



**Kimutai v Kuria (Civil Appeal E204 of 2023)  
[2025] KEHC 1701 (KLR) (Civ) (6 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1701 (KLR)

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

**CIVIL**

**CIVIL APPEAL E204 OF 2023**

**JN MULWA, J**

**FEBRUARY 6, 2025**

**BETWEEN**

**HILLARY KOIN KIMUTAI ..... APPELLANT**

**AND**

**DAVID KURIA ..... RESPONDENT**

**RULING**

1. Before the court for determination is an application dated 16/07/2024 brought by the appellant seeking a review and or setting a ride of orders of the court issued on 28/07/2024 dismissing the appeal herein for want of prosecution upon a Notice to Show cause why the appeal should not be dismissed for want of prosecution.
2. The motion is premised on provision of Order 17 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules and Section 1A, 1B and 3A of the *Civil Procedure Act*.  
The applicant also seeks an order for reinstatement of the appeal (suit).
3. The Advocate representing the appellant, Julia Kariuki swore the Supporting Affidavit setting out the events culminating to the dismissal, but mainly that no notice to show cause was served upon them to enable the Advocates attend court to show cause and therefore has urged the court to set aside the dismissal order and reinstate the appeal for hearing on merit.
4. In opposition, the Respondent filed a Replying Affidavit sworn on 20<sup>th</sup> July 2024 by himself the Respondent.

It is the respondent's averments that the appellant has on multiple times failed to attend court without justifiable reasons causing significant delays in the progression of the appeal that the trial court



judgment was delivered on 25/08/2022 and therefore the applicant's motion is a further delay and argues that the motion should be dismissed.

5. The respondent has filed his submissions undated submissions the applicant has not filed submissions.

6. The Memorandum of Appeal herein is dated 14/03/2023, and the record of appeal 6/09/2023.

It is noted that at all times the respondent and its advocate attended court for mention and that the same position cannot be said of the appellant and or his advocate who in numerous times failed to attend court, contributing to inordinate delay in the progression of the appeal.

7. However, the salient issue here is whether the appellant and or his advocates were served with the Notice to Show Cause why the appeal should not be dismissed and the hearing notice thereof for the 28/06/2024 when due to the appellants failure to attend court and show cause the appeal was dismissed.

8. It is trite that a case (and an appeal in this case) belongs to the litigant, not to the advocate representing the litigant as held in the case of *Ruga Distributors Limited v. Nairobi Bottlers Limited* [2015] eKLR; and *Utalii Transport Company Limited & 3 Others v. NIC Bank & Another* [2014] eKLR for the further holding that it is the primary duty of the plaintiff to take to take steps to progress their case since they are the ones who dragged the defendant to court.

9. The court has perused the Supporting Affidavit and notes that the Advocates office received a text message from the court on 29/06/2024 informing them that the appeal was dismissed for non-attendance a day after the event; and the court file closed.

10. A Notice to show cause (NTC) is ordinarily issued by the Deputy Registrar of the Court and served to both the appellant and the respondent.

11. I have perused the CTS and specifically for the notice to show cause (NTSC). None of the parties have told the court that they were served with notice to show cause, particularly the Respondent. Indeed the respondent laments of delays to progress the appeal by the appellant but does not state that it was served with the notice to show cause.

12. On 24/05/2024, it is noted that in the absence of the appellant, the DR issued a NTSC for service upon the appellant and for hearing on 28/06/2024 before Majanja J. There is nothing in the court proceedings to confirm service or otherwise of the notice to show cause upon the appellant.

13. On 28/06/2024, the matter was listed before Hon. Majanja J. who proceeded to dismiss the appeal for want of prosecution with costs assessed at Kshs. 15,000/=.

There is nothing on record to show that the NTSC had been served; no affidavit of service was filed.

14. To that extend, therefore, this court is satisfied that the NTSC was not served upon the appellant. A party to a suit must be served with all court process before any action is taken against it.

15. Despite the obvious delay in progression of the Appeal, the appellant should not have been condemned unheard.

16. The court finds the application dated 16/07/2024 to be merited and proceeds to allow it in terms of prayers no. 1 and 2 thereof, in the interest of justice and fairness.

The appeal having been reinstated for hearing, directions are issued that both parties attend court for taking directions on the appeal under Order 42 Rule 13 of the Civil Procedure Rules on 20/02/2025.

**DELIVERED DATED AND SIGNED AT NAIROBI THIS 6<sup>TH</sup> DAY OF FEBRUARY 2025.**



**JANET MULWA**  
**JUDGE**

