



**Kurao & another v Naaman & another (Suing as the legal representatives
of the Estate of the Late Robert Pondi Odeko) (Civil Appeal
166 of 2019) [2024] KEHC 3686 (KLR) (26 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3686 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 166 OF 2019
SM MOHOCHI, J
MARCH 26, 2024**

BETWEEN

DAVID EBOO KURAO 1ST APPELLANT

AMBROSE MOSIGISI 2ND APPELLANT

AND

**BERNETTA AYIEKA NAAMAN & EVERLYNE OKWEYA OMINDO (SUING AS
THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE ROBERT
PONDI ODEKO) RESPONDENT**

RULING

1. Before this Court is Notice of Motion dated 20th March 2023, filed Pursuant to Sections 1A, 1B, 3A and 95 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya and Order 45 Rule 1, Order 42 Rule 6, Order 42 Rule 21, Order 50 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules*, 2010 and all other enabling provisions of the Law, an application for Orders: -
 - i. Spent.
 - ii. Spent.
 - iii. Spent.
 - iv. That this Appeal being Nakuru HCCA NO. 166 OF 2019 be and is hereby reinstated for hearing and determination in the normal way.
 - v. That this Court do make any such further Order(s) and issue any other relief it may deem just to grant in the interest of justice.
 - vi. That the costs of the application be in the cause.



2. The Application is based on the following nineteen (19) grounds: -

- i. That, the Appellants instituted this Appeal vide a Memorandum of Appeal dated 3rd October 2019 against the Judgment of the Honorable Nderitu, delivered on 03/09/2019 in Molo CMCC 247 of 2018.
- ii. That, despite relentless efforts, the Appellants have not been able to obtain the relevant documents from the lower Court to enable them file their Record of Appeal.
- iii. That, as a result, the Appeal was dismissed on 26/01/2023 for want of prosecution and specifically failure to file the Record of Appeal.
- iv. That, the Appeal herein stands dismissed, and this thereby exposes the Appellants to imminent execution hence the urgency of this Application.
- v. That, the delay in filing the Record of Appeal was inadvertent and beyond the Appellants control.
- vi. That, the Appellants are greatly apprehensive that the Respondent may at any time Commence execution against them as the Appeal stands dismissed.
- vii. That, the Appellants have complied with stay conditions by paying kshs. 990,000 to the Respondent's Advocates and depositing Kshs. 1,500,000 in Court.
- viii. That, the Appellants contend that the delay occasioned so far in prosecuting the Appeal, in so far as it cannot be attributed to the Appellants, is not so unreasonable and/or inordinate as to prejudice the Respondent and such delay can always be compensated by an award of damages and/or costs.
- ix. That, unless this Application is certified urgent and heard immediately and the orders sought herein granted, the Appellants stand to suffer irreparable loss, prejudice and harm.
- x. That, under Article 48 of *the Constitution* of Kenya, 2010, access to justice for all is guaranteed and unlimited.
- xi. That, under Article 159 (2) (d) of *the Constitution* of Kenya, 2010, this Court is enjoined to administer justice without undue regard to procedural technicalities.
- xii. That, the Appellants are keen on prosecuting their Appeal and seek the indulgence of this Court not to be ousted from the seat of justice.
- xiii. That, the Appellants are desirous and fully committed to ensuring the just and timely disposal of the Appeal herein and as such pray that the Appeal herein be reinstated and set down for Hearing in the normal manner.
- xiv. That, the Appellants humbly believe that they have an arguable Appeal and should be given an opportunity to have the same prosecuted and determined on its merits.
- xv. That, accordingly it is only just, fair and in the interests of justice that the Appeal be reinstated/ re-admitted and the same be heard to a logical conclusion.
- xvi. That, unless the Appeal is re-instated the Appellants stand to suffer irreparable loss, prejudice and damage and their Appeal will be rendered nugatory despite it being meritorious.
- xvii. That, this Application has been made without undue delay.



- xviii. That, this Application ought to be granted in the interests of equity and justice.
- xix. That, what is deponed to hereinabove is true to the best of the Appellants knowledge information and belief save as to matters deponed to on information sources whereof have been disclosed, and matters deponed to on belief, whereupon the grounds thereof have been given.
3. The Court had issued directions on the 28th of March 2023. Mention for compliance and fixing of ruling date was scheduled for the 6th of June 2023, by the 28th of November 2023, the Applicants had complied and filed their written submissions filed on 5th June 2023, the Respondent's written submissions were filed on the 6th April 2023 subsequently there was conflict of legal representation with the firm of Kimani & Muchiri Advocates having filed a Notice of Change of advocates dated 29th August 2023 that was opposed by the firm of Gekonga & Co Advocates on record, the Court urged the two to urgently sort out their conflicting instructions and to file written submissions on that issue. Ruling was reserved for the 26th of March 2024.

