



REPUBLIC OF KENYA



KENYA LAW
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**Kenya National Highways Authority v Ruwa & another (Civil Appeal
110 of 2022) [2025] KEHC 5021 (KLR) (25 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5021 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 110 OF 2022**

**M THANDE, J
APRIL 25, 2025**

BETWEEN

KENYA NATIONAL HIGHWAYS AUTHORITY APPELLANT

AND

TIMOTHY FONDO RUWA 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

RULING

1. By an Application dated 21.2.24, the Appellant seeks reinstatement of its appeal which was dismissed on 18.10.23.
2. The grounds upon which the Application is premised are that the appeal was dismissed for non attendance and want of prosecution, yet the Appellant was not served with any notice to show cause neither was any summons taken out indicating intention to have the appeal dismissed for want of prosecution. Further, that a period of 1 year was yet to lapse between the last date the Appellant appeared and the date of dismissal for want of prosecution. The Appellant argued that the dismissal was contrary to the provisions of Order 42 Rule 35 and Order 17 Rule 2 of the Civil Procedure Rules. It was further averred that the Appellant only learnt of the dismissal on 7.2.24 when it was served with the 1st Respondent's bill of costs. The Appellant stated that it was interested in prosecuting the appeal and that should the same not be reinstated, it would suffer the consequences of an unfavourable and flawed decision of the lower court which has implications on its operations. The Appellant attributed the absence of his advocate to a prolonged illness for which he underwent surgery and hospitalization. It was further pleaded that the Application was brought without further delay.
3. In his replying affidavit sworn on 4.6.24, the 1st Respondent stated that the Appeal was lodged on 22.11.22 and the Appellant obtained exparte orders for the detention of the Respondent's truck pending the hearing and determination of its application for stay of the orders of the trial court orders.



On 8.2.23, the Court directed him to deposit the sum of USD 7350.60 as security for release of the truck. He took a loan and deposited the said sum to enable him get back to business. The Respondent attributed delay in prosecuting the appeal to the Appellant's officers' vow to punish him for not yielding to their extortionist ways of demanding bribes from him. The Appellant was aware that the matter was coming up on 18.10.23 but chose not to attend Court and was only moved by the demand for costs. The Respondent asserted that the Appellant has many lawyers who could have stepped in for counsel. He added that the Appellant is not deserving of the orders sought as it has been indolent and has not demonstrated the prejudice it will suffer if the orders sought are not granted.

4. In a further affidavit sworn on 15.7.24 in rejoinder, counsel for the Applicant reiterated the earlier averments and further averred that the replying affidavit was fatally defective for offending the provisions of the *Oaths and Statutory Declarations Act*. Counsel denied the allegations of bribery by the Respondent and further stated that the deposit of security was pursuant to a court order. Further that the record of appeal was filed on 8.3.23 and that the Appellant should not be punished for the inaction of its advocate.
5. I will begin by considering the challenge to the validity of the 1st Respondent's replying affidavit. The Applicant contends that the affidavit is fatally defective for purportedly being sworn in Mariakani and commissioned in Mombasa. The Applicant argued that the replying affidavit does not amount to an affidavit.
6. Section 5 of the *Oaths and Statutory Declarations Act* provides:

Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.
7. In Regina Munyiva Ndunge vs. Kenya Commercial Bank Limited (2005) eKLR, the Court stated as follows regarding an affidavit sworn in a place different from where it was commissioned:

If the affidavit was sworn at Machakos, it should have been before a Commissioner for Oaths in Machakos and the stamp should show likewise. The only conclusion one can reach on looking at this affidavit is that the place the affidavit was sworn and where it was commissioned are two different places. That is irregular and unacceptable and that affidavit is, therefore, fatally defective as it was not sworn in the presence of a Commissioner for Oaths. It is likely that the stamp was just affixed. This court should have no alternative but strike off the replying affidavit as it is not properly commissioned and that the application would stand unopposed.
8. I agree with the Appellant that the replying affidavit is fatally defective for want of compliance with the requirements of Section 5 of the *Oaths and Statutory Declarations Act*. The same is hereby struck out, with the result that the Application stands unopposed.
9. I now turn to the question whether the orders sought should be granted.
10. The Court appreciates that it has discretion to extend time for compliance as was aptly put by Nambuye, JA who in Ngugi v Thogo (Civil Application 372 of 2018) [2021] KECA 88 (KLR) (22 October 2021) (Ruling), stated:

The very Rules of the court that provide for timelines for the performance of an act under the said Rules are the same Rules of the court that allow the court to exercise its discretion



and extend time within which to comply in the event of any noncompliance with any of those Rules.

11. The record shows that the Appeal was filed on 22.11.22. Directions to file submissions thereon were first given on 8.2.23. On 17.5.23, the Appellant's counsel informed the Court she had been unable to comply on account of illness. The Court in the exercise of its discretion indulged the Appellant by extending the period for compliance and the matter was to be mentioned on 18.10.23. On the said date however, the Appellant had still not complied and did not attend Court and has to date not complied. The Court found the Appellant to be disinterested in prosecuting the Appeal and dismissed the same.
12. Court orders and directions are not given in vain. Parties are required to comply with whatever orders and directions are given. In the case of *Tana Teachers' Cooperative and Credit Society Limited v Andriano Muchiri* [2018] eKLR, the Court of Appeal considered an appeal from an order dismissing an appeal for non-compliance with directions of the court and had this to say:
 13. On the whole therefore, the first appellate court was right in finding that the appellant had been indolent and this court has been given no reason to interfere with that finding. We are mindful of the fact that the original suit giving rise to these proceedings was filed in 1994. The respondent has yet to enjoy the fruits of her judgment 24 years down the line. Although parties are always in haste to invoke the "overriding principle" when seeking favourable exercise of discretion by the courts or covering up for some infractions they may have committed, they tend to forget that Section 1A (3) *Civil Procedure Act* as well as section 3A *Appellate Jurisdiction Act* enjoins them to assist the court in ensuring that court directions are complied with and that justice is dispensed expeditiously. A party cannot egregiously fail or refuse to comply with directions of the court claiming that the said directions were salutary and not accompanied by any sanctions and hope to seek refuge in the overriding principle. That in our view amounts to gross abuse of court process. There must be an end to litigation and it behoves this Court to tell the appellant that its journey ends at this point.
13. Flowing from the cited decision, it can be seen that the law enjoins parties to assist the court in ensuring that court directions are complied with and that justice is dispensed expeditiously. To date, over 2 years and 2 months after directions were first given to file submissions on the Appeal, the Appellant is yet to comply.
14. The conduct of a party is key in any matter where the jurisdiction of the Court to exercise its discretionary powers is invoked. In *Moses Mwangi Kimari v Shammi Kanjirapparambil Thomas & 2 others* [2014] eKLR, Gikonyo, J. stated and I concur:

We should not only look at the delay of six months since the direction of 8th November, 2012, we should look also at the entire conduct of the Plaintiff; it is negligent and tintured a don't-care attitude towards court orders. This is not unfair indictment of the Plaintiff; it is simply an atonement of serious disobedience of court orders which no serious court of law should countenance.
15. The Appellant's conduct of disobeying the Court's directions should not be countenanced.
16. Notwithstanding the absence of a rebuttal by the Respondent, the Appellant was required to prove its case (see *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR). The material placed before the Court is not sufficient to warrant the exercise of the Court's discretion in favour of the Appellant.



17. In the end and in view of the foregoing, I do find that the Application dated 21.2.24 is for dismissal and the same is hereby dismissed with costs to the 1st Respondent.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 25TH DAY OF APRIL 2025

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M. THANDE

JUDGE

