



REPUBLIC OF KENYA



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**Omote v Soi (Suing as the administrator of the Estate of Nicholas Kipyegon Kikwai)  
(Civil Appeal E023 of 2021) [2024] KEHC 3121 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3121 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CIVIL APPEAL E023 OF 2021**

**RL KORIR, J**

**MARCH 20, 2024**

**BETWEEN**

**EVANS ONGERA OMOTE ..... APPLICANT**

**AND**

**RICHARD KIKWAI SOI (SUING AS THE ADMINISTRATOR OF THE ESTATE  
OF NICHOLAS KIPYEGON KIKWAI) ..... RESPONDENT**

**RULING**

1. The Applicant filed his Notice of Motion Application dated 23rd January 2023 which sought the following Orders:
  - i. Spent.
  - ii. Spent.
  - iii. That the court grants stay of execution of the Judgment of the Honourable Judge delivered on 23/01/2023 essentially dismissing the Appeal pending the hearing and determination of this Application.
  - iv. That this Honourable Court does deem the Replying Affidavit dated 21/12/2022 as duly filed and thereafter reinstate the Appeal for continuation of its hearing in the normal way.
  - v. That this Honourable Court be pleased to give any other and or further orders that it may deem fit, just and expedient in the circumstances and in the interest of justice.
  - vi. That the costs of this Application be in the cause.
2. The Application was brought under Sections 1, 1A, 3A and 63 of the *Civil Procedure Act*, Order 22 Rule 22. Order 50 Rule 5, Order 51 Rule 1 of the *Civil Procedure Rules*, 2010 and Rules 55(4)



and 55(5) of the [Auctioneers Rules](#). The Application was premised on the grounds on the face of the Application and further by the Supporting Affidavit sworn by Victor Nganga on 23rd January 2023.

### **The Applicant's Case.**

3. The Applicant stated that he instituted an Appeal against the Judgment in Sotik PMCC No. 34 of 2019 through a Memorandum of Appeal dated 8th September 2021.
4. It was the Applicant's case that the Respondent filed an Application dated 4th October 2022 where they sought dismissal of the Appeal. That he filed his Replying Affidavit dated 21st December 2021 stating that his advocates did not prosecute the Appeal because they were short staffed with clerks and that the advocate who handled the case left their firm without a proper handover.
5. The Applicant stated that this court dismissed his Appeal on 23rd January 2023 for want of prosecution. He further stated that there was no stay of execution and that he was currently exposed to execution by the Respondent.
6. It was the Applicant's case that unless the orders he sought were granted, the Respondent would proceed for execution thereby rendering this Application nugatory and that he would have been condemned unheard.
7. The Applicant stated that he had made the Application with good faith, without unreasonable delay and that the mistakes of an advocate should not be visited upon an innocent litigant.

### **The Response**

8. The Respondent filed his Replying Affidavit dated 23rd February 2023. He stated that the Applicant was engaged in frivolous and vexatious litigation. That he lost his son in a road traffic accident and that the Applicant was hindering his efforts to be compensated and get closure.
9. It was the Respondent's case that the Applicant filed his Appeal on 8th September 2021 and failed to prosecute it for over one and a half years. That he filed his Application dated 4th October 2022 seeking dismissal of the Appeal. It was his further case that the Applicant's failure to prosecute the appeal or oppose his Application meant that the Applicant had lost interest in the Appeal.
10. The Respondent stated that the Applicant filed his Replying Affidavit three days after the Appeal had been dismissed by this court and that the assertion by the Applicant that they had filed their Replying Affidavit was untrue. The Respondent further stated that the prayer to have the annexed Replying Affidavit could not be granted as it was filed against a non-existing Appeal.
11. It was the Respondent's case that that the Applicant had failed to give an explanation for his failure to prosecute the Appeal. That the prayers sought are not capable of being granted as they are not supported by any tangible facts or any law. It was the Respondent's further case that the Applicant had failed to show any proper cause as to why the Application should be granted and that the same should be dismissed.
12. The Respondent stated that the Applicant had already been granted stay of execution pending Appeal but had slept on his laurels. He prayed that the Application be dismissed.
13. I have gone through and considered the Notice of Motion dated 23rd January 2023, the Replying Affidavit dated 23rd February 2023 and the sole issue for determination was whether the Appeal dated 8th September 2021 should be reinstated.