Applicant's Case

4. The Appellants filed a Notice of Motion Application dated 20th March, 2023 seeking orders of Court that the Appeal herein be reinstated for hearing in the normal way and for its logical determination on merit.
5. That, there is no likelihood that the Respondent will suffer prejudice if any, in the event that the Appellants are given time to prosecute their appeal to finalization. Indeed, there is no prejudice at all to be suffered by the Respondents as the conditions for stay of execution pending hearing of the appeal were fully complied with. The sum of kshs. 990,000/- was paid to the Respondent's Advocates and Kshs. 1,500,000/- deposited in Court in fulfillment. The Respondent's interests are thus secured.
6. That, the Appellants have not obtained the requisite documents in order to file their Record of Appeal and have attached evidence of follow-up. On the other hand, the gist of the matter is that the Appellants stand to suffer prejudice in the event that the appeal is not heard on merit since the Appellants would have lost their right to Appeal.
7. That, the Appellant's appeal has merits as demonstrated in the Memorandum of Appeal, and in the event that the Appeal is not heard to completion, the Appellants stand to lose their Constitutional Right to Appeal and the right to have their case heard and determined on its merits.
8. Indeed, this Honorable Court has on diverse occasions pronounced itself on striking a balance between the competing rights of the rival parties as the scenario herein.
9. In the case of *Njai Stephen v Christine Khatiala Andika* [2019] eKLR the Court opined that every person is entitled as envisaged under Article 50 of *the Constitution* of Kenya to have a fair trial and held:
- “It therefore follows that every person ought not to be shut out from accessing Court or having his day in Court.”
10. Indeed, the right of a party to enjoy the fruits of his judgment must be weighed against the right of a party to access Court to have his dispute heard and determined by a Court or tribunal of competent jurisdiction.
11. In view of the foregoing, it is the Appellants humble submissions that the Appeal was not yet ripe for dismissal for want of prosecution. The Appellants rely on the case of *Jurgen Paul Flach v Jans. Akoth*



- Flach*, Nakuru Civil Appeal No119of 2012, the Court rightly stated that where Directions had not been issued, dismissal of Appeal for want of prosecution cannot be granted.
12. Moreover, in *Kirinyaga General Machinery v. Hezekiel Mureithi Ileri* [2007] eKLR, Kasango J. ruled as follows:
- “It is clearly seen from that rule before the Respondent can move the Court either to set the appeal down for hearing or to apply for dismissal for want of prosecution directions ought to have been given as provided in Rule 8B. Directions have never been given in this matter. Directions having not been given the orders sought by the Respondent cannot be entertained.”
13. Further in *Allan Otieno Osula v. Gurdev Engineering & Construction Ltd* [2015] eKLR, the Court held as follows;
- “It is therefore on the above grounds that I decline to strike out the appeal as prayed. I employ the principle that the right of appeal is a constitutional right and in as much as there has been delay which has not been satisfactorily explained by the appellant, this Court has to weigh the cost and prejudice that is likely to be occasioned to the appellant as well as the respondent, if the appeal is struck out at this stage without according the appellant an opportunity to be heard on the merits of the appeal.
- In the circumstances. I shall invoke the overriding objective principle in order to obviate the hardship expense, delay and focus on substantive justice. I find albeit there was delay, that it is in the interest of justice that the Appeal should not be struck-out as the Respondent can adequately be compensated by an award of costs.”
14. In *Elem Investment Limited John Mokora Otwoma* [2015] eKLR, Aburili J noted as follows;
- “..in my view, the Court will not dismiss an appeal for want of prosecution unless directions are issued....”
15. In addition, the prejudice that the Appellant is likely to suffer if this Appeal is dismissed is likely to be graver than the prejudice that the Applicant/ Respondent would suffer if the Appeal is ordered to proceed, given that the Appellant has deposited the decretal amount in Court and settled some of the undisputed costs. In arriving at that conclusion, I am enjoined by the Court of Appeal decision in *Abdurrahman Abdi v Safi Petroleum Products Ltd & 6 others* [2011] eKIR, Civil Application No Nat. 173 of 2010 where the Court stated:
- “The Court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the Court strikes out its document. The Court in that regard exercises judicial discretion”.
- I think it would be appropriate and in the wider interests of justice to allow the Appellant to take appropriate steps to ensure the Appeal is set down for directions and hearing expeditiously.”
16. That from the foregoing, it is clear that the Courts have been consistent when interpreting Order 42 Rule 35 and that the same principles enunciated in the caselaw above apply to this Appeal as directions are yet to be issued.



