



REPUBLIC OF KENYA



KENYA LAW
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**Wanja v Muchami (Civil Appeal E039 of 2023)
[2025] KEHC 1941 (KLR) (14 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1941 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E039 OF 2023
RC RUTTO, J
FEBRUARY 14, 2025**

BETWEEN

KAILEMIA LYDIA WANJA APPLICANT

AND

MICHAEL NGANGA MUCHAMI RESPONDENT

RULING

1. Before this court for determination is a Notice of Motion Application dated 17th July 2024 seeking: -
 - a. Spent
 - b. Spent
 - c. That this Honourable court be pleased to set aside its orders issued on 3rd June 2024 dismissing this Appeal and reinstate the same
 - d. That the costs of the Application be borne by the Respondent.
2. The basis of the application is that the appeal was admitted for hearing on 12th February 2024. A mention to confirm filing of the Record of Appeal was scheduled for 3rd June 2024. However, the Respondent served the Applicant's counsel with a mention notice indicating that the matter was scheduled for mention on 3rd July 2024 instead of 3rd June 2024. The matter came up for mention on 4th June 2024 and there was no appearance by both parties. Consequently, the appeal was dismissed for want of prosecution.
3. The application was opposed by the Respondent vide their replying affidavit sworn on 2nd August 2024. The Respondent's counsel stated that she served the Applicant's counsel with the mention date of 3rd July 2024 and on the said date, when they attended court, its counsel was informed that the court suo moto dismissed the appeal for want of prosecution.



4. Pursuant to the directions of this court issued on 9th September 2024, the Appellant filed his submissions dated 1st October, 2024 while the Respondent's submissions are dated 3rd October 2024.
5. The Applicant submitted on only one issue that is, whether the appeal was properly dismissed.
6. It was her submission that there was no attendance on 3rd June 2024 since she was served with an incorrect date. They urged that the matter be reinstated so as not to deny them an opportunity to be heard. They placed reliance on Order 42 Rule 21 of the Civil procedure Rules and referred to the cases of John Nahashon Mwangi v Kenya Finance Bank Limited (In Liquidation) [2015] and Richard Nchapai Leiyangu v IEBC & 2 others Civil Application No. 299 of 2013 and Ridge v Baldin (1964) AC (1963) 2 ALL ER 66 in urging this court to reinstate the appeal.
7. The Respondent delimited the following issues for determination; whether this court should invoke its inherent powers and reinstate the appeal and whether there has been prolonged, inordinate and inexcusable delay on the part of the Appellant/Applicant in prosecuting the appeal.
8. On the first issue, the Respondent submitted that the discretion of the court to reinstate an appeal should not be misused. He made reference to section 1A of the *Civil Procedure Act* on the overriding objective of the court and on the duty of advocates to assist the court to further it. The Respondent relied upon the cases of E. Muriu Kamau and Another v National Bank of Kenya Ltd [2009] eKLR and Esther Wamaitha Njihia & 2 others v Safaricom Limited [2014] eKLR.
9. The Respondent also submitted that the Applicant failed to comply with the court's directions given on 20th May 2024 despite being served via email on 22nd May 2024 which demonstrates that she was not keen on prosecuting the appeal. To buttress this point he relied on the case of Econet Wireless Kenya Limited v Minister for Information & Communication of Kenya and Another [2005] eKLR.
10. On whether there has been prolonged delay on the part of the Applicant, the Respondent referred to the test established in Ivita v Kivumbi [1975] eKLR and submitted that there was prolonged delay in the filing of the Record of Appeal.
11. I have carefully considered the present application, the affidavit in support and opposition of it as well as the parties' respective submissions and it is my view that there are only two issues for determination: -
 - i. Whether this court should reinstate the Appeal for determination on merit
 - ii. Who should bear the costs of the ApplicationWhether this court should reinstate the Appeal for determination on merit
12. The Applicant is seeking to reinstate the appeal on the ground that the Respondent's counsel served them with a mention notice containing an erroneous date. The chronology of events as contained in the record is as follows; the Deputy Registrar gave the parties a mention date of 20th May 2024. On the said date only, the Respondent was present. A further mention date for 3rd June 2024 was scheduled by the court in the presence of the counsel for the Respondent. On 3rd June 2024, the Appeal was dismissed for want of prosecution.
13. The Applicant's position is that the Respondent's counsel misinformed them of the date scheduled for mention by indicating it as 3rd July 2024 instead of 3rd June 2024. The Respondent's counsel in his response confirms that indeed, they served a mention notice for 3rd July 2024 instead of 3rd June 2024.



14. Under Order 12 of the Civil Procedure Rules the court will dismiss an application where a party fails to attend court with full notice of the hearing date. Order 12 Rule 7 Civil Procedure Rules provides:

“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.”
15. The Court of Appeal in *Njue Njagi v. Ephantus Njiru & Another* [2016] eKLR stated that dismissal of a suit for non-attendance by the plaintiff or for want of prosecution amounts to a judgment in that suit. In *Philip Chemowolo & Another v Augustine Kubende* [1986] KLR it was stated that:

“Blunders 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...”
16. Thus, guided by the above, it is clear that where a party demonstrates that they were unaware of the hearing or mention date through no fault of their own, the court can exercise its discretion to rule in favour of such a party. The court has discretion to set aside such a judgment to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake.
17. In this matter an apparent error was made by the parties. The applicant was notified of an incorrect mention date, which led to her failure to attend court on 3rd June 2024. The respondent too failed to attend court on that day. I do find that the non-attendance has been adequately explained and it is excusable. I also find that the respondent will not suffer any prejudice if the appeal is reinstated as he will have a chance to challenge the appeal.
18. The applicant as I have pointed was not made aware of the mention date and the application was brought without undue delay.
19. Therefore, I find that the applicant has shown sufficient cause to warrant this court to set aside the order of June 3, 2024 and reinstate the appeal.
20. The costs shall be in the cause. The matter to be mentioned before the Deputy Registrar.

Orders accordingly

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 14TH DAY OF FEBRUARY 2025

For Appellant:

For Respondent:

Court Assistant:

