



**Njororo v Kinuthia & another (Commercial Appeal E092 of 2021)
[2024] KEHC 3148 (KLR) (Commercial and Tax) (22 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3148 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E092 OF 2021
MN MWANGI, J
MARCH 22, 2024**

BETWEEN

STEPHEN COLLINS NJORORO APPELLANT

AND

RACHEL KINUTHIA 1ST RESPONDENT

PYRAMID AUCTIONEERS 2ND RESPONDENT

RULING

1. Before this Court is the appellant/applicant's Notice of Motion dated 23rd March, 2023 brought under Articles 50(1), 159 and 165 of the Constitution, Sections 1A, 1B, 3A, 63 and 65 of the Civil Procedure Act and Order 51 of the Civil Procedure Rules, 2010.
2. The applicant seeks the following orders;
 - i. Spent;
 - ii. That the orders of this Court of 16th January, 2023 dismissing the appeal for want of prosecution be set aside;
 - iii. That the appeal be reinstated; and
 - iv. That costs of the application do abide by the outcome of the appeal.
3. The application is supported by an affidavit sworn by Ngunjiri Gichari in which he averred that the appeal was dismissed for want of prosecution on the basis that no evidence was furnished to demonstrate the efforts employed by the applicant in obtaining typed proceedings from the Trial Court. He stated that the applicant obtained typed proceedings on 17th March, 2023 together with a Certificate of Delay dated 14th March, 2023. He argued that the intended appeal is well founded and



has a high probability of success. He attributed the failure to file and serve the Record of Appeal in time to the Court's Registry.

4. The application was opposed by the 1st respondent's grounds of opposition dated 5th April, 2023 and a replying affidavit sworn by Ivy Mouti on 5th April, 2023. She averred that the applicant filed frivolous applications in the Trial Court which were dismissed, and in an attempt to deny the respondent justice, he filed the instant appeal which he failed to prosecute. She urged this Court to find that the applicant has slept on his rights in prosecuting the appeal.
5. She deposed that the Certificate of Delay issued was for the period between 30th June, 2022 to 10th March, 2023 which is for a period of more than one year after the time the applicant filed its Memorandum of Appeal dated 7th October, 2021. She urged this Court to uphold the decision dismissing the appeal. She contended that placing the blame on the Court's Registry lacks merit, and that the applicant's Advocates are to blame as they were accorded enough time by this Court but failed to adhere to the same.
6. The application herein was canvassed by way of written submissions. The applicant filed written submissions dated 23rd May, 2023, whereas the 1st respondent filed written submissions dated 19th June, 2023.
7. Mr. Michuki, the applicant's learned Counsel submitted that no prejudice will be suffered by the respondent if the appeal is reinstated. He relied on the case of *John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR and urged this Court to balance between the interests of the applicant in appeal and the rights of the respondent.
8. Mr. Michuki urged this Court to allow the indulgence, as the mistake made by the firm of M/S E. Kinyanjui & Co. Advocates, if any, should not be visited on the applicant. He urged this Court to find that he had since prepared the intended Record of Appeal which had been attached to the affidavit. He prayed for the Court to be guided by the spirit of the *Constitution* and reinstate the appeal.
9. Ms Munjogu, the 1st respondent's learned Counsel submitted that the only issue for determination is whether the applicant deserves the orders sought in the instant application. Counsel submitted that the applicant is not keen in prosecuting the appeal and is employing delaying tactics. She indicated that the applicant requested for typed proceedings 9 months after the filing of the Memorandum of Appeal, but no sufficient cause had been advanced for the delay in obtaining typed proceedings. She cited the case of *Wachira Karani v Bildad Wachira* [2016] eKLR, in which the Court stated that sufficient cause is a question of fact and the Court has to exercise its discretion in the varied and special circumstances in the case at hand, and there cannot be a straight-jacket formula of universal application, thus the defendant must demonstrate that he was prevented from attending Court by a sufficient cause.
10. The respondent's Counsel also relied on the case of *Joswa Kenyatta v Civicon Limited* [2020] eKLR. She submitted that the applicant had failed to meet the threshold of setting aside proceedings and reinstatement of the appeal. She contended that the respondent stands to suffer great prejudice due to the conscious delay of the proceedings by the applicant. She urged this Court to find that the application is frivolous, bad in law and lacks merit. She prayed for the application to be dismissed.

Analysis And Determination.