14. The law on reinstatement of dismissed suits of Appeals is found in Order 12 Rule 7 of the [Civil Procedure Rules](#) which states:-

Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.

15. Reinstatement of a suit is at the discretion of the court. Such discretion ought to be exercised in a just manner, as was held in [Bilba Ngonyo Isaac v. Kembu Farm Ltd & another & another](#) (2018) eKLR which referred to the decision of the court in [Shah v. Mbogo & Another](#) (1967) EA 116, where the court stated:-

“The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”

16. Similarly in [Alex Wainana t/a John Commercial Agencies v Janson Mwangi Wanjibia](#) (2015) eKLR, the Court of Appeal stated:-

“The principles governing the exercise of judicial discretion were set out by Ringera JA (as he then was) in the case of [Gathiaka v Nduriri](#) (2004) 2KLR 67. These are that such discretion should be exercised on sound reason rather than whim, caprice or sympathy and with the sole aim of fulfilling the primary concern of the court that is to do justice to the parties before it.”

17. The principles for reinstatement of a suit or Appeal were elucidated by Njunguna J. in [Ronald Mackenzie v Damaris Kiarie](#) (2021) eKLR where she held:-

“The application herein seeks to reinstate the suit. It is trite that the decision on whether the suit should be reinstated for trial is a matter of judicial discretion and it depends on the facts of each case. 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.”

18. Similarly in [Vintage Investments Limited v Amcon Builders Limited & another](#) (Civil Appeal 45 of 2019) [2021] KECA 259 (KLR) (3 December 2021) (Judgment), the Court of Appeal held that:-

“In considering an application for dismissal of a suit for want of prosecution, a defendant (like the appellant herein) must show:

- i That there had been inordinate delay. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case but should not be too difficult to recognise inordinate delay when it occurs.
- ii. That this delay is inexcusable. As a rule until a credible excuse is made out the natural inference would be that it is inexcusable.
- iii. That the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff or between each of other or between themselves and third parties. In addition to



any interference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay the greater the likelihood of prejudice at trial.” See *Allan v Sir Alfred Mc Alphine and Sons Ltd* [1968] 1 ALL ER 543.”

### **Analysis and determination**

19. The trial court in Sotik Civil Case number 34 of 2019 delivered a Judgment on 17th August 2021 where it awarded the Respondent Kshs 802,000/= plus costs and interest of the suit. Being aggrieved with the Judgment, the Applicant filed his Memorandum of Appeal to this court on 9th September 2021.
20. The Applicant filed a Notice of Motion Application dated 22nd September 2021 seeking stay of execution of the Judgment in Sotik Civil Suit Number 34 of 2019. By Consent, on 29th September 2021, stay was granted on condition that the Applicant provided a Bank Guarantee within 30 days.
21. The Respondent filed a Notice of Motion Application dated 4th October 2022 where he sought to have the Appeal dismissed for want of prosecution. This court, on 23rd January 2023 dismissed the Appeal for want of prosecution. It is this Ruling that gave rise to the present Application.
22. The Respondent stated that the present Application should be dismissed because his Application for dismissal for want of prosecution was unopposed. That the Applicant filed his Replying Affidavit on a non-existent Appeal.
23. The Applicant on the other hand stated that he did not file his Replying Affidavit on time as the advocate who had been handling the matter had left the law firm without a proper handover. That the law firm was also short staffed with clerks and as such, the Replying Affidavit could not be processed in time. The Applicant further stated that a mistake of an advocate should not be visited upon a client.
24. It is trite that an Applicant should not suffer due to a mistake of its Counsel. In *Philip Chemowolo & Another v Augustine Kubede* (1982-88) KAR 103, the Court of Appeal held that:-

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.”
25. Similarly, the Court of Appeal in *Habo Agencies Limited v Wilfred Odhiambo Musingo* (2020) eKLR held that:-

“.....We readily grant that the Court may excuse a genuine mistake on the part of counsel where it is satisfied that such mistake existed.....”
26. I have noted that the Applicant failed to file his Replying Affidavit and that he attached the said Replying Affidavit dated 21st December 2021 in the current Application. I have gone through the Replying Affidavit and it gives reasons why the Applicant was unable to prosecute his Appeal within the required time. In my view, this court should have had the chance to determine the Application on merit after both sides have presented their cases.
27. Having considered both positions, I find that the delay in filing the Replying Affidavit was excusable. It is also my finding that it would be prudent to allow the Applicant to have his day in court and have



his Appeal heard and determined on merit. The door of justice should not be closed to him on account of his counsel's mistake. I find guidance in *Belinda Murai & Others v Amos Wainaina* (1978) LLR 2782 (CALL) where Madan, JA (as he then was) stated:-

“A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of Junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.”

