



**Daima Connections Co. Ltd & another v Ombui (Suing as the Administrator of the Estate of the Late David Ogega Okioga) (Civil Appeal 100 of 2021) [2024] KEHC 3379 (KLR) (19 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3379 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL 100 OF 2021  
JM CHIGITI, J  
MARCH 19, 2024**

**BETWEEN**

**DAIMA CONNECTIONS CO. LTD ..... 1<sup>ST</sup> APPELLANT**

**JAMES KINARA ISOE ..... 2<sup>ND</sup> APPELLANT**

**AND**

**THOMAS OKIOGA OMBUI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE DAVID OGEGA OKIOGA) ..... RESPONDENT**

**RULING**

1. The application before this court is the Notice of Motion dated 4<sup>th</sup> June, 2021. The applicant seeks orders that;
  1. Spent
  2. Spent
  3. That this appeal being HCCA 100 of 2021 be and is hereby reinstated for hearing and determination on merit.
  4. That this Honourable Court do make any such further Order (s) and issue any other relief it may deem just to grant in the interest of justice.
  5. That the costs of the application be in the cause.

**The applicants case:**

2. On 25<sup>th</sup> November 2021 the Appellant's were directed to file a Supplementary Record of Appeal containing a signed copy of the decree from the lower court file Kisii CMCC 622 of 2019.



3. When the matter came up for mention to confirm the filing of a supplementary Record of Appeal on 17<sup>th</sup> February 2022, it was dismissed as they had not obtained the copy of the signed decree and therefore had not filed their Supplementary Record of Appeal.
4. Reliance is placed on the case of *Grace Njeri Theuri v John Mburu Wainaina* [2022] eKLR where the court held as follows:

“Notably, the procedure for rejection and/or admission of appeal and giving of directions is very well set out in the Civil Procedure Rules. However, this procedure does not seem to be strictly followed and differs from one court to another. In the Civil Division Milimani Law Courts, the Registrar issues the notice for admission and directions of appeal after the High Court receives the file and lower court proceedings. The appellant does not seem to have any role in fixing the appeal for directions as contemplated under Order 42 Rule 11 of Civil Procedure Rules and Order 42 Rule 13 (1) of the Civil Procedure Rules. It is important to point out that under Order 42 Rule 13 (4) of the Civil Procedure Rules, the judge shall not allow a matter to proceed for hearing unless the record of Appeal is duly filed. Once directions are given under Order 42 Rule 13 of Civil Procedure Rules and the appellant fails to fix the appeal for hearing, the respondent may fix the same for hearing and/or seek dismissal of the same for want of prosecution under Order 42 Rule 35 (1) of the Civil Procedure Rules or the registrar lists the appeal before a judge for dismissal under Order 42 Rule 35 (2) of Civil Procedure Rules. Order 42 Rule 35 (1) of the Civil Procedure Rules stipulates as follows: “Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution”. Order 42 Rule 35 (2) of the Civil Procedure Rules stipulates as follows: “If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal. “The provisions of the law relating to dismissal cannot be read in isolation. The bottom line is that directions must have been given before an appeal can be dismissed for want of prosecution. Indeed, there does not appear to be any penalty where an appellant fail to proceed as per Order 42 Rule 11 and Order 42 Rule 13 of the Civil Procedure Rules, 2010. In any event, there was also no evidence that the Registrar had issued a notice under Order 42 Rule 12 of Civil Procedure Rules. There was also no indication that the lower court file and proceedings had been forwarded to the High Court for the Registrar to proceed as aforesaid.” The High Court went on and reinstated the appeal.

#### **The respondent's case:**

5. The cause of action herein arose 6-years ago being a fatal road traffic accident that occurred on 20.12.2017. The trial suit, vide, Kisi MC No. 622/2019, was filed, tried on merit and determined with judgment being delivered on 30.07.2021; The Appellants/Applicants thereafter delivery of judgment by the lower court, filed an application, vide notice of motion dated 24.08.2021, seeking stay of execution of the judgment pending hearing and determination of the appeal herein; The Appellant was granted stay of execution on 08.09.2021; The instant appeal itself was filed on 27.08.2021;

The Appellant having granted stay orders, is now over a span of more than 2- years, yet to have the appeal set down for substantive hearing.



