



**Mark Holdings Limited v Wairimu & 2 others (Civil Appeal  
E235 of 2022) [2025] KEHC 3948 (KLR) (Civ) (26 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3948 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E235 OF 2022**

**SN MUTUKU, J**

**MARCH 26, 2025**

**BETWEEN**

**MARK HOLDINGS LIMITED ..... APPELLANT**

**AND**

**VIRGINIA WANJIKU WAIRIMU ..... 1<sup>ST</sup> RESPONDENT**

**AUTO INDUSTRIES LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**DAVID NG'ANG'A ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**Applications**

1. Pending determination by this Court are two (2) applications. The first is the Notice of Motion dated 2.11.2024 (the first application) brought by Mark Holdings Limited (hereafter the Appellant) and supported by the grounds laid out on the face of that Application and in the Supporting Affidavit of the Appellant's advocate, Kimamo Muchiri. It seeks the following orders:
  - i. Spent.
  - ii. That the proceedings on 19.11.2024 and the orders/directions issued on the said date dismissing the appeal be set aside.
  - iii. Spent.
  - iv. That the hearing of the 1<sup>st</sup> Respondent's Application dated 15.11.2024 be stayed pending the hearing and determination of this appeal.
  - v. Spent.



- vi. That the proceedings in the taxation matter instituted by the Bill of Costs filed on 4.12.2024 be stayed pending the hearing and determination of this appeal.
- vii. That the costs of the Application be borne by the Respondents.
2. The first application is expressed to be brought under Sections 1A, 1B, 3 and 3A of the Civil Procedure Act (CPA); Order 12, Rule 7 and Order 51, Rule 1 of the Civil Procedure Rules (CPR); and Article 40(1) and (2) of the Constitution of Kenya, 2010.
3. In his supporting affidavit, the Appellant's advocate has stated that following delivery of the lower court judgment on 29.03.2022, the Appellant filed the present appeal on 14.04.2022. The advocate has further stated that the delay in prosecuting the appeal was occasioned by the delay in obtaining the certified copies of the typed lower court proceedings and judgment, to enable the Appellant's advocate compile and file a record of appeal, despite various requests and follow-ups being made on the same. That in the premises, the appeal was dismissed on the basis of factors beyond the Appellant's control, thus denying it the right to pursue its appeal. That unless the orders sought in the first application are granted, the Appellant stands to suffer grave financial loss.
4. The second application is the Notice of Motion dated 18.11.2024 brought by Virginia Wanjiku Wairimu (hereafter the 1<sup>st</sup> Respondent) under Sections 1A, 1B, 3A and 63(e) of the CPA; and Orders 16, 17, Rule 2(1) and Order 51, Rule 1 of the CPR. It is supported by the grounds set out on its body and in the affidavit of the 1<sup>st</sup> Respondent's advocate, David Nyareru Bosire. The 1<sup>st</sup> Respondent seeks a substantive order for release of the sum of Kshs. 300,000/- deposited in court as part of the decretal amount, pursuant to the court order made on 11.05.2022 and that the same be released to the bank account belonging to her advocates, namely Diamond Trust Bank; Nyareru & Associates Advocates: Account No. 0300xxxxxx01, Wabera Street.
5. The 1<sup>st</sup> Respondent further seeks an order that the Appellant pays the balance of the decretal sum plus costs awarded both in the lower court and in the present appeal, within a period of 14 days and an order that the costs of the second application be borne by the Appellant herein.
6. In his supporting affidavit, the advocate has deposed that the Appellant's appeal was dismissed for want of prosecution on 14.11.2024. That previously, the Appellant had deposited a sum of Kshs. 300,000/- in court as security for part of the decretal sum awarded by the lower court. The advocate has deposed that in view of the dismissal order made in the present appeal, it would only be fair for the deposited sum to be released to the account details referenced hereinabove, and for the remaining balance of the decretal sum to be paid to the 1<sup>st</sup> Respondent by the Appellant, within the proposed timelines.