28. On whether the Application was brought timeously, it is my finding that there was no delay in filing the present Application. It was filed on 25th January 2023 which was two days after this court had dismissed the Appeal.
29. In determining this Application, I must ensure that the interests of both parties are catered for. On one hand, the Respondent is the Judgment holder and ought to enjoy the fruits of his Judgment and on the other hand, it would be unjust to lock out or deny the Applicant his chance to have his Appeal heard and determined on merit.
30. As a condition for the grant of the stay order, the Applicant was to provide a Bank Guarantee. The Applicant attached a Bank Guarantee dated 25th October 2021 Reference Number 003GUCSXXXXXXXXX1 from Family Bank to the tune of Kshs 970,160/= which means that he satisfied the condition precedent.
31. In my view, the Applicant went to sleep as soon as he had provided the Bank Guarantee. He was only sprung to action by this court's Ruling of dismissing his Appeal. The Applicant seemed to take advantage of the stay order to prolong or frustrate the hearing and determination of the Appeal, a conduct that this court abhors. He has not done enough to prosecute his Appeal.
32. However, in the interests of justice and bearing in mind the interest of both parties, it is my finding that the Appeal be reinstated for expeditious hearing and determination. The same would be predicated upon by stringent conditions that this court shall impose at the end of this Ruling.
33. Before this Application was determined, the Respondent filed a Notice of Motion Application dated 26th May 2023.

#### **Notice of Motion Application dated 26th May 2023**

34. The Respondent sought for an order for the release of Kshs 970,160/= plus all accrued interest held in Family Bank vide the Bank Guarantee Reference Number 003GUCSXXXXXXXXX1 be released to the firm of Keter Nyolei & Company Advocates.
35. It was the Respondent's case that the Applicant had been granted stay of execution and that he provided a Bank Guarantee for the decretal sum. That the stay was to be valid until the Appeal was heard and determined. It was the Respondent's further case that the Appeal was dismissed on 23rd January 2023.
36. The Respondent stated that the Applicant's advocates had declined to execute the necessary forms for the release of the funds. That the continued delay in releasing the funds was now causing injustice to the Respondent.



37. This Application was unopposed. This however does not mean the court will simply allow the Application without considering its merits or demerits.
38. This Application cannot be considered on its own. It has to be considered in light of the Applicant's Notice of Motion dated 23rd January 2023 as the Respondent's Application dated 26th May 2023 was dependent on the Appeal staying dismissed.
39. In the final analysis and in light of this court's decision to reinstate the Appeal, the Respondent's Application dated 26th May 2023 is pre mature.
40. In the end, having considered the Applicant's Notice of Motion dated 23rd January 2023, the Respondent's Notice of Motion dated 26th May 2023 and in balancing the interests of both parties, I make the following Orders:-
  - i. The Appeal dated 8th September 2021 is reinstated for hearing and determination.
  - ii. The Applicant, Evans Ongera Omote shall file his Record of Appeal and set it down for Directions within the next thirty (30) days.
  - iii. The Applicant shall pay the Respondent, Richard Kikwai Soi Kshs 485,080/= within 30 days of this Ruling.
  - iv. In default of the Applicant paying the Respondent Kshs 485,080/= being half the decretal sum within the stated 30 days, the Appeal shall stand dismissed and the Respondent shall be free to execute.
  - v. The Notice of Motion Application dated 26th May 2023 is struck out with no orders as to costs.

**RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 20TH DAY OF MARCH, 2024**

.....

**R. LAGAT-KORIR**

**JUDGE**

Ruling delivered in the presence of Mr.Nyolei for the Applicant,N/A for the Respondent and Siele (Court Assistant)