6. The Appeal was dismissed pursuant to the Court's orders made on 25.11.2021 in light of the Appellant's manifest non-keenness to prosecute the instant appeal.
7. The Appellant up to this very moment - being more than a year after filing the instant appeal, is yet to place on record a complete and legally compliant record of appeal.
8. The Appellant/Applicant has not offered any credible reason for its failure to have the appeal set down for hearing-more than one-and-half years now.
9. The Appellants/Applicants' Counsel in his supporting affidavit states that the Appellants/Applicants failed to file a complete and legally complete record of appeal because they were unable to extract the decree.
10. The foregoing being afterthought excuses that are clearly absurd and conjectured.
11. A perusal of the concerned decree as filed in the supplementary record of appeal clearly shows that the said decree itself was issued way back on 16.03.2022.
12. The Appellants/Applicants more than 7-months later on 25.11.2021 when the Appeal was dismissed, was yet to file the said decree- the Courts orders of 25.11.2021 dismissing the appeal were therefore clearly made against the face of glaring and unjustifiable indolence on the part of the Appellants.
13. The Court's record clearly indicates that on 25.11.2021, the Appellants were expressly ordered to file a supplementary record of appeal incorporating the Respondent's lower court submissions - this the Appellants have never done more than one-and-half years now.
14. The Appellants even in filing the supplementary record of appeal are yet to comply with the Court's orders of 25.11.2021 with no reason whatsoever given by the Appellant for the said non-compliance.
15. The foregoing are bold markings of unjustifiable indolence and non-keenness on the part of the Appellants to participate in court processes and comply with court directions as required under section 1A (3) of the *Civil Procedure Act* [Cap. 21 - Laws of Kenya.
16. Reliance is place in the case of *AIG Insurance Company Limited v Benard Kiprotich Kirui* [2021] eKLR;  

“However, it must be remembered that the suit belongs to the Appellant and that the Appellant cannot just file an appeal and let it lie in the court system. The Appellant must demonstrate what action it took to move the appeal forward.
17. This chronology of events demonstrated a clear laxity on the part of the Appellants. They moved the court to ensure that the decretal amount was not paid to the Respondent as they felt that they Appeal had overwhelming chances of success. After that, they went quiet and made no follow up on having the Record of Appeal filed in court, the Appeal admitted and the same listed for directions only until after the current application was filed and served upon them. Indeed, if they were desirous of moving the Appeal forward, they would have actively followed up on the file immediately and filed the record expeditiously. It is evident that the Appellants forgot about expedition once they obtained stay orders.
18. Parties are bound under section 1A (3) of the *Civil Procedure Act* [Cap. 12 - Laws of Kenya to cooperate towards just, expeditious, efficient and timely adjudication of legal disputes at a cost that is affordable to all. The Appellants/Applicants' conduct herein stands in conflict thereof.



19. The Appellants/Applicants cannot lodge applications seeking orders of stay in the pretext of an appeal and having obtained the same adopt an indolent conduct protracted to indefinitely stall conclusion of proceedings herein.
20. The respondent further relies in the High Court's pronouncement in National Super Alliance(NASA) Kenya v Independent Electoral and Boundaries Commission [2017] eKLR;

“However, like all discretion, that power must be exercised judiciously and not on caprice, whim, likes or dislikes. Discretion vested in the court is dependent upon various circumstances, which the court has to consider among them the need to do real and substantial justice to the parties to the suit. [5] Discretion must be exercised in accordance with sound and reasonable judicial principles. The King's Bench in Rookey's Case [6] stated as follows: ‘Discretion is a science, not to act arbitrarily according to men's will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other.

This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity is by *the constitution* entrusted with.”

21. This chronology of events demonstrated a clear laxity on the part of the Appellants. They moved the court to ensure that the decretal amount was not paid to the Respondent as they felt that they Appeal had overwhelming chances of success.
22. After that, they went quiet and made no follow up on having the Record of Appeal filed in court, the Appeal admitted and the same listed for directions only until after the current application was filed and served upon them. Indeed, if they were desirous of moving the Appeal forward, they would have actively followed up on the file immediately and filed the record expeditiously.
23. It is evident that the Appellants forgot about expedition once they obtained stay orders.
24. Consequently, I direct that the appellants take all necessary steps to set the appeal for admission and directions before the Judge within 21 days of this ruling.
25. Failure to do so, the appeal shall stand dismissed.
26. As is evident on record, the legal action herein concerns a cause of action that occurred on 20.12.2017.

#### **Analysis and determination;**

27. The applicants have since filed their Record of Appeal together with their Supplementary Record of Appeal and they are urging this court to reinstated the appeal for hearing since it raises triable issues which need to be determined on merit rather than on procedural technicalities.
28. Article 159 (2) (d) of *the Constitution* which state that, “justice shall be administered without undue regard to technicalities”. Article 50(1) of *the Constitution* of Kenya, 2010 to provides as follows:

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”



29. It is my finding and in exercise of my discretion I have invoked Article 159 of *the Constitution* in ensuring that the hearing and determination of the appeal is not impeded by technicalities.
30. The record of appeal has already been filed and the respondent shall not suffer prejudice if the appeal proceeds for hearing.
31. The Respondent has not pleaded or proven that he would be prejudiced if the orders sought in the present motion were granted. Allowing the application accords with the right to hearing as guaranteed under Article 50 of *The Constitution*.

**Order:**

1. The application dated 4<sup>th</sup> June 2021 is allowed.
2. The appeal shall be set down for hearing within 30 days of today's date.
3. No orders as to costs.

**DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF MARCH, 2024**

.....

**J.M. CHIGITI (SC)**

**JUDGE**