### **Replying Affidavits**

7. The 1<sup>st</sup> Respondent is opposed to the first application by way of the Replying Affidavit sworn by her advocate, David Nyareru Bosire, on 3.01.2025 in which it is averred, inter alia, that the first application is an afterthought and a delaying tactic, given that the Appellant did not comply with previous directions issued by the court, pertaining to the appeal; that since filing the appeal in 2022, the Appellant did not take any active steps in the matter and hence the court acted correctly in dismissing the appeal for want of prosecution and for non-compliance.
8. It is the advocate's assertion that no viable reasons have been given in the first application, to warrant an exercise of this court's discretion in favour of the Appellant. In his view, the Appellant has not approached the court in a sincere manner, and that much time has passed since the events leading to the dispute took place. Consequently, the advocate has urged this court to dismiss the first application, with costs.



9. David Ng'ang'a (hereafter the 3<sup>rd</sup> Respondent) has similarly opposed the first application, by placing reliance on the Replying Affidavit sworn by his advocate, Esther Wambui, on 4.01.2025. In sum, the advocate has termed the said application as an abuse of the court process, adding that the Appellant has neither sought to obtain the requisite typed and certified lower court proceedings nor filed its record of appeal since inception of the appeal. The advocate has stated that even after the 1<sup>st</sup> Respondent herein filed an application seeking the dismissal of the appeal for want of prosecution, the court granted the Appellant an opportunity to prosecute the appeal, but it did not, thereby resulting in its dismissal.
10. The 3<sup>rd</sup> Respondent's advocate has stated that the explanation given by the Appellant for non-compliance is not reasonable and does not meet the threshold for setting aside the dismissal order. For those reasons, the court has been urged to decline granting the orders sought in the first application.
11. On its part, the Appellant did not file any documents to oppose the second application; rather, it opted to rely on the averments made in the supporting affidavit to the first application.

### **Oral Submissions**

12. The two (2) applications were dispensed through oral arguments. Concerning the first application, Mr. Kimamo advocate for the Appellant chose to rely on his supporting affidavit to the first application.
13. In reply, Mr. Mukamani, advocate for the 1<sup>st</sup> Respondent, argued, inter alia, that his client is yet to enjoy the fruits of her judgment delivered by the lower court, and that since its inception, the appeal has not progressed, despite various court attendances. He argued that the delay in the Appellant's prosecution of the appeal is inordinate and inexcusable, citing the decision in *Nicholas Salat v IEBC & 7 others*, Supreme Court Application 16 of 2014 [2014] eKLR which sets out the guidelines on inordinate delay. The advocate has maintained that the court acted properly in upholding its dismissal order on the appeal. That in the premises, the first application ought to be dismissed with costs, paving way for the allowance of the second application.
14. Ms. Wambui, counsel for the 3<sup>rd</sup> Respondent, associated herself with the submissions made by counsel for the 1<sup>st</sup> Respondent, adding that there has been laxity on the part of the Appellant, in prosecuting the appeal. Counsel has therefore urged this court to allow the 1<sup>st</sup> Respondent herein to enjoy the fruits of the judgment, adding that the 3<sup>rd</sup> Respondent has satisfied his part of the judgment. She further submitted that to allow the first application would aid the Appellant's disobedience of previous court orders.
15. In rejoinder, Mr. Kimamo, while admitting that the delay in prosecuting the appeal has been inordinate and inexcusable, has argued that the same was occasioned by the delay on the part of the lower court, in availing the proceedings to enable the Appellant compile and file its record of appeal; with the relevant letters being availed to support the follow-ups made by the Appellant's advocate to that effect. The advocate further argued that part of the decretal sum has already been deposited in court as security.
16. Concerning the second application, Mr. Mukamani briefly submitted that in the absence of any existing appeal or stay orders in place, it is only fair that the security sum be released, to enable the 1<sup>st</sup> Respondent realize the fruits of her judgment.
17. Ms. Wambui has indicated her support of the second application, while Mr. Kimamo relied on the averments made in the first application, to oppose the second application.
18. From the record, it is apparent that the 2<sup>nd</sup> Respondent did not participate in the hearing of the respective applications.



