



**Ontita v VMN (Minor suing through next friend and father JNM) (Civil Appeal 94 of 2021) [2024] KEHC 1884 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1884 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL 94 OF 2021  
PN GICHOHI, J  
FEBRUARY 29, 2024**

**BETWEEN**

**SIRIBA ONTITA ..... APPELLANT**

**AND**

**VMN (MINOR SUING THROUGH NEXT FRIEND AND FATHER JNM) ..... RESPONDENT**

**RULING**

1. The background of this matter is the trial court's judgment delivered on 06/08/2011 in Kisii CMCC No. 464 of 2019; VMN (minor suing through his next friend JNM) v Siriba Ontita. Aggrieved by the said judgment, the Appellant filed a Memorandum of Appeal on 16/08/2021 and subsequently filed his record of appeal on 22/11/2022.
2. On 22/02/2022 and in the presence of the Appellant, the court directed that parties to appear before Court on 23/03/2022 for further directions as to disposal of the appeal. When the matter was mentioned on 23/03/2022, the appeal was dismissed as at 22/02/2022 since the court was misled. It is pursuant to those orders that the Appellant filed the Notice of Motion Application dated 15/06/2022 on 30/06/2022.
3. While invoking the provisions set out in section 1A, 1B, 3A and 95 of the *Civil Procedure Act*, order 42, rule 6 & 21, order 45, rule 1, order 50, rule 6 and order 51, rule 1 of the *Civil Procedure Rules*, the Appellant/ Applicant sought orders:-
  1. Spent.
  2. Spent
  3. That this appeal being Kisii HCCA No. 94 of 2021 be and is hereby reinstated for hearing and determination on the merit.



4. That this Court does make any such further orders and issue any other relief it may deem just to grant in the interest of justice.
5. That costs of the Application be in the cause.
4. The Application is supported by the grounds on the body of the motion and by the Supporting Affidavit sworn by Lawrence Njuguna Advocate on 15/06/2022.
5. The gist of the Application is that on 25/11/2021, the Appellants were directed to file their Record of Appeal on or before 22/02/2022. The absence of the said record informed the court's decision to dismiss the appeal on 22/02/2022 but according to the Appellant, the said Record had been filed but inadvertently omitted from the court record by the registry. Further, the Appellant maintained that the error was apparent when the matter was mentioned on that 22/02/2022.
6. The Appellant deponed that it was only in the interest of justice that the appeal be reinstated and be heard on its merits. He stated that he stood to suffer irreparable loss and damage as his appeal will be rendered nugatory. Lastly, he deponed that the grant of the orders sought would not occasion any prejudice on the part of the Respondent.
7. In his submissions dated 13/04/2023 and filed on 19/04/2023, the Appellant urged the Court to reinstate the appeal as he had complied with the directions of the court. Further, he submitted that the error was on the part of the court registry and therefore, the Appellant should not be condemned unheard. In support of that line of submissions, the Appellant cited article 50 (1) of the Constitution and the case of Grace Njeri Theuri v John Mburu Wainaina [2022] eKLR and urged that the appeal be reinstated for hearing on its merits.
8. The Respondent filed on 17/02/2023 his submissions dated 14/02/2023 . He submitted that the orders sought were discretionary as set out in order 50, rule 6 of the Civil Procedure Rules and section 95 of the Civil Procedure Act.
9. He submitted that the Appellant sought extension of time to file its appeal on 25/11/2021 and still failed to do so. Further, he submitted, the Memorandum of Appeal was filed on 16/08/2021 while the record of appeal was filed on 22/11/2021 which was over and above the sixty (60) day period as stipulated in rule 82 (1) in regard to institution of appeals. While citing the case of Mae Properties Limited v Joseph Kibe & another [2017] eKLR, he urged this court to dismiss the Application with costs.

### **Determination**

10. This Court has considered the circumstances leading to the filing of the Application herein and the submissions by both parties in . The issue leading to the dismissal was not that the Appeal was filed out time. The issue in the matter before this Court is whether the Court should reinstate an appeal that was dismissed for failure to file the Record of Appeal pursuant to leave granted by the Court. Those circumstances are completely different from those surrounding Mae Properties Limited (*supra*).
11. From the record herein, it is apparent that the Record of Appeal dated 02/11/2021 was actually filed in Court on 22/11/2021 as shown by the Court stamp. The Respondent did not file any Replying Affidavit and his submissions cannot substitute such an Affidavit on oath. Further, there is nothing on record to explain why the High Court Registry staff did not place the Record of Appeal in the Court file by Registry staff.
12. It is possible that the registry may have inadvertently omitted to have the Record of Appeal placed in the Court file when it was mentioned on 22/02/2022 as stated by the Appellant. However, lack of



due diligence by the Court staff cannot be used against the Appellant who had no control of timely placement of records in the Court file once filed and received from them. The failure by the Registry stood against the Appellant's right to a fair hearing under article 50 of the *Constitution of Kenya* 2010.

13. This Court is called upon to do substantive justice in this case in such instances as stated herein by sustaining the appeal so that it can be determined on its merits as long as no prejudice will be occasioned on the Respondent.
14. In this case, this Court is satisfied that the substantive justice will be done by reinstating this appeal where both parties will be heard on merit. Consequently, the Application dated 15/06/2022 is allowed in the following terms:-
  1. The appeal being Kisii HCCA No. 94 of 2021 be and is hereby reinstated for hearing and determination on the merit.
  2. The costs of this Application shall abide by the outcome of the appeal.
  3. The appellant shall fix the appeal for hearing within the next forty-five (45) days from the date of this Ruling.
  4. In default of order 3 above, the appeal will stand dismissed with costs for want of prosecution.

**DATED, SIGNED AND DELIVERED (VIRTUALLY) AT KISII THIS 29<sup>TH</sup> FEBRUARY, 2024.**

**PATRICIA GICHOHI**

**JUDGE**

**In the presence of:**

N/A for Applicants

Mr. Migiro for Respondent

Saewa/ Aphline, Court Assistant

