May 2023 for dismissal of the appeal for want of prosecution and the court directed that the application be served personally upon the appelland as her advocates had ceased acting for her. On 27th November 2023, after perusing the record and ascertaining that the appelland was served with the application, the appeal was dismissed with costs. The appelland then filed the instant application on 16th August 2024 about nine (9) months after the dismissal order.



22. It is noted from the court proceedings that the trial court forwarded the original record Ruiru SPMCC No. 301 of 2019 to the high Court in Kiambu on 8th July 2021. The appal file was later transferred to this court upon gazettelement of a High Court on 26th September 2023. The applicant failed to follow up on his appeal in this court or to file the record of appeal. The current application dated 22/04/2023 was filed when this file was still in Kiambu and was duly served on the applicant after her advocates ceased acting for her.
23. It had been close to four (4) years since this appeal was filed and since then, the appellant has not taken any steps to prosecute it. The applicant has not even tried to explain why she has not filed the record of appeal. Since 05/05/2022 when the court directed him to do so. It is evident that the applicant filed his appeal and abandoned it until execution came calling. The applicant is an indolent litigant who seems to have lost interest in her appeal immediately after filing it.
24. It is evident that the grounds of appeal in my view do not raise arguable points of law and neither does this appeal have high chances of success.
25. It is my considered opinion that the applicant has not given plausible reasons to justify the exercise of this court's discretion in the applicant's favour. In my considered view, the reinstating the appeal even assuming that this application was successful, would cause more hardship on the respondent who has been deprived of enjoying the fruits of the judgment which was rendered five years ago, on 29th April 2020.
26. Accordingly, I find the application dated 15th August 2024 lacking merit and I hereby dismiss it with costs to the respondent.
27. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 27TH DAY OF MARCH 2025.

F. MUCHEMI

JUDGE