## Analysis and Determination

19. The court has considered the affidavit material filed in support of and in opposition to the first and second applications. The court will first consider the first application. The orders sought in that application are three stated above in this ruling. The court has observed that prayers 3 and 4 of that application refer to the 1<sup>st</sup> Respondent's application dated 15.11.2024. The Court did not find that application in the court file. It remains unclear whether the Appellant meant to reference the second application (being dated 18.11.2024); be that as it may, there is no basis upon which to grant the aforesaid order.
20. The remaining orders sought in the first application are for setting aside the dismissal order giving rise to reinstatement of the appeal, and for a stay of the taxation proceedings in the appeal, pending the hearing and determination of the appeal.
21. The grant or refusal to set aside or vary an order, judgment or any consequential decree or order, is discretionary, wide, and unfettered. However, the discretion must be exercised judicially and justly. The applicable provision is Section 3A of the [CPA](#), which reserves the inherent power of the court "to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court."
22. Order 12 Rule 7 [CPR](#) provides that:

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.
23. The Court of Appeal in [Rose Njoki King'au & Another v Shaba Trustees Limited & Another](#) [2018] eKLR stated thus:

"Also cited was Section 3A of the [Civil Procedure Act](#) which enshrines the inherent power of the Court to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the Court. In *Equity Bank Ltd versus West Link Mbo Limited* [2013], eKLR, Musinga, JA stated inter alia, that, by "inherent power" it means that:

"Courts of law exist to administer justice and in so doing, they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without its being derived from the [Constitution](#) or statute. Such power enables the judiciary to deliver on their constitutional mandate.....inherent power is therefore the natural or essential power conferred upon the court irrespective of any conferment of discretion."
24. The record sets out the events leading to the first application in the following manner. The Appellant filed its memorandum of appeal on 14.04.2022 to challenge the judgment delivered by the lower court on 29.03.2022 in favour of the 1<sup>st</sup> Respondent and against the Appellant and the 3<sup>rd</sup> Respondent. Contemporaneously, the Appellant filed an application dated 14.04.2022 seeking a stay of execution pending hearing and determination of the appeal. When the matter came up in court, the Court granted a stay of execution in the interim, on the condition that the Appellant deposits a security sum of Kshs. 300,000/- by 23.05.2022, pending interparties hearing thereof. It is apparent from the record that the Appellant complied with the conditions, by depositing the abovementioned sum on 22.05.2022. Upon inter partes hearing, the Court delivered a ruling on 22.06.2023, allowing the



