



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kinyua v Serea & 3 others (Civil Appeal E790 of 2022)  
[2025] KEHC 7944 (KLR) (Civ) (5 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 7944 (KLR)

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

**CIVIL**

**CIVIL APPEAL E790 OF 2022**

**AC MRIMA, J**

**JUNE 5, 2025**

**BETWEEN**

**ISOLINA KAWIRA KINYUA ..... APPELLANT**

**AND**

**GLADYS NASEIYA SEREA ..... 1<sup>ST</sup> RESPONDENT**

**ISAAC NDUNG’U WAMBUI ..... 2<sup>ND</sup> RESPONDENT**

**GEORGE NDIRANGU WERU ..... 3<sup>RD</sup> RESPONDENT**

**MOSES ODHIAMBO OWUOR ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. Through an application by way of Notice of Motion dated 28<sup>th</sup> January 2025, the Appellant/Applicant sought the following orders: -
  1. .... Spent
  2. .... Spent
  3. The orders made dismissing the Appellants appeal for want of prosecution be set aside and the Appellant be granted leave to file Record of Appeal, the Appeal be admitted and prosecuted for hearing and determination on merit.
  4. There be a stay of execution of the judgement entered and decree made in Nairobi Small Claims Court Case No. E485 of 2022 Gladys Naseiya Serea & Isaac Ndung’u Wambui vs Isolina Kawira Kinyua & George Ndirangu Weru & Moses Odhiambo Owuor.
  5. The costs of this application in the cause.



2. The application was strenuously opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, hence, this ruling.
3. The application was supported by the grounds on the face of it and the Affidavit sworn on 28<sup>th</sup> January 2025. The application arose out of the order of this Court made on 30<sup>th</sup> June 2023 where the Court dismissed the appeal for want of prosecution under Order 42 Rule 35(2) of the Civil Procedure Rules. The Applicant averred that she promptly filed the Memorandum of Appeal and requested for typed proceedings and judgment for purposes of compiling and filing the Record of Appeal. That, upon follow up on the online portal, she learnt that the appeal had been dismissed. Additionally, the Applicant averred that neither any formal notice to dismiss the appeal was issued nor served upon her. She further averred that the appeal was not admitted for hearing and no directions for hearing were given. The Applicant further averred that she is desirous to have the appeal expeditiously heard and determined, and that if the orders sought are not granted, she will suffer irreparably.
4. In opposing the application, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed Grounds of Opposition dated 13<sup>th</sup> February 2025 and a Replying Affidavit sworn on 14<sup>th</sup> February 2025. They averred that the Applicant was guilty of laches and indolence as the Applicant's application for reinstatement was filed one year seven months after the appeal was dismissed. They further submitted that the Applicant was forum shopping as she filed a similar application before the lower Court. In conclusion, they submitted that the application should be dismissed with costs because it is an abuse of the Court process, is bad in law, frivolous and vexatious.
5. Pursuant to the directions of this Court, the application was canvassed by way of written submissions. The Applicant's submissions were dated 26<sup>th</sup> February 2025 while the Respondents' submissions were dated 11<sup>th</sup> March 2025. The gist of these submissions will be ingrained in the latter part of this ruling.
6. Having considered the application, the responses, the submissions and the decisions referred to by the parties, the issue that stands out for this Court's determination is whether the application is merited.
7. From the record, the application was filed under Order 42 Rule 35(2) of the Civil Procedure Rules which provides as follows: -

Dismissal for want of prosecution [Order 42, rule 35]

1. Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.
  2. If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in Chambers for dismissal.
8. The above provision gives two scenarios upon which a Court may dismiss an appeal for want of prosecution. The first instance is where directions have been given in the appeal. In that case, if the appeal is not set down for hearing within three months of the directions, then, the Respondent may either set the appeal down for hearing or apply for its dismissal. The second instance arises when the appeal is not set down for hearing within one year of service of the memorandum of appeal. In such a case, the Registrar may list the appeal for dismissal.
  9. The above rule ought to be read in tandem with Article 159[2][b] of *the Constitution* and Sections 1A and 1B of the *Civil Procedure Act* which call for expeditious and fair determination of disputes. To that end, further to the provisions of Order 42 Rule 35 of the Civil Procedure Rules, a Court seized of an



appeal may, subject to appropriate notice given, dismiss an appeal at anytime if the circumstances call for such an order. For instance, if a Court lists an appeal for directions and the parties do not appear despite service on several occasions, the Court may dismiss the appeal either for want of prosecution and/or for non-attendance. It all depends on the peculiar instances of a case. Order 42 Rule 35 of the Civil Procedure Rules should, therefore, not be construed to mean that appeals can only be dismissed under the two scenarios provided therein. A Court always reserves its inherent powers to ensure that justice is done and such powers include dismissal of appeals in appropriate instances.

10. According to the record, the appeal was dismissed on 30<sup>th</sup> June 2023 under Order 42 Rule 35 of the Civil Procedure Rules following issuance of a Notice to Show Cause why the appeal should not be dismissed. On the said day, none of the parties appeared in Court and there being no cause shown, the appeal was dismissed. Nothing seems to have taken place until in 2025 when the Applicant filed the instant application seeking reinstatement of the appeal and an order for stay of execution of the judgment and decree. The reasons tendered by the Applicant for the intervening period since the dismissal of the appeal have already been captured above. The reasons have been opposed to by the Respondents in equal measure.
11. It is still on record that when the Applicant filed the Memorandum of Appeal on 7<sup>th</sup> October 2022, the Deputy Registrar of this Court called for the trial Court's file vide a letter dated 12<sup>th</sup> October 2022. The file was forwarded to this Court through a letter dated 21<sup>st</sup> March 2023. Therefore, when the appeal was dismissed on 30<sup>th</sup> June 2023, the trial Court's file had already been forwarded to and received by this Court. The matter was then listed before the Hon. Deputy Registrar for directions in the months of May and June 2023 before the dismissal. The record has it that when the parties failed to once again appear on 29<sup>th</sup> May 2023, the Court listed the appeal for dismissal on the 30<sup>th</sup> June 2023 and directed service to be undertaken. There is, however, no evidence of service.
12. Without proof of service, there is no way a party can be accorded a fair trial as envisaged under Article 50[1] of *the Constitution*. According a party an opportunity to present its case is at the heart of the constitutional imperative of fair trial. In this case, despite the delay in bringing the instant application, the Applicant was not accorded an opportunity to be heard by way of proper service before the appeal was dismissed. The Applicant was, therefore, not aware that her appeal had been dismissed since there is still no evidence that she was neither informed of the availability of the trial Court's file nor called upon for directions at any of the instances when the appeal came up before the Deputy Registrar.
13. Deriving from the foregoing discussion, it is apparent that the Applicant was not heard before the appeal was dismissed for want of prosecution. As such, despite the time that lapsed between the dismissal of the appeal and the filing of the application under consideration, the legal clock has to unwind and return to factory settings, so to say.
14. Having found as much, the next consideration is the quest for stay of execution of the decree. In striking a balance between the period that has since lapsed since the delivery of the impugned judgment on 23<sup>rd</sup> September 2022 and the need to accord the Applicant an opportunity to be heard on appeal, the Applicant will deposit the judgment sums in Court as security, and, since the lower Court file is before this Court and the proceedings are certified, this Court will give further orders on way forward.
15. In the end, the following final orders do hereby issue: -
  - (a) The appeal be and is hereby reinstated and the dismissal order made on 30<sup>th</sup> June 2023 is hereby set-aside and quashed accordingly.
  - (b) There shall be a stay of execution of the judgment and decree in Nairobi Small Claims Court Case No. E485 of 2022 pending the determination of this appeal on condition that the



Applicant deposits the judgment sums in Court in the next 21 days of this ruling, and, in default execution to issue.

- (c) Since the trial Court's record is before Court and with a view to expedite the disposal of the instant appeal, the following orders do hereby issue: -
- (i) The appeal is hereby admitted for hearing and the filing and service of the Record of Appeal is hereby dispensed with.
  - (ii) The Appellant shall file and serve written submissions within 14 days of this ruling.
  - (iii) Upon service, the Respondents shall file and serve written submissions within 14 days of service.
- (d) Highlighting of submissions on a date to issue.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 5<sup>TH</sup> DAY OF JUNE, 2025.**

**A. C. MRIMA**

**JUDGE**

Ruling No.1 virtually delivered in the presence of:

Mr. Odawa, Learned Counsel for the Appellant.

Mrs. Okure, Learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

Michael/Amina – Court Assistants.

