



Agutu & another (Suing as Administrators of the Estate of Andrea Abonyo Owoth - Deceased) v Oduor & 3 others (Civil Appeal E024 of 2023) [2025] KEELC 1135 (KLR) (6 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1135 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
CIVIL APPEAL E024 OF 2023**

**AE DENA, J
MARCH 6, 2025**

BETWEEN

**RICHARD ALOO AGUTU 1ST APPELLANT
CHARLES ATIENO AGUTU 2ND APPELLANT
SUING AS ADMINISTRATORS OF THE ESTATE OF ANDREA ABONYO
OWOTH - DECEASED**

AND

**ISMAEL OMONDI ODUOR 1ST RESPONDENT
FRANCIS EDWARD OKOTH (SUING AS ADMINISTRATORS TO THE
ESTATE OF JULIUS ODUOR BENSON - DECEASED) 2ND RESPONDENT
THE LAND REGISTRAR, SIAYA 3RD RESPONDENT
THE HON. ATTORNEY GENERAL 4TH RESPONDENT**

(Being an appeal from the Judgment of the Chief Magistrate’s Court at Siaya Hon. B.B. Limo(PM), delivered on 22/11/2023 in Siaya ELC case no. E044 of 2023)

RULING

1. The Appellants/Applicants herein Richard Aloo Agutu and Charles Atieno Agutu filed an application vide Notice of Motion dated 14th October 2024 seeking the following verbatim orders:
 1. That the order of this Hon. Court made on 14th October 2024, by Hon. Lady Justice A. Y. Koross, dismissing the Appellants/Applicants appeal by way of Memorandum of Appeal dated 19th December 2023 and consequential proceedings of 14th October 2024 for want of prosecution, be set aside and the same be reinstated to be litigated to completion.



2. That upon the grant of prayer 1 above, this Honourable court be pleased to allow the Appellants/Applicant's written submissions herein dated 11th October 2024 in terms of 'Draft Written Submissions' annexed hereto and marked R.O.A-1 and C.O.A 1 upon payment of requisite fees.
 3. That the costs of this application be provided for.
2. The said application is supported premised on the grounds on its face and the affidavit sworn on 3rd September 2024 by Ochanyo B. Onyango, the Advocate on record for the Appellants.
 3. It is averred that the Memorandum of Appeal dated 19th December 2023 and proceedings were dismissed by an order of this Honorable court made on 14/10/2024 for want of prosecution.
 4. That the Appellants/Applicants submissions had already been prepared dated 11th October 2024 pending filing there having been a system internet outage on the e-filing system which caused an interference on the law firm's e-filing system profile. That an official communication dated 9th October 2024 was made from the court ICT department concerning the e-filing system interruption. The said communication was attached as R.O.A-1 & C.O.A.-1.
 5. That the firm sought the services of the ICT Officer Siaya Law courts who helped in restoring the site. That on 14/10/2024 the date of dismissal of the matter, the firm they tried joining the virtual session as usual but encountered unforeseen challenges with their gadgets in the office, and on successful attempt they found that the matter had already been dismissed for want of prosecution.
 6. That the matter was scheduled on 14/10/2024 for mention to confirm filing of submissions and issuance of a judgment date.
 7. It is further deponed that the firm has been diligent in all the court sessions in this matter and the challenges faced were not occasioned by them but the system breakdown and were indeed inadvertent. That they are desirous of prosecuting the case to its logical conclusion that is issuance of a judgment date if the application is allowed. That it is in the interest of justice that the application is allowed.
 8. The Respondents opposed the application by a Replying Affidavit sworn jointly by Israel Omondi Oduor and Francis Edward Okoth the 1st and 2nd Respondents respectively on 17th January 2025. It is deponed that the Applicants on caused to be filed an incomplete record of appeal, ignored directions of the court issued on 19/6/24 to file a supplementary record of appeal and have had close to 3 months to prepare, file and serve submissions. That there is no appeal to reinstate by dint of the incomplete record of appeal.
 9. It is stated that the delay in filing the supplementary record of appeal and submissions was aimed at preventing the Respondents from enjoying the fruits of their lower court judgment. That on 14th October 2024 counsel ought to have requested another counsel to hold his brief as a show of respect to the court. That incase of system down time the court ordinarily in provides an address where pleadings can be sent to. It was pointed that Counsel for the Applicant has not been acting diligently and has missed court on two occasions. That appeals are time bound and reinstatement is not right but is on the discretion of the court. The court is invited to dismiss the application with costs to the Respondent.

Submissions

10. This application was canvassed by way of written submissions and both parties have complied. The applicants submissions are dated 23rd January and the Respondents 31st January 2025.



Applicants Submissions

11. The Appellant/Applicants submitted that they were condemned unheard contrary to Article 50(1) of *the Constitution* yet their submissions were ready and dated 11th October 2024. That it is the e-filing system is that had been interrupted.
12. The Appellants majorly reiterated the contents of their supporting affidavit as captured above and relied further on article 159(2)(d) of *the Constitution*, Sections 1A and 1B of the *Civil Procedure Act* advocating for substantive justice rather than procedural technicalities.
13. To buttress their case the Appellants relied on a myriad of authorities including Mbogo vs Shah (1968) EA 93, as referred to in Pithon Waweru Maina vs. Thuka Mugira(1983)eklr, Elizabeth Kavere & Another vs. Lilian &another (2020) eKLR , Winnie Wambui Kibinge and 2 others vs. Match Electricals limited Civil case no. 222 of 2010.
14. While placing reliance on the case of Philip Kiptoo Chemwelo & Another vs. Augustine Kubede (1986)eklr KAR 103 the Appellant submitted as was held by the Court of Appeal that “ blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit.”
15. It is urged that the court has unlimited discretion to set aside or vary a judgment that was entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of respective merits of the cases. The court was referred to the case of Kimani vs McConnell(1966) EA 545. The court was urged to allow the application with costs pursuant to section 27 of the *Civil Procedure Act*.

Respondents Submissions

16. The Respondents submitted that section 1A of the *Civil Procedure Act* that matters ought to be disposed of expeditiously. Further, that under section 3A of the *Civil Procedure Act* that nothing in the *Civil Procedure Act* shall limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process.
17. The Respondents relied on a myriad of cases including the case of Mobile Kitale Service Station vs Mobil Oil Kenya Limited & Another (2004)eklr where Warsame J had this to say:

“I must say that courts are under a lot of pressure from backlogs and increased litigation, therefore it is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by the delay would be a thing of the past. Justice would be better served if we dispose off matters expeditiously. Therefore, I have no doubt that the delay in the expeditious prosecution of this suit is due to the laxity, indifference and /or negligence of the Plaintiff; that laxity, indifference and negligence should not and cannot be placed at the doorsteps of the defendant. The consequences must be placed on their shoulders.”
18. Relying on the case of Dilpack Kenya Limited vs. William Muthama Kitonyi(2018) eKLR where Odunga J expounded on the nature and quality of the inadvertence. It was submitted that pure and simple inaction by counsel or a refusal to act cannot amount to a mistake, which ought not to be visited on the client.”
19. In conclusion the Respondents submitted that the application be dismissed with costs to them.



Analysis And Determination

19. Upon considering all the foregoing my task is to determine whether the orders sought in the application dated 14th October should be granted.
20. The application has been brought under the provisions of sections 1A, 1B, 1A of the Civil Procedure Act, Order 8 Rule 3,5,8 and 51 Rule 1,2 of the Civil Procedure Rules. I note that Order 8 concerns Amendment of pleadings and this is misplaced. I think Order 10 Rule 11 and Order 12 Rule 7 of the Civil Procedure Rules should suffice for purposes of setting aside orders of the court.
21. In setting aside ex parte Judgment, the Court is called to exercise its discretion. Discretion must however be exercised judiciously. This position was affirmed in the case of Patel v E.A. Cargo Handling Services Limited [1974] E.A. 75 where it was stated:

“There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure.”
23. Also see the Court of Appeal decision in Pithon Waweru Maina vs. Thuka Mugira(1983)e KLR where the court cited Patel Vs E.A Cargo Handling Services Ltd (supra). However the court cautioned against assisting a person seeking to obstruct or delay the course of justice which for me seems to be the main reason upon which the application is being opposed.
24. Justice Nyagaka IUR faced with an application to set aside an order of dismissal on the grounds that counsel experienced internet challenges to log into the virtual platform persuasively observed in the case of Langat v Director of Land Adjudication and Settlement & 3 others; Sabuni & 180 others (Interested Party) (Environment & Land Petition 26 of 2014) [2023] KEELC 21588 (KLR) (17 November 2023) (Ruling) as follows;-

