



**Balozi Housing Co-operative Society v Kamandu (Civil Appeal
17 of 2019) [2024] KEHC 6144 (KLR) (Civ) (24 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6144 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 17 OF 2019

AN ONGERI, J

MAY 24, 2024

BETWEEN

BALOZI HOUSING CO-OPERATIVE SOCIETY APPELLANT

AND

FLORENCE K KAMANDU RESPONDENT

RULING

1. The application coming for consideration in this ruling is the one dated 12/1/2021 brought under Order 12 Rule 7 Section IA & 1B and 3A of the *[civil Procedure Act](#)* Cap 21 and all other enabling provisions of the law seeking the following prayers;
 - i. That this application be heard first and dispensed with at the first instance.
 - ii. That this Court be pleased to set aside the orders of 7th October, 2022 dismissing this Appeal and reinstate the Appeal for a just conclusion.
 - iii. That the Appellant be granted leave to file a Record of appeal out of time.
 - iv. That costs of the application be in the Appeal.
2. The application is based on the following grounds;
 - i. The Appeal was dismissed on 7th October, 2022 apparently upon a Notice to Show Cause why the same should not be dismissed.
 - ii. That the Appellant was not served with a notice for purposes of attending Court on the said date.



- iii. That the Appeal arises from a ruling of the Co-operative tribunal where the Appellant was dissatisfied with the said Judgment and filed a Memorandum of Appeal.
 - iv. The Appellant applied for typed proceedings at the Tribunal registry which action was delayed due to the file being missing from the said registry.
 - v. That the failure to prosecute the Appeal is not deliberate but due to actions that are beyond the Appellant.
 - vi. That it is in the interest of Justice that the Appeal be reinstated.
 - vii. The Appellant/Applicant has a good appeal that raises friable issues in terms of Memorandum of Appeal already on record filed on 18th January, 2019.
 - viii. The respondent shall suffer no prejudice should the appellant be allowed to prosecute this appeal on its merits.
3. The application is supported by the affidavit of Job Mwangi Thiga sworn on 12/1/2024 as follows;
- i. That the appeal was from the Ruling of the Co-operative Tribunal at Nairobi delivered on 10th December, 2018 where the appellant herein was dissatisfied and sought the redress of this Court herein.
 - ii. That we timeously filed the Memorandum of Appearance dated 18th January, 2019 and then served the same on our counterparts.
 - iii. That we wrote to the tribunal requesting for a certified copy of the Ruling and proceedings for purposes of filing the Record of appeal but there was delay in obtaining the same before the onset of Covid - 19 and the shutdown of physical access to the court registries.
 - iv. That at all time in the course of this appeal we were acting in good faith on the assumption that the file at the Tribunal was at the typing pool awaiting conclusion of the typing of proceedings.
 - v. That subsequently, upon resumption of limited physical services at the Court registries, we were able to obtain the typed proceedings. However, efforts to file the Record of Appeal in this appeal have been hampered by the unavailability of the Court file.
 - vi. That it is in the course of following up on the availability of the court file that it has transpired that the appeal was dismissed on 7th October, 2022 upon a Notice to Show Cause why the same should not be dismissed. No notice was served on the Appellant or its lawyers on record.
 - vii. That the failure to appear on 7th October, 2022 was therefore not intentional or deliberate and the circumstances are regrettable and excusable.
 - viii. That we have a good appeal that raises triable issues in terms of the filed Memorandum of Appeal.
4. The respondents filed a replying affidavit as follows;
- i. That I have read and understood the Affidavit of John Mwangi Thiga sworn on 12th January, 2024 which I wish to respond to as follows: -
 - ii. That I am the Respondent herein hence competent to swear this Affidavit
 - iii. That the Appeal hence was filed on 18th January, 2019 by the appellant.



- iv. That the Appellant/Applicant since 18th January, 2019 has never taken any step to prosecute the appeal herein.
 - v. That the default to prosecute this Appeal has been intentional.
 - vi. That the delay from 18th January, 2019 to to-date is and excusable delay which the Appellant and their Advocates are responsible.
 - vii. That the delay for inexcusable delay is such that it has given rise to substantial risk of a fair trial of the issues in litigation.
 - viii. That with the delay for almost five years it is not possible for the court to obtain a fair trial.
 - ix. That the court exercised its administrative machinery to disencumber itself of case records in which the appellant appear to have lost interest. I confirm that both parties were duly notified of the Notice to Show Cause a copy attached and marked as "FKM-I".
 - x. That the period is prolonged inordinate and is inexcusable delay in prosecution of the suit which is to the prejudice of the Respondent
 - xi. That the reason advanced by the Advocate for the applicant are after thoughts as they are not supported by evidence.
 - xii. That what is deponed herein above is true to the best of my knowledge, information and belief.
5. Both parties filed written submissions as follows; the applicant submitted that from the courts record, directions have never been taken in this appeal as the court's file was not available. The applicant made follow ups with the registry before the shutdown of physical access to the court registries in the year 2020, subsequently limited physical access to the court registries in the year 2021 which considerably delayed the process or attempts to trace the file and or prosecute the appeal
 6. The applicant submitted that there has been no indication that the lower court file has been availed to enable parties take directions as anticipated in order 42 rule 13. Section 1A and 1B of the Civil Procedure Act, Section 3A and 3B of the Appellate Jurisdiction Act and Article 159 of the Constitution strive to sustain rather than strike out pleadings purely on technical grounds. In support of their argument the applicant cited Milimani HCC No. 389 of 2003 Britana Oils Limited V. B.P Kenya Limited [2006] eKLR where it was held;

“Shutting out a litigant from court should be the last inclination of a court of justice. Parties should be accorded all due opportunity to be heard and their matters determined on merit, unless there are very good grounds to deny them this right”
 7. The respondent on the other hand submitted that the appeal herein was filed on 18/1/2019 and dismissed in 7/10/2022. The respondent argued that the delay in prosecuting the appeal was inordinate, inexcusable, caused grave injustice and has given rise to substantial risk of a fair trial on the issues in litigation. That it is not in dispute that the court issued notices to the parties to show cause why the appeal should not be dismissed for want of prosecution and the appellant failed to show cause.
 8. The respondent contended that the reasons for delay advanced by the appellant are an afterthought as there is no evidence produced by the advocate that they applied for court proceedings and rulings. There is also no evidence that this appeal went missing at any stage as there is similarly no proof of the same. This is a clear case where the appellant lost interest in the appeal.



9. The sole issue for determination is whether the order dated 7/10/2022 dismissing this appeal should be set aside and the appeal reinstated for hearing.
10. The court has a discretion to reinstate the appeal upon certain conditions. Order 12 Rule 7 of the *Civil Procedure Rules* states as follows –

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

11. In the current case, I find that no record of appeal has been filed.
12. The appellant has not demonstrated any seriousness in prosecuting this appeal.
13. The application dated 12/1/2024 lacks in merit. The same is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF MAY, 2024.

A. N. ONGERI

JUDGE