11. I have considered the instant application together with the affidavit in support thereof, as against the replying affidavit and grounds of opposition filed by the 1st respondent. I have also considered the submissions in support of the various arguments by the parties. The issues for determination are:



- i. Whether this Court should set aside the orders of 16th January, 2023 and reinstate the appeal for hearing on merit; and
 - ii. Who is to bear the costs of the application?
12. A Memorandum of Appeal dated 7th October, 2021 was duly filed in Court. The applicant subsequently sought copies of the typed proceedings on 30th June, 2022 from the Trial Court, as evidenced by a copy of the Certificate of Delay. The appeal came up for mention severally but Counsel for the applicant attributed the delay in filing the Record of Appeal to the delay in obtaining typed proceedings. According to the applicant, the Registry was solely to blame for the delay in prosecuting the appeal due to delay in supplying the applicant with typed copies of the proceedings. The Court called for evidence from the applicant to demonstrate the efforts employed in the obtaining the typed proceedings and by failing to submit the same. The Court then proceeded to dismiss the appeal on 16th January, 2023
13. The applicant has now moved this Court to have it exercise its discretion and set aside the dismissal orders and reinstate the appeal. This Court is vested with the discretionary remedy to set aside orders the orders issued in dismissing the appeal, but that discretion must to be exercised judiciously on a case to case basis.
14. The principles governing reinstatement of suits was stated in the case of *John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR as follows-

“The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of the *Constitution* of Kenya Article 50, coupled with Article 159 of the *Constitution* on the right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles that should guide the court in deciding on such matter of reinstatement of a suit which the court has dismissed. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such acts are comparable only to the proverbial “Sword of the Damocles” which should only draw blood where necessary. The same test will apply in an application to reinstate a suit, and a court of law should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the defendant would suffer if the suit were reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated.”
15. From the above decision, Courts are urged to exercise caution when dismissing suits, as dismissal is a draconian act that drives litigants from the seat of justice.
16. The application for reinstatement is strongly opposed as the 1st respondent averred that the applicant is employing delaying tactics and is not keen in prosecuting the appeal. She argued that no sufficient reasons have been advanced for the delay in prosecuting the appeal and she is entitled to the fruits of the judgment. She urged this Court to dismiss the appeal.
17. In applying the legal requirements of fair trial under Article 50 of the *Constitution* and dispensation of substantive justice under Article 159(2)(b) of the *Constitution* and the overriding objectives under the *Civil Procedure Act*, it is imperative for the appeal to be heard on merits.



18. It is the finding of this Court that the inconvenience caused to the 1st respondent by the inordinate delay of the applicant may be compensated by way of costs which may be assessed by this Court.
19. In the case of *Josphat Oginda Sasia v Wycliffe Wabwile Kiiya* [2022] eKLR, the Court held as follows-
- “But as has been held time and again before, all the court needs to do when a party does not take steps to prosecute his matter is for it to “give notice” of the intent to dismiss the matter. Such notice can be by way of publishing the intent through the Cause Lists, Websites or even court notice boards. (see the cases of *Fran Investments Limited v G4S Security Services Limited* [2015] eKLR and *Jim Rodgers Gitonga Njeru v Al-Husnain Motors Limited & 2 others* [2018] eKLR).”
20. The record is clear that the applicant was accorded sufficient time by the Court to prosecute the appeal, but he failed to do so, and the Court proceeded to find that the applicant had failed to aid the Court in the dispensation of justice. The Court then proceeded to dismiss the appeal.
21. In an application such as the one before me that calls for the exercise of my discretion either to grant or decline to grant the orders sought, I pay due regard of the fact that the right to hearing is protected by the *Constitution* of Kenya, 2010, and every litigant is entitled to a fair hearing. The applicant being aggrieved with the decision of the Trial Magistrate’s Court filed a Memorandum of Appeal, but did not move with speed to secure copies of typed proceedings.
22. This Court notes that the delay in obtaining the said proceedings was not entirely of the Registry’s making but the applicant contributed to the same as well by failing to apply for typed proceedings in a timely manner. The Certificate of Delay speaks for itself. Typed proceedings were applied for on 30th June, 2022, yet the Memorandum of Appeal was filed on 7th October, 2021. This Court is cognizant of the doctrine that delay defeats equity, but at the same time appreciates the overriding objectives in the dispensation of justice and the right to accord all parties a fair hearing.
23. In the spirit of Articles 50 and 159(2)(b) of the *Constitution* of Kenya, I will allow the application in order to accord the applicant an opportunity to be heard.
24. The upshot is that I make the following orders-
- i. The application dated 23rd March, 2023 is allowed and the dismissal order of 16th January, 2023 is hereby set aside. Consequently, the appeal is reinstated for hearing on merits;
 - ii. The applicant will file and serve his Record of Appeal within 45 days from today; and
 - iii. The applicant shall bear the costs of this application by paying throw away costs in the sum of Kshs 20,000/= within fourteen (14) days from today.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF MARCH, 2024.

RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Ngunjiri h/b for Mr. Michuki for the applicant



Ms Munjogu for the 1st respondent

No appearance for the 2nd respondent

Ms B. Wokabi – Court Assistant.