17. That the Appellants stands to suffer prejudice and thus pray for the reinstatement with timer being afforded to the Appellant to have the Record of Appeal filed. They thus pray that the Application dated 20th March 2023.

Respondent's Case

18. The appeal herein was listed for notice to show cause as to why the same should not be dismissed for want of prosecution when all parties were notified of the 26th January, 2023. Both counsel of the parties appeared before Hon D. K. Magare J but the Appellants failed to give a good reason as to why the appeal had not been prosecuted.
19. The Appellants also failed and/or refused to file an affidavit to show cause to the said notice to show cause.
20. The Appellants were given a chance to defend the dismissal of the appeal herein but they misused the said opportunity. They have not given any good reason as to why the appeal was not prosecuted in application herein just like they did on 26th January, 2023 when the same was dismissed.
21. The principles that should guide the Court when dealing with such an application were well laid out in the case of *Ivita v Kyumbu* [1984 KLR 441 which are; the reasons for the delay: whether the delay is prolonged and inexcusable and if justice can still be done despite the delay .
22. The Respondent submit that, the application is an abuse of the Court process since the plaintiff seeks to set aside the dismissal orders on the same grounds which were considered by the Court before it dismissed the same.
23. That, the current application is therefore *res judicata* as provided for in Section 7 of the [Civil Procedure Act](#) and the same should be dismissed with costs to the respondents. Accordingly, that Section 7 of the [Civil Procedure Act](#) applies to cases where the issue in dispute is similar to an issue that was previously in dispute between the same parties when they were litigating under the same title and which was conclusively determined on merit by a Court of competent jurisdiction. Section 7 states as

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

24. The Respondent submit that, the Applicants have brought another Application seeking to be allowed to prosecute their appeal which application was already with. Since the Applicants were aggrieved by the said decision they were supposed to appeal against it but not to bring it back to the Court that had already made its decision therefore being *functus officio*, The Court in the English case of *Henderson v Henderson* (1843-60) ALL E.R.378. observed thus:

“...where a given matter becomes the subject of litigation in, and of adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special case, not only to points upon which the Court



was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

25. The Respondent submit that, the Applicants have also brought this application under Order 42 and 45 of the *Civil Procedure Act*. They have however failed to meet the requirements thereon; which is another ground for dismissal of their application.
26. That the application herein is scandalous and an abuse of the Court process. The applicants advocate was present in Court when the matter came up for notice to show cause but failed to give a satisfactory reason that would persuade the Court not to dismiss the appeal herein.
27. The Respondent submit that, the Applicants are still giving the same reasons advanced earlier on 25th January, 2023 when the appeal was dismissed. This is surely an abuse of the Court process.
28. As to whether justice still be done despite the delay? it is trite that justice is justice for both the Applicants and the Respondents. From the conduct of the Applicants it is evident that they are out to frustrate, deny and/or prevent the Respondents from achieving the justice they so rightly deserve. The Applicants had a duty to expedite the prosecution of their appeal but failed to do so.
29. The Respondent therefore submit that, from the conduct of the Applicant justice will not be done despite the delay. Justice delayed is justice denied the Respondents have been waiting to enjoy the fruits of their judgment for close to 4 years. And thus pray for the dismissal of the Application dated 20th March 2023.

Determination.

30. The Applicants have moved this Court Appealing for the exercise of my discretion to reinstate the Appeal and I have considered the following;
31. That the Applicants Appeal was dismissed in an inter parte hearing of a notice to show cause why the Appeal should not be dismissed for want of prosecution.
32. The Applicant was afforded an opportunity to show cause and the reasons advanced herein are significantly the same reasons advanced before Hon D. K. Magare J on the 26th January 2023.
33. Nothing novel has been presented warranting the Court exercising its discretion to allow the application, set aside the orders of dismissal and reinstate the Appeal.
34. This Court finds the Application dated 20th March 2023 to be without merit and the same is accordingly dismissed

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA TEAMS PLATFORM AT NAKURU ON THIS DAY OF 26TH DAY OF MARCH, 2024.

S. MOHOCHI
JUDGE

