



**Wanjiku v Agayo (Civil Appeal E085 of 2022)
[2024] KEHC 16641 (KLR) (9 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16641 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E085 OF 2022
GL NZIOKA, J
DECEMBER 9, 2024**

BETWEEN

JULIA WANJIKU APPLICANT

AND

JULIUS KORE AGAYO RESPONDENT

RULING

1. By a notice of motion application dated 19th August 2024, brought under the provisions of Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules 2010, section 3A of the *Civil Procedure Act* (Cap 21) Laws of Kenya and all enabling provisions of the law, the applicant is seeking for the following orders: -
 - a. Spent
 - b. That the Honourable Court be pleased to issue a temporary order staying execution of the Judgement delivered herein on 10th November 2022 and the decree obtained in the lower court being Naivasha CMCC No. 666 of 2021 pending inter-parties hearing of this application.
 - c. That this Honourable Court be pleased to set aside the ex parte proceedings of 8th May. 2023 and all the consequential orders.
 - d. That this Honourable Court be pleased to set aside its orders of 8th May 2023 dismissing the appellant/applicant's appeal herein dated 15th November 2022 and reinstate the same for hearing and determination on its merits.
 - e. That the Honourable Court be pleased to issue an order staying execution of the Judgement delivered on 10th November 2022 in pending hearing and determination of the appeal lodged from the lower court's judgment delivered herein.



- f. That the Honourable Court be pleased to issue an order that the entire decretal sum herein of Kshs. 413, 068 which was deposited in a joint interest earning account in the name of both firms of Advocates on record for the parties, be maintained as security for the appeal lodged from the Lower court's judgment.
- g. That the costs of the application be provided for.
2. The application is supported by the grounds thereto and the affidavit of the even date sworn by G. N. Karanja, an Advocate of the High Court of Kenya representing the applicant.
 3. He avers that, the applicant instituted the appeal against the decision of the trial Magistrate in Naivasha CMCC No. E666 of 2021 delivered on 10th November 2022 vide a memorandum of appeal dated 15th November 2022. However, on 8th May 2023 the appeal was dismissed for want of prosecution.
 4. That, the delay in prosecuting the appeal was occasioned by not being able to obtain the relevant documents from the lower court to enable her to file the record of appeal despite her relentless efforts to obtain the same. Further, the delay was inadvertent and beyond the applicant's control and cannot be attributed to her.
 5. That in the circumstances the delay is not unreasonable and/or inordinate so as to prejudice the respondent. That in any event the respondent can be compensated by way of an award of damages.
 6. Furthermore, the applicant in compliance with conditions for stay deposited the entire decretal sum of Kshs. 413,068 in a joint interest earning account in the name of Advocates of both firms.
 7. That, the applicant stands to suffer irreparable loss, damage and harm as the respondent has moved the lower court to release the decretal sum deposited as security and is apprehensive that the respondent may at any time commence execution proceedings against her.
 8. The learned Counsel further deposed that the applicant has an arguable appeal which will be rendered nugatory despite being meritorious if the application is not allowed. Further, she is desirous of prosecuting the appeal in a just and timely manner and should therefore be given an opportunity to have the appeal prosecuted and determined on its merits.
 9. Further that Article 48 of *the Constitution* of Kenya provides guaranteed and unlimited access to justice while Article 159 (2)(d) enjoins the court to administer justice without undue regard to procedural technicalities.
 10. Further, the application has been filed without undue delay and therefore it is only fair and in the interest of justice that the appeal be reinstated and heard to its conclusion.
 11. However, the respondent opposed the application and filed a replying affidavit dated 12th September 2024 and confirmed that the applicant filed her appeal against the decision of the trial on 15th November 2022, which was subsequently dismissed on 8th May 2023.
 12. The respondent further deposed that in compliance with the trial court's order the applicant deposited the decretal sum as security into a joint interest earning account at HFC Bank in the name of the parties Advocates pending the outcome of the appeal.
 13. That upon the court dismissing the appeal, his Advocates prepared a consent letter for the release of the security dated 13th May 2023 addressed to the Bank Manager and forwarded it to the applicant's Advocates, but it has never been signed and/or released.



