



**Muthemba & another v Muthemba & 4 others (Civil Case 300 of 2006)
[2024] KEHC 3515 (KLR) (Commercial and Tax) (21 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3515 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 300 OF 2006
PM MULWA, J
MARCH 21, 2024**

BETWEEN

ROSE WARUINU MUTHEMBA PLAINTIFF

AND

DESMOND PATRCICK MUTHEMBA APPLICANT

AND

JANE NJERI MUTHEMBA 1ST DEFENDANT

DAVID MUNGAI MUTHEMBA 2ND DEFENDANT

JOHN MUTHEMBA MUNGAI 3RD DEFENDANT

LIMITED 4TH DEFENDANT

MUNGAI MUTHEMBA 5TH DEFENDANT

RULING

1. For determination is the applicant's Notice of Motion application dated 27th July 2023 brought under Order 43 Rules 9,10 and 14, Order 8 Rules 3(1), 3(3), 3(4), 3(5) and Order 8 Rule 5(1) of the Civil Procedure Rules 2012.
2. The applicant prayed for the following orders:
 - “ 1. That the Plaintiff's oral application for leave to appeal made to this honourable Court on 30th June 2023 be allowed and the Plaintiff be granted leave to appeal against the ruling delivered by Justice Chacha Mwita on 30th June 2023 dismissing the suit for want of prosecution.



2. That the Court grant such further or other orders as this honourable Court may deem fit and just to grant.
3. That there be no orders as to costs.”
3. The application is supported by the affidavit of Andrew Mmbogori and is based on the grounds that on 30th June 2023 the court gave an order dismissing the plaintiff’s suit for want of prosecution and that immediately the said ruling was delivered, counsel for the plaintiff made an oral application for leave to appeal in accordance with Order 43 Rule 1(3) of the Civil Procedure Rules.
4. The applicant averred that no orders were given on the said oral application and instead the plaintiff’s advocates were directed to verify whether leave was required and if so to return to court on the issue of leave.
5. According to the applicant dismissal of suits for want of prosecution is regulated by the provisions of Order 17 Rule (2) of the Civil Procedure Rules, which is not among the orders whereby leave to appeal is as of right and in the circumstances, the plaintiff prayed that her oral application for leave to appeal as made on 30th June 2023 be allowed as prayed.
6. The applicant prayed that it would be in the interest of justice that leave to appeal be determined expeditiously so that the plaintiff can have her appeal determined on merit without procedural issues fettering her constitutional right to an appeal.
7. The application is unopposed despite the fact that the defendants were duly served as evidenced by the affidavit of service dated 16th August 2023.
8. Order 43, Rule 1 of the *Civil Procedure Rules* provides the instances when an appeal shall lie as of right. An order for the dismissal of a suit for want of prosecution is not among the listed instances.
9. Rule 2 thereto states:

“An appeal shall lie with the leave of the court from any other order made under these Rules.”
10. In the Court of Appeal case of *Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another* [2014] eKLR it was held:

“Leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration.”
11. In this case, the plaintiff submitted that his appeal is not frivolous and challenged the dismissal of the suit for want of prosecution for failure to set it down for hearing while there was a pending application for substitution of a plaintiff who is suffering from dementia. That the said application remained undetermined through no fault of the plaintiff. Further that the intended appeal will raise the issue of whether a party can justly be faulted for failing to set the same down for hearing when the court expressly directed the Deputy Registrar not to give dates on the matter.
12. This court may grant leave to a party to file an appeal against the order striking out the suit for want of prosecution where there are grounds that merit serious judicial consideration.
13. In this case, the court issued an order dated 30th June 2023 dismissing the plaintiff’s suit for want of prosecution. On the same date the plaintiffs promptly filed a notice of appeal dated and requested for typed proceedings in order to file the appeal.



14. Having considered the grounds that the plaintiffs intend to anchor their appeal on and the fact that the plaintiffs filed their notice of appeal in good time, I find that it will be in the interest of justice to grant leave to the plaintiffs to appeal against the order of the court dated 30th June 2023.
15. Consequently, the application dated July 27, 2023 is merited and the same is allowed in terms of prayer No. 1. Costs shall abide the appeal.

RULING DELIVERED, DATED AND SIGNED AT NAIROBI THIS 21ST DAY OF MARCH 2024.

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P. MULWA

JUDGE

In the presence of:

N/A for plaintiff/applicant

Mr. Aloo h/b for Mr. Maruti for 1st respondent

Mr. Njuguna for 3rd and 4th Respondents

Court Assistant: Carlos