“Even where there is failure of the internet or anticipated network failure, the parties are under obligation to inform the Court as soon as practicable that they are in a problem and unable to log into the virtual session. They do this through calling other colleagues who can have stronger internet to log into the court session and hold brief or inform the court otherwise. They cannot sit back and wait for another day to move the court to set aside proceedings. Moreover, the party has to use technology to demonstrate to the Court that indeed they attempted to log into the court session but failed. For instance, they need to demonstrate through internet logs that they indeed tried to log into the session but failed.’
25. The Applicants/Appellants state that the matter was scheduled on 14/10/2024 for mention to confirm filing of submissions and issuance of a judgment date. That the Appellants/Applicants submissions had already been prepared dated 11th October 2024 pending filing. They were pending filing owing to a system internet outage on the e-filing system which caused an interference on their law firm’s e-filing system profile. That an official communication dated 9th October 2024 was made from the court ICT department concerning the e-filing system interruption.



26. My first stop was then to peruse the communication from the court which is deponed to have been annexed to the supporting affidavit of Mr. Ochanyo. However the same was not attached. The court went out of its way to confirm from the CTS but the same appears not to have been uploaded. I therefore had no way of confirming that there was official communication touching on the system outage. It is also not clear how the services of the ICT officer Siaya Law courts were sourced and whether the assistance was extended remotely. I will however give the benefit of doubt to counsel who is an officer of the court and also noting the registry would not shy from extending assistance in relation to system matters.
27. Is counsel guilty of delay meant to obstruct justice? The court notes that as at 22nd May 2024 the Deputy Registrar noted that the Record of Appeal had been filed. I also note that when the matter came up for directions on the appeal before Koross J on 29/05/2024 while the Appellant did not attend court Ms. Kokeyo sought directions on an application dated 27/05/2024. Ms. Kokeyo withdrew the application on 19/06/2024. On the same day the appellant sought to file a supplementary record as he was awaiting the decree and to index and paginate the record. Ms. Kokeyo stated she had no objection thereto. Leave was granted and directions on disposal of the appeal issued and hearing fixed on 14/10/24 when the impugned orders were issued. From the record I have noted that the appellant has largely attended court.
28. But of utmost importance I note that the appeal was dismissed for want of compliance with the courts directions. These directions related to the filing of submissions and supplementary record of appeal. I have note that the Applicants annexed a copy of the draft submissions. My perusal of the same reveal they are dated 11th October 2025 running 13 pages. This goes to confirm that the same were prepared 3 days prior to 14th October 2024. At least the submissions were prepared and this cannot be deemed as inaction. I also note Counsel for the Applicant moved the court on the present application on the same day being 14th October 2024.
29. The court has noted the submission that there is nothing to reinstate since the record of appeal is incomplete. For me I think this is purely an administrative issue that can be handled by the court by way of further directions. It should not cloud justice. I'm emboldened by the following persuasive decisions In the case of Shashikant C. Patel v Oriental Commercial Bank [2005] eKLR Maraga J (as he then was) held inter alia;
- “...we should never lose sight of the fact that rules of procedure, though they may be followed are the handmaids of justice. They should not be given a pedantic interpretation which at the end of the day denies parties justice.”
30. Similarly, the court in Dominion Farm Limited vs. African Nature Stream & Another Kisumu HCCC No. 21 of 2006 held that:
- “Whereas the rules of procedure are not made in vain and are not to be ignored, often times the Courts will encounter inadvertent transgressions or unintentional or ill-advised omissions through defective, disorderly and incompetent use of procedure but which if strictly observed may give rise to substantial injustice and in such circumstances, the exercise of the discretion of the Court comes into play to salvage the situation for the ends of justice.”
31. The matter being at the stage it is, I think it behooves this court to look at substantive justice and the constitutional right of every individual to access justice by being heard on the exercise of its right to appeal. I see no reason to reject the motion.



32. The application dated 14th October is therefore disposed in the following terms:-

1. The order of this honourable court made on 14th October 2024 dismissing the appeal herein are set aside.
2. The appeal is hereby reinstated.
3. The Supplementary Record of appeal shall be filed and served within 3 days of this Ruling.
4. Costs of the application shall abide the outcome of the appeal.
5. Failure to comply with 3 above the Appeal shall automatically stand dismissed.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 6TH DAY OF MARCH 2025

HON. LADY JUSTICE A.E. DENA

JUDGE

06/03/2025

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Ochanyo for the Applicant

Ms. Kokeyo for the 1st and 2nd Respondent

No appearance for the 3rd & 4th Respondents

Court Assistant: Ishmael Orwa