- application dated 14.04.2022 and directing that the deposited sum be retained as security for the due performance of the decree.
25. The record shows that when the matter subsequently came up before the Deputy Registrar on 5.12.2023 and 8.05.2024, the Appellant was granted opportunity to file and serve the record of appeal. In the absence of any compliance therefore, the 1<sup>st</sup> Respondent filed an application dated 2.09.2024 seeking dismissal of the appeal for want of prosecution.
  26. On 16.10.2024, when the matter came up for inter partes hearing, the record shows that the aforementioned application was compromised by consent of the parties, on the terms that the Appellant files and serves the record of appeal within 14 days thereof and that the appeal be prosecuted fully by 31.12.2024, in default of which the same would stand dismissed for want of prosecution, with costs to the Respondents. The Appellant did not comply with the above terms and hence when the matter subsequently came up in court on 14.11.2024, the Court deemed the appeal dismissed, pursuant to the orders made on 16.10.2024. The Appellant then brought the first application.
  27. Upon considering the explanation given by the Appellant to the effect that the delay in prosecuting the appeal was primarily the result of a delay in obtaining certified copies of the impugned judgment and typed proceedings, upon consideration of the record in its totality, the court observed that while the Deputy Registrar sent reminders dated 21.04.2022, 18.09.2023 and 26.10.2023 to the Small Claims Court, requesting for the lower court record and requisite documents, the record shows that the Appellant on its part only availed three (3) correspondences dated 14.04.2022; 27.05.2024; and 12.06.2024 and annexed to its advocate's supporting affidavit as Annexures "KM-1 and KM-2", requesting for the requisite documents.
  28. Save for the referenced correspondences, no other credible material was tendered before the court to demonstrate any diligent and persistent attempts by the Appellant at following up on the said documents. Furthermore, since the date on which the application seeking dismissal of the appeal was compromised, the Appellant has not tendered any credible material or material at all, to indicate any efforts in complying with the terms of compromise.
  29. In view of the foregoing circumstances, the court is not persuaded that the Appellant has demonstrated what would suffice as a reasonable and diligent effort, on its part, at complying with the various court orders and directions requiring it to timeously prosecute its appeal.
  30. Further to the foregoing, the court is convinced that the 1<sup>st</sup> Respondent herein, being lawfully entitled to enjoy the fruits of her judgment, will likely suffer prejudice if the orders sought are granted, upon consideration of the fact that the cause of action arose in the year 2018. It is my considered view that litigation must come to an end.
  31. Ultimately, this court is not persuaded that the explanation given by the Appellant is sufficient to warrant an exercise of discretion in its favour. Consequently, this court declines to reinstate the appeal as sought under prayer number 2 of the 1<sup>st</sup> Application. Having declined to grant prayer 2 of the application, there is no reason to address prayer 6 seeking a stay of the taxation proceedings.
  32. In regard to the 2<sup>nd</sup> application, which essentially seeks the release of the security sum of Kshs. 300,000/- earlier deposited in court; as well as an order that the balance of the decretal amount be paid within 14 days, I have considered the materials placed before me. The outcome of the orders I have issued above in respect to the 1<sup>st</sup> Application, it is apparent that there is no existing appeal here. Similarly, there are currently no stay orders in place and therefore, there is no reason to continue holding Kshs 300,000/-, deposited as security. I am inclined to grant prayer 2 of the Notice of Motion dated 18.11.2024 as prayed, which I hereby do.



33. Concerning the second prayer seeking payment of the balance of the decretal sum by the Appellant, upon a perusal of the record, it is apparent that the lower court awarded the 1<sup>st</sup> Respondent a total sum of Kshs. 461,550/- out of which the 3<sup>rd</sup> Respondent paid a portion of Kshs. 450,000/- to the 1<sup>st</sup> Respondent. In the circumstances, the court is satisfied that the sum deposited in court would be sufficient in settling the remaining balance of the decree.
34. Consequently, the following orders are made:
- a. The Notice of Motion dated 2.11.2024 is hereby dismissed with costs to the 1<sup>st</sup> and 3<sup>rd</sup> Respondents.
  - b. The Notice of Motion dated 18.11.2024 partially succeeds in that an order be and is hereby issued for release of the sum of Kshs. 300,000/- to the 1<sup>st</sup> Respondent's advocates vide their Bank Account details: Diamond Trust Bank; Nyareru & Associates Advocates: Account No. 0300xxxxxxx01, Wabera Street within 30 days of this day.
  - c. The Appellant shall bear the costs of the two applications, the Notice of Motion dated 2.11.1014 and the Notice of Motion dated 18.11.2024.
35. Orders shall issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 26<sup>TH</sup> MARCH 2025.**

**S. N. MUTUKU**

**JUDGE**

In the presence of:

Mr. Kimamo for the Applicant

Mr. Mukamani holding brief for Mr. Nyareru for the 1<sup>st</sup> Respondent.

Ms. Wambui for the 3<sup>rd</sup> Respondent

