



**Kinpash Enterprise Limited v Desbro (Kenya) Limited (Civil Appeal E1280 of 2024) [2025] KEHC 12192 (KLR) (Civ) (5 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 12192 (KLR)

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

**CIVIL**

**CIVIL APPEAL E1280 OF 2024**

**TW CHERERE, J**

**JUNE 5, 2025**

**BETWEEN**

**KINPASH ENTERPRISE LIMITED ..... APPELLANT**

**AND**

**DESBRO (KENYA) LIMITED ..... RESPONDENT**

**RULING**

1. The Appellant moved this Court by a Notice of Motion dated 08<sup>th</sup> April 2025 brought under Article 159(2)(d) of *the Constitution*, Sections 1A, 1B, and 3A of the *Civil Procedure Act*, and Order 42 Rule 21 and Order 51 Rule 1 of the Civil Procedure Rules. The Appellant seeks reinstatement of its appeal which was dismissed on 03<sup>rd</sup> April 2025 for non-compliance with court directions issued on 29<sup>th</sup> January 2025.
2. The application is supported by an affidavit sworn on even date by Andrew Kabugu, counsel for the Appellant, who deposed that on 29<sup>th</sup> January 2025, the Court directed the Appellant to file a record of appeal and submissions within thirty (30) days and fixed the matter for mention on 03<sup>rd</sup> April 2025. He avers that although counsel logged into the virtual court platform on 03<sup>rd</sup> April 2025, the call dropped and he could not participate in the proceedings.
3. He further avers that the Appellant was unable to file the record of appeal as the typed proceedings had not been availed by the registry despite repeated follow-up. The Appellant asserts that the appeal raises arguable issues with high chances of success, and that there is an imminent risk of execution.
4. In response, the Respondent filed a replying affidavit sworn on 22<sup>nd</sup> May 2025 by Suman Kumar Sennik, opposing the application. He contends that the Appellant failed to comply with clear court directions and that no evidence of follow-up on proceedings was provided. Respondent accuses the Appellant of casualness and indolence.



5. The Appellant's submissions dated 29<sup>th</sup> May 2025 reiterated the grounds on the face of the application. The Appellant cited Order 42 Rule 1 and relied on *Kiprotich v Matata* [2024] KEHC 808 (KLR) submitting that the Court has jurisdiction to reinstate the appeal and that the failure to comply with court orders was due to circumstances beyond its control.
6. The Appellant also cited *Kimeu v Family Bank* [2024] KEHC 1279 (KLR), which referenced *Lucy Bosire v Kehancha Div. Land Disputes Tribunal* [2013] eKLR, emphasizing that procedural lapses or mistakes by counsel should not be visited upon litigants.
7. The Respondent filed submissions dated 30<sup>th</sup> May 2025 citing Order 42 Rule 21 and relied on *Shah v Mbogo & Another* [1967] EA 116, *Bernard Muthee & Another v Anita Kamba Mwiti* [2021] eKLR, *Kenya Tea Development Agency v Henry G. Kiambati* [2018] eKLR, *Tana and Athi Development Authority v Jeremiah Kimigho Mwakio & 3 Others* [2025] eKLR, and *Kriza Motors Ltd & Another v Mutunga* [2024] KEHC 9488, urging the Court to decline the invitation to excuse the Appellant's default.

### **Issues for determination**

8. Having considered the motion, the affidavits, and rival submissions, the only issue that falls for determination is whether the Appellant has shown sufficient cause to warrant reinstatement of the appeal.

### **Analysis and Determination**

9. The Court is called upon to determine whether the Appellant has demonstrated sufficient cause to warrant the exercise of judicial discretion in its favour. Central to this determination are principles of justice, access to the right to be heard, and the balance between procedural compliance and substantive adjudication. The Court must consider whether the lapses in procedure were excusable and whether the Respondent will suffer prejudice should the appeal be reinstated.
10. Order 42 Rule 21 provides that:

“If on the day fixed... the appellant does not appear; the court may make an order that the appeal be dismissed. If dismissed... the court shall set aside the order upon such terms as it thinks fit.”
11. This provision vests the court with discretion to reinstate an appeal dismissed for non-attendance, provided sufficient cause is shown and it is just to do so.
12. The principles governing the exercise of this discretion were set out in *Shah v Mbogo* [1967] EA 116, where the Court stated:

“This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”
13. It therefore follows that the primary consideration is whether the default was deliberate or whether it arose from an excusable cause.
14. The failure to file the record of appeal was attributed to the non-availability of typed proceedings despite follow-up. As for non-appearance during the virtual mention on 03<sup>rd</sup> April 2025, counsel



explained that although he had logged into the court platform, the connection dropped, and he was unable to participate.

