



**Kanake v Wanyoike & 3 others (Civil Case 452 of 2010)
[2024] KEHC 8676 (KLR) (27 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 8676 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 452 OF 2010
AN ONGERI, J
JUNE 27, 2024**

BETWEEN

ELIJAH KANAKE PLAINTIFF

AND

MARGARET WANGARI WANYOIKE 1ST DEFENDANT

GEORGE MWAI KIMONDO 2ND DEFENDANT

K. B. SANGHANI & SONS 3RD DEFENDANT

JOSPAT KIMANI 4TH DEFENDANT

RULING

1. The application coming for consideration in this ruling is the one dated 16/1/2024 brought under Article 159 & 48 of the [Constitution](#); Order 51 rule 1 of the [Civil Procedure Rules](#) and Sections IA, 1B and 311 of the [Civil Procedure Act](#) and all other Enabling Provisions of the Law seeking the following orders;
 - i. That this application be certified urgent and heard ex-parte in the first instance and as a matter of urgency.
 - ii. That this Honourable Court be pleased to reinstate the Notice of Appeal dated 29th October 2023 and the orders issued on 16th December 2021.
 - iii. That the costs of this application be provided for.



2. The application is based on the following grounds;
 - i. That the 3rd & 4th Defendants/ Applicants being dissatisfied with the Judgement of this Honourable Court filed a Notice of appeal dated 29th October 2021 against the said judgment.
 - ii. That the Notice of Appeal was struck out vide the Plaintiff's Application dated 9th November 2022 without being heard as the aforesaid Application was not served upon the Defendants,
 - iii. That the 3rd & 4th Defendants/ Applicants have since filed a record of appeal being Nairobi Civil Appeal No. 14 of 2024.
 - iv. That substantial loss will result to the 3rd & 4th Defendants/ Applicants unless the order sought is granted.
 - v. That this application ought to be granted in the interest of Equity and Justice.
3. The application is supported by the following affidavit sworn on 16/1/2024 that the 3rd & 4th Defendants/ Applicants being dissatisfied with the Judgement of this honourable Court filed a Notice of appeal dated 29th October 2021 against the said judgment.
4. That the Notice of Appeal was struck out vide the Plaintiff's Application dated 9th November 2022 without the 3rd & 4th Defendants being heard as the aforesaid Application was not served upon the Defendants. A cursory look at the Affidavit of service filed in court clearly shows at 'the subject area' that the alleged service was done on Tuesday 23rd November 2021 and the trail bears address not found.
5. That the 3rd & 4th Defendants/Applicants have since filed a record of appeal being Nairobi Civil Appeal No. 14 of 2024.
6. That substantial loss will result to the 3rd & 4th Defendants/ Applicants unless the order sought are granted as the delay in filing the record of appeal was on account of delay in receipt of court proceedings.
7. The respondent opposed the application with a replying affidavit sworn on 2/2/2024 that this matter was filed at the high court on 7th October 2010.
8. That directions were taken to certify the matter was ready for hearing by this honourable court and the matter proceeded to a full hearing after which Judgement was delivered on 22nd October 2021.
9. That on the 29th day of October 2021 the firm of Solonka & Company Advocates filed a notice of appeal but failed to apply for the typed proceedings.
10. That the firm of Chamwada & Company Advocates thereafter filed an application for a stay of execution on the 2nd day of November 2021 which application was granted.
11. That after the orders were granted, they took no action as they did not even apply for and pay for the typed proceedings.
12. That the matter remained inactive for eighteen months which was an inordinate delay after which I instructed my Advocates on record to make an application to strike out the Notice of appeal.
13. That the firm of Akolo Wanyanga & Company Advocates applied to strike out the Notice of Appeal dated the 9th day of November 2022 and the same was served on the 8th day of March 2023.