14. Subsequently, his Advocate fixed the lower court matter for mention on 3rd July 2024 before the trial court on which date the applicant's Advocate sought for more time to respond to the issue of the release of funds, and a further mention dated fixed on 17th July 2024.
15. That on the said date, the applicant's Advocate never appeared before the trial court and the trial court ordered the release of the funds noting that the appeal had been dismissed.
16. That, on 19th July 2024 the order for release of funds was presented to the bank and the bank called the applicant's Advocate to authorize release of the funds. However, the applicant's Advocate instead filed an application under certificate of urgency seeking to stop release of the funds and an order of temporary stay of execution granted. That, the application was heard and was dismissed for lack of merit.
17. Furthermore, while the application before the trial court was still pending, the applicant filed the current application and that, the applicant has not given any reason for the delay of fifteen (15) months in filing the present application despite being aware that the appeal had been dismissed.
18. The respondent further argued, that the delay is unreasonable and as no good explanation has been given to warrant the court to exercise its discretion and allow the application. As such, it is unfair to deny him the fruits of his judgment.
19. The application was disposed of by way of oral submissions. Mr. Mwanzia holding brief for Mr. Karanja for the applicant reiterated that, the appeal was dismissed as the applicant had not obtained the record of appeal. That the record of appeal has been filed and prays that the appeal be reinstated and heard on its merit,
20. However, Mr. Owour learned counsel for the respondent submitted that as the orders sought are equitable, equity aids the vigilant and not the indolent. Further, the present application was only filed after the respondent sought for the release of the decretal sum.
21. Furthermore, that the applicant cannot file a record of appeal when the appeal is dismissed as there is no open file to file it in. That, the applicant is just delaying the respondent from enjoying the fruits of his labour and urged the application to be dismissed.
22. At the conclusion of the arguments by the parties, I find that the first issue to address is whether the applicant has advanced adequate reasons and/or explanation to warrant the reinstatement of the dismissed appeal, as no other order can be granted unless and until the appeal is reinstated.
23. The law on reinstatement of dismissed matter is settled by court's decisions. The factors to take into consideration were discussed by the Court in *Ivita vs. Kyumbu* [1984] KLR 441 as follows:

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay? Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”



24. It is also noteworthy that the issue of reinstatement of the suit is a matter of judicial discretion and not as of right and depends on the circumstances of each case.
25. Indeed, a court has discretion under Order 12 Rule 7 of the Civil Procedure Rules to reinstate a suit that has been dismissed. The subject provisions state that: -

“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.”
26. However, the discretion must be exercised judicially and justly. The rationale for this wide discretion was underscored by the East African Court of Appeal in *Shah vs. Mbogo and Another* [1967] E.A 116 as follows:

“The discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”
27. It follows that the applicant has to satisfy the court that he has excusable and/or plausible explanation for the delay.
28. In the instant matter the appeal was initiated via a memorandum of appeal dated 15th November, 2022. The directions thereon were given on 14th December 2022 and the applicant given 45 days to file and serve a record of appeal.
29. By 16th February 2023 the applicant had not filed a record of appeal and she was given a further 30 days to comply. On the 27th March 2023, a notice to show cause was issued why the appeal could not be dismissed for want of prosecution.
30. On 8th May 2023, the court was informed that the appellant had been served with the notice to show cause but there was no appearance by either party.
31. The matter became dormant until the application dated 16th August 2024 was filed. Notably that was one year and eight months later from the date of filing the memorandum of appeal.
32. It is noteworthy as already stated the applicant avers that all that period she was waiting for, “relevant documents from the lower court” to file a record of appeal. Again notably the subject documents are not indicated. Are they proceedings or what?
33. The applicant further avers that the delay was inadvertent and beyond the applicant’s control and fails to substantiate the inadvertence.
34. It also suffices to note that the applicant states that she has since filed a record of appeal but that holds no water as no documents of what kind can be filed in a dismissed suit, until the dismissal order is set aside.
35. The principles of law that guides reinstatement of a suit requires the court do consider the interest of both parties in the case. The respondent has been kept off the fruit of judgment for too long.
36. The applicant woke up only when the money deposited as security was earmarked for liquidation. The reasons advanced for delay are unsatisfactory.



37. The upshot of the afore is that, I find the application has no merit and dismiss it.

38. It is so ordered

DATED, DELIVERED AND SIGNED ON THIS 9TH DAY OF DECEMBER, 2024.

GRACE L. NZIOKA

JUDGE

In the presence of: -

Mr Mwanzia HB for Mr Karanja for the Applicant

Mr Owour for the Respondent

Mr Mbololo Court Assistant