15. In *Kiprotich v Matata* [2024] KEHC 808, the court, in considering an application to set aside an ex parte judgement cited Court of Appeal decision in *CMC Holdings Ltd vs. Nzioki* [2004] KLR 173, where the court stated that:

“.....In law the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error.....”

16. While the Respondent contested the adequacy of the explanations by the Appellant, the Court takes judicial notice of systemic delays in the preparation of typed proceedings and the technical challenges occasionally experienced during virtual court sessions. As for the Respondent’s reliance on *Tana and Athi River* (supra) and *Kriza Motors* (supra), the Court finds no pattern of disobedience or persistent default by the Appellant in complying with directions concerning filing the record of appeal and submissions.

17. The explanation tendered for the Appellant’s default appears to the Court not to have been deliberate, but rather the result of administrative delays and technical hitches. The rationale in *CMC Holdings Ltd v Nzioki* (supra) underscores the court’s duty to lean in favour of hearing parties on merit where the explanation, though imperfect, is made in good faith and with a measure of diligence.

18. Courts have reiterated that a litigant should not automatically be penalised for the fault of counsel, particularly where the mistake does not cause prejudice that can be remedied by costs. In *Lucy Bosire v Kehancha Divisional Land Disputes Tribunal & 2 Others* (supra), the Court stated:

“It is true that where the justice of the case mandates, mistakes of advocates—even if blunders—should not be visited on clients when the situation can be remedied by costs. Blunders will continue to be made from time to time and it does not follow that because a mistake has been made, a party should suffer the penalty of not having his case determined on the merits.”

19. There is no evidence that the Respondent stands to suffer anything beyond the inconvenience of continued litigation and no prejudice can be said to arise from giving a party a chance to be heard unless the delay is egregious and unexplained.

20. The Court is not satisfied that the Respondent has suffered irredeemable prejudice, nor that reinstating the appeal would amount to an abuse of process. On the contrary, denying the Appellant an opportunity to be heard where the default was not deliberate would amount to undue hardship.

21. Article 50(1) of *the Constitution* guarantees a fair hearing. Article 159(2)(d) enjoins courts to administer justice without undue regard to procedural technicalities. In *Philip Chemwolo v Augustine Kubende* [1982–88] KAR 103, it was stated:

“The door of justice is not closed because a mistake has been made by a man of experience who ought to have known better... the Court ought to do whatever is necessary to rectify it if the interests of justice so dictate.”

22. In the result, the Court finds that the threshold for reinstatement has been met. The Appellant has provided a reasonable, though imperfect, explanation. In keeping with the principles stated above and guided by the overriding objective under Sections 1A and 1B of the *Civil Procedure Act*, the Court is



persuaded that it is in the interest of justice to reinstate the appeal and allow the matter to be heard on its merits.

### **Disposition**

23. From the foregoing analysis, I find that the notice of motion dated 08<sup>th</sup> April 2025 has merit and it is allowed on the following terms:
1. The appeal is hereby reinstated
  2. The Appellant shall file and serve the record of within thirty (30) days from today
  3. The Appellant shall pay throw-away costs of KES. 10,000 to the Respondent within the 7 days.
  4. Mention before the Deputy Registrar on 31<sup>st</sup> July 2025 to confirm compliance

**DELIVERED AT NAIROBI THIS 05<sup>TH</sup> DAY OF JUNE 2025**

**WAMAE.T. W. CHERERE**

**JUDGE**

Appearances

Court Assistant - Ubah

For Appellants - Ms. Wairimu for Kabugu & Co. Advocates

For Respondent - Ms. Manjogu for CMAAdvocates LLP

