



REPUBLIC OF KENYA



KENYA LAW
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**Kadzomba v Isabu (Civil Appeal E087 of 2023)
[2025] KEHC 3475 (KLR) (14 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3475 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E087 OF 2023**

M THANDE, J

MARCH 14, 2025

BETWEEN

FATUMA RUWA KADZOMBA APPELLANT

AND

SYLVIAH NAOMI MACHOCHO ISABU RESPONDENT

RULING

1. Before this Court for determination is a Notice of Motion dated 20.12.23 seeking:
 1. Spent.
 2. That the Honourable Court be pleased to set aside the Orders issued on 31st August 2023 and reinstate the Appellant/Applicant's appeal filed on 18th July 2023.
 3. That the costs of this Application be provided for.
2. The grounds upon which the Application is premised are that the Appellant filed her memorandum of appeal on 9.6.23 and the record of appeal on 18.7.23. By a letter dated 28.7.23, the Appellant sought a mention date for directions on the appeal, which letter was not responded to. The Appellant further states that without any notice to her, the matter was set down for hearing on 31.8.23. Being unaware of the said date, the Appellant failed to attend court. This led to the dismissal of the appeal without notice to her and just 2 months after filing. Further, that the appeal was given a hearing date before directions were given. She urged that the appeal has high chances of success and that it is in the interest of justice that the Application be allowed.
3. The Application is opposed by the Respondent vide a replying affidavit sworn on 20.5.24 by her counsel Mcmillan Edwin Njengo. He deposed that when the matter came up for hearing, the Judge was satisfied about service of the hearing notice and the issue cannot be revisited without reviewing the finding on service on the hearing date. hence proceeded to dismiss the matter. Further that the



Appellant has not annexed any evidence like extracts of her advocate's diary to show that he was not aware of the matter. Additionally, there has been inordinate and unexplained delay in filing the current Application. As such, to file the Application 8 months after appeal was dismissed will occasion prejudice upon the Respondent who has already closed her file. The Respondent urged that the Appellant is not worthy of the exercise of the court's discretion as she is an indolent litigant who has not owned up to her mistakes.

4. Parties filed their written submissions which I have duly considered.
5. The law relating to reinstatement of suits is found in Order 12 Rule 7 of the Civil Procedure Rules, which 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.

6. The Orders sought by the Applicant are discretionary. The rule does not provide the conditions that must be met for reinstatement of dismissed suits. The Court thus has wide discretion to grant orders on terms. The terms must however be just.

7. Order 42 Rule 13(1) of the Civil Procedure Rules provides for directions on appeals as follows:

Upon notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the registrar shall cause the appeal to be listed for the giving of directions by a judge in chambers.

8. I have considered the circumstances of the case. The record shows that the appeal and record of appeal were filed on 9.7.23 and 18.7.23 respectively. There however nothing on record to show that the registrar caused the appeal to be listed for directions before a judge in chambers as required by Order 42 rule 13(1).

9. The Appellant did do what was required of her. While the Court notes that there was failure to attend court on the date set for hearing leading to dismissal of the appeal, I do find that the wider interests of justice require that the appeal be reinstated for hearing on merit. In this regard, I associate with Odunga, J. (as he then was) who in *Robert Kimani Ndungú v Kenya Deposit Insurance Corporation (Being sued in its capacity as the receiver manager of Chase Bank Limited (In Receivership) [2022] eKLR*, stated:

44. In these circumstances, what the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice.

10. I am also guided by the holding in *Patel -vs- E.A. Cargo Handling Services Ltd [1974] EA 75* at page 76 C and E where the Court of Appeal stated:

There are no limits or restrictions on the Judge's discretion to set aside or vary an ex-parte judgement except that if he does vary the judgement, 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 conditions on itself to fetter the wide discretion given it by the rules.



11. The circumstances herein are such that the prejudice that will be suffered by the Appellant should the orders not be granted far outweigh that to be suffered by the Respondent should the orders be granted. In exercising its discretion therefore, the Court opts for the lower rather than the higher risk of injustice, namely to reinstate the appeal for hearing on merit on terms that are just.
12. The upshot is that the Application dated 20.12.23 is merited and allowed on the following terms:
 1. The appeal is hereby reinstated for hearing on merit.
 2. The Appellant shall file and serve submissions by 21.3.25.
 3. In default, the appeal shall stand dismissed.
 4. Mention for compliance on 23.4.25.
 5. The Respondent shall have costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 14TH DAY OF MARCH 2025

M. THANDE
JUDGE

