Kwetu Sacco Limited v Mutinda (Civil Appeal 105 of 2019)
[2025] KEHC 17831 (KLR) (27 November 2025) (Ruling)

Neutral citation: [2025] KEHC 17831 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 105 OF 2019

EN MAINA, J

NOVEMBER 27, 2025

BETWEEN

KWETU SACCO LIMITED ..... APPELLANT

AND

PAUL KYALO MUTINDA ..... RESPONDENT

RULING

1. This is a ruling on the Notice of Motion dated 24th July 2023 which seeks a stay of execution of the judgment and decree of Hon. Kahuya delivered on 11th July 2019 in Machakos CMCC No 297 of 2018 pending the interpartes hearing of the application. It also seeks that the order dated 16th January 2023 which dismissed this appeal for want of prosecution be set aside and the appeal and stay orders issued on 18th November 2019 be reinstated and the appeal be heard on merit.

2. The application is supported by the affidavit of Julius Nzioka sworn on 24th July 2023. The gist of the application, as can be discerned from the grounds on its face and supporting affidavit, are that the appellant's properties have been proclaimed as a result of dismissal of the appeal for want of prosecution; that the appeal was merited and had a good chance of success and further that the appellant is willing to furnish sufficient security.

3. The application was opposed through the replying affidavit of Paul Kyalo Mutinda sworn on 15th August 2025, where he deposed that the application is frivolous, misconceived and an abuse of the court process; that it has been four years and seven months since the auctioneers began the process of execution yet the Appellant is always looking for excuses to frustrate execution; that the delay occasioned is prejudicial to him and the intent to furnish security is but an excuse for delaying the satisfaction of the decree. He urged this court to dismiss the application with costs.

Disposition

4. This court's power to order stay of execution is governed by Order 42 Rule 6(1) & (2) of the *Civil Procedure Rules*. The main considerations are whether the applicant is likely to suffer substantial loss, whether the application has been made timeously and whether the applicant is willing to deposit security.

5. I have carefully considered this application, the grounds on its face, the rival submissions and the law. In regard to the first limb of the application, the applicant is required to demonstrate the substantial loss he is likely to suffer should the stay not be granted. I find that the applicant herein has not met this condition as it has not been demonstrated that the Respondent would not be in a position to refund the decretal sum were the appeal to succeed.

6. The condition for bringing the application timeously has also not been met as the application was filed more than six months since the last order for stay of execution was vacated for reason of the dismissal of the appeal for want of prosecution. No plausible explanation has been proffered for such a long delay. The discretion of the court cannot and should never be exercised so as to aid an indolent party and this court is bound by that principle.

7. On the issue of reinstatement of the appeal, such an order is granted at the discretion of the court. The discretion must be exercised fairly and judicially but not capriciously or at a whim. The main consideration as was held in the case of *Ivita vs Kyumbu*, Civil Suit No. 340 of 1971 (1975) EA 441, 449,

> " is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay."

In the case of *Cecilia Wanja Waweru v Jackson Wainaina Muiruri & another* [2014] KECA 492 (KLR) the Court of Appeal stated:

> " There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case. We are of the considered view that the learned judge in considering the application, should have looked at the appellant's conduct from the time the appeal was filed up to the date the application for reinstatement was filed....."

8. The Applicant is seeking to reinstate the appeal on the ground that the appeal was dismissed for want of prosecution without notice to the parties. The chronology of events as contained in the record however show otherwise: the Deputy Registrar gave the parties a mention date of 6th October 2022 but they did not attend. A Dismissal Notice was subsequently issued on 2nd December 2022 and on 16th January 2023, the appeal was dismissed for want of prosecution as no cause was shown.

9. In the case of *Cecilia Wanja Waweru v Jackson Wainaina Muiruri & another* [2014] KECA 492 (KLR) the Court of Appeal dealing with a similar issue stated:

> " There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case. We are of the considered view that the learned judge in considering the application, should have looked at the appellant's conduct from the time the appeal was filed up to the date the application for reinstatement was filed.....

> We have to ask ourselves whether the failure by the appellant to prosecute the appeal in the High Court and/or the delay in filing the application for reinstatement constitute an excusable mistake or was it meant to deliberately delay the cause of justice.....Why didn't she set the appeal down for hearing for almost 14 years? The reasonable explanation would be that the appellant had been indolent and had slept on her rights. She was only awakened from her slumber by the dismissal of the appeal..."

10. The applicant herein brought this application almost six months after the appeal was dismissed. The delay is inordinate yet no plausible explanation as would excuse the same has been given. In any event a party who has filed a suit is obligated by Sections 1A and 1B of the *Civil Procedure Act* to see to it that the same is heard expeditiously. The applicant cannot hide behind the issue of notice because the record indicates they were served. Moreover, he had an obligation to look up his case to see the progress and to move the court towards its expeditious disposal. Justice is a two sided sword and it is time the Respondent was allowed to enjoy the fruits of her judgment. To grant the orders sought would be greatly prejudicial, unfair and unjust.

11. In the upshot, I find that the application has no merit and it is dismissed with costs to the Respondent.

    Orders accordingly.

RULING SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 27TH DAY OF NOVEMBER, 2025.

E. N. MAINA

JUDGE

In presence of:

No appearance by parties