



**Chitavi v Malesi (Suing on behalf of the Estate of the Late Wilbroda Nyarotso Okwomi - Deceased)
& another (Civil Appeal E165 of 2023) [2025] KEHC 8579 (KLR) (18 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8579 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E165 OF 2023
S MBUNGI, J
JUNE 18, 2025**

BETWEEN

MICHAEL MUNYIFWA CHITAVI APPLICANT

AND

**MARY SHISIA MALESİ (SUING ON BEHALF OF THE ESTATE OF THE LATE
WILBRODA NYAROTSO OKWOMI - DECEASED) 1ST RESPONDENT**

BRIAN OKWARE OMERI 2ND RESPONDENT

RULING

1. What is before this court is a motion dated 14th October 2024, filed by the applicant, brought under Sections 1A, 1B, 3A, and 95 of the *Civil Procedure Act*, Cap 21 Laws of Kenya and Order 45 Rule 1, Order 42 Rules 6 and 21, Order 50 Rule 6, and Order 51 Rule 1 of the Civil Procedure Rules, 2010, seeking a raft of reliefs arising from the dismissal of the appellant’s appeal on 9th October 2024.
2. The applicant sought the following orders:
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of this Application, there be an order of stay of execution of the judgment delivered on 19/10/2023 in Mumias CMCC No. 136 of 2021.
 - d. That the appeal file herein be reopened.
 - e. That the orders made on 09/10/2024 dismissing the appeal herein be set aside.
 - f. That upon granting prayer (5) above, the appeal herein be reinstated and be heard on merit.
 - g. That the record of appeal together with the written submissions be deemed as duly filed.



- h. That the ruling and/ or decision of the court in this application do apply to Kakamega HCCA no. E166 OF 2023 and Kakamega HCCA no. E167 OF 2023 that will be affected by the ruling herein.
 - i. That this Honorable Court do make any such further Orders and issue any other relief it may deem just to grant in the interest of justice.
 - j. That the costs of the application be in the cause.
3. The application is supported by the affidavit of Theldred Wesonga, counsel for the applicant, sworn on even date. He deponed that the appeal herein was dismissed on 9th October 2024 during a mention date for directions when counsel failed to attend due to extraordinary circumstances that had beset the instructing client, Directline Assurance Company Limited.
 4. Counsel averred that the instructing client had, due to internal shareholder disputes, ceased operations and the head office was subsequently invaded, paralyzing its internal systems including access to servers and digital files. A public pronouncement to that effect was allegedly made on Citizen TV on 10th June 2024. As a result, counsel was unable to retrieve or access case files, cause lists, or diaries relevant to this appeal.
 5. It was further deponed that a suit to wit Milimani HCCC No. E328 of 2024 was filed and determined by a ruling dated 4th October 2024 ordering restoration of the affected systems. Counsel indicated that access was restored on 14th October 2024, prompting the immediate filing of the instant application. He asserted that the appeal was ready for prosecution and annexed a draft record of appeal and submissions.
 6. Counsel prayed for the court to exercise its discretion in favor of the applicant and reinstate the appeal to prevent the applicant from being condemned unheard, as failure to attend was not deliberate, but occasioned by exceptional and documented circumstances beyond the applicant's control.
 7. The application was opposed through a replying affidavit sworn on 22nd October 2024 by Okwaro Winnie Anono, an Advocate of the High Court of Kenya acting for the 1st Respondent. She contended that the application is devoid of merit, brought in bad faith, and amounts to an attempt to delay the cause of justice.
 8. The respondent's counsel argued that the appeal ought not to be reinstated because the applicant had failed to comply with clear court directions requiring the filing of the record of appeal and submissions by 30th April 2024, well before the alleged internal wrangles at the instructing insurance company began on 10th June 2024. She asserted that the failure to comply with court timelines preceded the operational challenges cited and thus cannot be excused.
 9. It was deposed further that as of 30th April 2024, there was no competent appeal before this court, and therefore there exists no proper basis upon which a reinstatement could be entertained. According to counsel, the applicant's actions or inactions amount to indolence, and the Court ought not to aid such conduct.
 10. Counsel further submitted that reinstatement of the appeal would greatly prejudice the 1st Respondent who obtained a judgment on 19th October 2023 and is yet to enjoy the fruits thereof. She urged the court to balance the interests of both parties, highlighting that the respondent has not been compensated to date for injuries sustained in a road traffic accident that occurred on 15th July 2021.



11. In the alternative and without prejudice, the 1st Respondent prayed for throw away costs of Kshs. 40,000 in the event the application were to be allowed.

Analysis and Determination

12. The Court has carefully considered the application, the court record, rival affidavits, the applicable law, and the submissions by the applicant dated 24.02.2025.
13. While it is true that court orders ought to be obeyed, and timelines followed, the court also recognizes that the overriding objective under Sections 1A and 1B of the *Civil Procedure Act* mandates it to facilitate the just, expeditious, and proportionate resolution of disputes. The court is further empowered under Section 3A to exercise its inherent jurisdiction to prevent abuse of the process and ensure the ends of justice are met.
14. The record shows that although there was non-compliance with the directions issued for filing of the record of appeal by 30th April 2024, the applicant was active in the proceedings prior to that. The applicant has also submitted reasons that led to the inordinate delay in filing the appeal. The broader context presented, including the documented system outage due to corporate upheaval and the restoration order issued in HCCC E328 of 2024, gives sufficient ground to believe the lapse was not entirely deliberate. Moreover, from the annexures by the applicant, the record of appeal is ready.
15. The Court is persuaded that striking out the appeal in the circumstances would defeat the right to be heard on merit. As held in *Belinda Murai & Others v Amos Wainaina* [1978] KLR 278, "The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better."
16. Nonetheless, this Court cannot ignore the respondent's right to enjoy the fruits of her judgment. A just balance must therefore be struck.

Final Orders

17. Having considered the parties submissions, I hereby issue the following orders; The Notice of Motion dated 14th October 2024 is hereby allowed on the following terms:
 - I. The orders made on 9th October 2024 dismissing the appeal are hereby set aside;
 - II. The appeal is hereby reinstated for hearing on its merits.
 - III. The record of appeal and written submissions annexed by the applicant are hereby deemed as duly filed, and the same shall be served upon the respondent within seven (7) days from today for a response.
 - IV. There shall be a stay of execution of the judgment delivered on 19th October 2023 in *Mumias CMCC No. 136 of 2021*, pending the hearing and determination of the appeal;
 - V. In the interest of justice, mention on 24.7.2025 for directions on the appeal.
 - VI. The applicant shall pay throw away costs of Kshs. 20,000/- to the 1st Respondent within 30 days, failing which the stay granted shall lapse automatically;
 - VII. The ruling herein shall, mutatis mutandis, apply to *Kakamega HCCA Nos. E166 of 2023 and E167 of 2023*;
18. Orders accordingly.



DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 18TH DAY OF JUNE, 2025

S.N MBUNGI

JUDGE

In the presence of :

Court Assistant – Elizabeth Angong'a

Ms. Alukwe for the 1st Respondent present.

Ms Wesonga for the Applicant present .