14. That at the Hearing on the 28th day of November 2023, there was no appearance on the part of Chamwada & Company Advocates so the orders striking out the Notice of Appeal were granted and the court vacated the orders issued on the 16th day of December 2021 for a stay of execution.
15. That the said firm of Advocates is not being candid with this court as they were duly served with the Application dated the 9th day of November 2022 and served with a hearing Notice.
16. That the said Advocates have not explained why they did not attend court on the 29th day of May 2022.
17. That after the Notice of Appeal was struck out, the respondent instructed his advocates on record to proceed to tax the bill of costs.
18. That the present application by the 3rd and 4th Respondents is a sham, vexatious and an abuse of the law, made in bad faith and is meant to delay the taxation and conclusion of this matter and the Applicants are put to strict proof thereof. Litigation must come to an end.
19. That it is apparent on the court record that this matter has been in court for thirteen (13) years and the inordinate delay has all this time been caused by the 3rd defendant's unwarranted applications to try and delay the delivery and execution of the judgement while the respondent continues to suffer.
20. That The certificate of delay is self-explanatory as it clearly shows that the Applicants applied for the typed proceedings on the 13th day of July 2023 more than twenty months after delivery of the judgment herein and no explanation has been advanced by the Applicants to explain the delay.
21. That the stated record of appeal was filed out of time and it has been filed without leave of court and is thus null and void ab initio.
22. That Rule 84 of the [Court of Appeal Rules](#) provides that within sixty days an Appellant must lodge the Memorandum of Appeal, Record of Appeal, the prescribed fee and the Security of costs and the Applicants have failed to abide by this rule to date and they are put to strict proof thereof.
23. That the firm of Chamwada & Company Advocates (the said firm) is not properly on record and thus has no audience before this court.
24. That when the said firm purported to come on record they never sought leave of this honourable court to come on record after Judgement to replace the firm of Solonka & Company Advocates.
25. That the firm of Chamwada & Company Advocates therefore does not have locus to represent the 3rd and 4th defendants herein and they should be struck off the record.
26. The parties filed written submissions as follows; the applicants submitted that the Application is anchored on the ground that the Notice of Appeal was struck out vide the Plaintiff's Application dated 9/11/2022 without being heard as the aforesaid Application was not served upon the Defendants.
27. The application is thus anchored on Article 48 and 159 of the [Constitution](#), on the right to be heard and the need for a court of law to frown upon procedural technicalities in favour of substantive justice are meant to ensure substantive justice to all parties. the applicants submitted that they have demonstrated reasonable grounds for the reinstatement of the notice of appeal and justice will be served if the same is granted.
28. The plaintiff/respondent submitted that a cursory look at the application reveals that the applicant states that they were not served with the application and hearing date. However, the respondent has shown clearly what email address was used to serve the applicant and the applicant has not refuted this



fact. They have not denied the email address that the firm of Charnwada & Company used to serve the firm of Akol Wanganya & Company Advocates when they took over this matter.

29. That Plaintiff/respondent submitted that this matter has been in court for more than 10 years and the applicant was given a chance to appeal but never took it by not requesting for the proceedings. It was the plaintiff/respondents position that the applicants have not given any proper reason why they did not attend court on 29/5/2023 and has taken then 7 months to file the application for reinstate the notice of appeal.
30. The sole issue for determination is whether the notice of appeal should be reinstated.
31. The court has a discretion to reinstate any suit that has been dismissed under certain conditions.
32. The discretion of the court, ought to be exercised in a just manner, as was held in *Bilba Ngunyo Isaac vs. Kembu Farm Ltd & another & another* [2018] eKLR ((JN. Mulwa J), which echoed the decision of the court in *Shah vs. Mbogo & Another* (1967) EA 116 (Harris J), where the court stated on the matter of discretion:

“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.”
33. In the current case I find that the cause of action arose in the year 2009. The judgment sought to be appealed against was delivered on 22/10/2021.
34. The respondent’s leg was amputated during the accident and the applicant has delayed in prosecuting this appeal.
35. The Notice of appeal dated 29/10/2021 was struck out on 29/5/2023.
36. The Application dated 9/11/2022 was served upon the applicant before the notice of appeal was struck out. It was the duty of the applicants to prosecute the appeal and not to wait for the respondent to apply for dismissal of the Notice of appeal in order to take action.
37. It is not in dispute that the delay in proceeding to the Court of Appeal is inordinate in the circumstances of this case and that the same has occasioned the respondent untold suffering.
38. The duty of the court is to balance the interest of the parties. The applicant has a right to appeal while the respondent whose leg was amputated in the accident has the right to enjoy the fruit of his judgment.
39. In the case of *Utalii Transport Company Limited & 3 Others vs. NIC Bank Limited & Anor* [2014] eKLR it was held;

“Whereas there is no precise measure of what amounts to inordinate delay and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so, on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying court’s mind on the delay, caution is advised for courts not to take the word ‘inordinate’ in its dictionary meaning, but in the sense of excessive as compared to normality.”



40. I find that the applicant is not serious about prosecuting the intended appeal and the delay herein is inordinate.

41. The application dated 16/1/2024 has no merit and the same is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 27TH DAY OF JUNE, 2024.

A. N. ONGERI

JUDGE

In the presence of:

for the Plaintiff

for the Defendant

