



**Guardian Coach Limited v Bii (Civil Appeal E020 of 2023)
[2025] KEHC 5769 (KLR) (8 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 5769 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL E020 OF 2023**

JK SERGON, J

MAY 8, 2025

BETWEEN

THE GUARDIAN COACH LIMITED APPELLANT

AND

REUBEN CHERUIYOT BII RESPONDENT

RULING

1. The application coming up for determination is a notice of motion dated 26th March, 2025 seeking the following orders;
 - (i) Spent
 - (ii) That this Honourable Court be pleased to set aside the proceedings of 24th March, 2025 and all the consequential orders.
 - (iii) That the instant appeal be reinstated and the same be set down for mention to confirm filing of record of appeal.
 - (iv) That costs of this application abide in the outcome of the appeal.
2. The application is based on grounds on the face of it and the supporting affidavit of Lydiah Ongwacho an Advocate of the High Court of Kenya practicing as such in the firm name and style of M/S Kairu & Mccourt Advocates and having the conduct of this matter for and on behalf of the Appellant/applicant hence competent and duly authorized to swear this affidavit.
3. She avers that the appeal herein was coming up for mention to confirm filing of record of appeal on 24th March, 2025 however while on her way to court the motor vehicle she was travelling in developed some mechanical problem and thus she was not at a position to attend court on time and that by the time she was in court directions had already been taken and the appeal dismissed for want of attendance.



4. She avers that the non-attendance was not intentional as the same was caused by mechanical problem that was beyond her control and that the instant application has been filed without delay.
5. She avers that the appellant/applicant is desirous to prosecute the appeal and that it is in the interest of justice that appeal be reinstated, all orders made on 24th March, 2025 be set aside, and the appeal be set down for mention to confirm filing of record of appeal and that in the premise it is only fair that this application be allowed.
6. Reuben Cheruiyot Bii the respondent filed a replying affidavit in response to the application.
7. He avers that the application herein is misconceived, bad in law and an abuse of court process as the Advocates that have filed the Application have not complied with the rule of Order 9 Civil Procedure Rules, where there is Change of Advocates after Judgement, they therefore do not deserve the audience of this Honourable Court.
8. He avers that the Applicant appealed against Judgement entered before the Kericho CMCC No. E206 of 2021 through a Memorandum of Appeal filed before this Honourable Court on 28/6/2022 and that they were granted leave to put in their Record of Appeal before this Honourable Court and that to date, the Applicant has never filed any Record of Appeal hence delaying the prosecution and conclusion of this Appeal without any reasonable grounds.
9. He avers that his Advocates on record filed a Notice of Motion together with a Supporting Affidavit dated 22nd day of October 2024 seeking dismissal of Appeal for want of prosecution. The said Application was properly served upon the Applicant but to date they have never responded to it.
10. He avers that the Applicant has not been keen to Prosecute this Appeal and further to that, they have not been attending court intentionally to prolong or delay conclusion of this matter to my disadvantage.
11. He avers that on 31/10/2024, a date taken by consent, the Applicant's Advocate choose to ignore attendance of the court and the Honourable Court was lenient enough to slate the matter for Mention on 24/3/2025 and that further to the foregoing, his Advocates on record served them with Notice to attend court and the Advocate failed to attend court, they attached a copy of a Mention Notice and Affidavit of Service duly filed in court to confirm the same.
12. He avers that the Honourable Court allowed the application for dismissal for want of prosecution and therefore this Honourable Court is functus officio. The Applicants can only Appeal.
13. He avers that this matter has been pending before this Honourable Court for two years now with minimal efforts being made by the Applicant to prosecute their case hence subjecting him to unnecessary delay to accessing justice.
14. He avers that the reasons for non-attendance given by the Advocates is an afterthought to try and mislead this Court and that there is nothing to show that indeed she had travelled annexed to her affidavit.
15. He avers that the Applicant has not come to this court with clean hands, they cannot have their cake and eat it.
16. He therefore avers that if the Honourable Court considers the Application and the Application is allowed he will be subjected to further delay and injustice as the Applicants have had two years to litigate but they have never taken steps to prosecute the same.



17. He reiterated that the replying affidavit was made in opposition to the application dated 26th day of March 2025 and sought to have the application dismissed with costs.
18. The matter came up for inter partes hearing, the learned counsel for applicant reiterated that she would rely on the grounds in the application and the averments in the supporting affidavit and the learned counsel reiterated that she would be relying on the averments in the replying affidavit.
19. Having considered the pleadings by the parties this court finds that the issue (s) for determination are whether to set aside the proceedings of 24th March, 2025 and all the consequential orders and reinstate the instant appeal and the same be set down for mention to confirm filing of record of appeal.
20. On one part, the applicant conceded that the instant suit was slated for mention to confirm filing of record of appeal on 24th March, 2025, however, while on her way to court the motor vehicle she was travelling in developed some mechanical problem and thus she was not at a position to attend court on time and that by the time she was in court directions had already been taken and the appeal dismissed for want of attendance.
21. On the other part, the respondent set out the chronology of events and reiterated that the applicant has not been keen to prosecute this appeal and further to that, they have not been attending court intentionally to prolong or delay conclusion of this suit.
22. The respondent contended that this court having allowed the application for dismissal for want of prosecution, this Court is therefore functus officio, the only recourse open to the applicant is to appeal. The respondent invited this court to consider that the instant matter has been pending before this Court for two years now with minimal efforts being made by the Applicant to prosecute their case hence subjecting him to unnecessary delay to accessing the fruits of judgment.
23. On the issue as to whether to set aside the proceedings of 24th March, 2025 and all the consequential orders and reinstate the instant appeal, the instructive section is Order 12 Rule 7 of the Civil Procedure Rules under which provides that:

“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.”

Courts grapple with dismissal of suits for delay and the subsequent applications for reinstatement, this notwithstanding, there is need for expeditious conclusion of suits.

24. This court wishes to associate itself with the remarks of Warsame J, as he was in *Mobile Kitale Service Station vs. Mobil Oil Kenya Limited & another* [2004] eKLR where it was held:

“I must say that the 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 delay would be a thing of the past. Justice would be better served if we dispose of matters expeditiously. Therefore, I have no doubt the delay in the expeditious prosecution of this suit is due to the laxity, indifference and/ or negligence of the plaintiff. That negligence, indifference and/or laxity should not and cannot be placed at the doorsteps of the defendant. The consequences must be placed on their shoulders.”

25. I am not entirely convinced by the arguments put forward by the appellant’s advocate to explain her non-attendance in court as and when required and more so on 24th March, 2025.



26. In the end, I find the reason put forward to justify the absence of the plausible. Consequently, the Application dated 26/3/2025 is allowed. The order dismissing the Appeal is set aside. The Appeal is reinstated. The same is fixed on 15/7/2025 to confirm the filing of the Record of appeal and for further Orders and directions. Costs of the Application to abide the outcome of this Appeal.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 8TH DAY OF MAY, 2025.

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J. K. SERGON

JUDGE

In the Presence of:-

C/Assistant - Rutoh

Miss Ongwacho for the Applicant

Miss Ngeno for the Respondent

