



REPUBLIC OF KENYA



**Mkenda v Kithoka (Civil Appeal E1492 of 2023)
[2025] KEHC 8841 (KLR) (Civ) (23 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8841 (KLR)

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

CIVIL

CIVIL APPEAL E1492 OF 2023

LP KASSAN, J

JUNE 23, 2025

BETWEEN

CHRISTINE MKENDA APPELLANT

AND

MARY NGONDU KITHOKA RESPONDENT

RULING

1. Before this court is a Notice of Motion dated 24.11.2024 brought under Order 12 Rules 7, of the [Civil Procedure Rules](#), Sections 1A, 1B, and 3A, of the [Civil Procedure Act](#) wherein the Applicant seeks orders to wit:
 - a. That this Honourable court be pleased to set aside the dismissal orders issued on 19th November 2024.
 - b. That this Honourable Court be pleased to reinstate the Appeal herein, which was dismissed for want of prosecution on 19th November 2024.
 - c. That the costs of this application be provided for.
2. The said application is premised on the grounds on its face and further supported by the affidavit sworn by the Counsel for the Applicant. The Applicant's case is that when the matter came up for hearing of the notice to show cause, the Appellant/Applicant had filed a Replying affidavit setting out reasons why the appeal should not be dismissed. The dismissal of the appeal was occasioned by the inadvertent error on the part of the Appellant's advocate. The Appellant has at all material times acted with due diligence in seeking to prosecute the appeal, but has been impeded by difficulties in obtaining the requisite proceedings and decree from the trial court. The Applicant's position is that no prejudice shall be occasioned to the Respondent should the appeal be reinstated. It is further submitted that it is



in the interest of justice that the Appellant be afforded an opportunity to have the appeal determined on its merits.

3. In the Replying Affidavit, the 2nd Respondent reiterates the grounds of opposition and further avers that the Appellant has not provided a satisfactory explanation for the delay in filing the appeal and that allowing the application would prejudice the 2nd Respondent.
4. The Respondent has never entered an appearance.

Applicant's Submissions

5. The Appellant/Applicant submits that the dismissal of the appeal was occasioned by an inadvertent and bona fide mistake on the part of counsel, and not as a result of negligence or want of prosecution. The Respondent has not demonstrated any prejudice that would warrant the denial of the Appellant's right to be heard. The Appellant has acted promptly and diligently in seeking to have the appeal reinstated, thereby evidencing a bona fide intention to prosecute the appeal.
6. With regard to the issue of costs, the Appellant submits that the Respondent has not filed any pleadings or taken any steps in this appeal, and as such, cannot claim to have suffered any prejudice. The Appellant/Applicant prays the present application be allowed as prayed.
7. The issues for determination herein are
 - i. Whether the application has merits and the appeal be reinstated?
 - ii. Who should bear the costs?
8. The principles governing reinstatement of a suit was discussed by Gikonyo J. In the case of *John Nabashon Mwangi v Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR as follows:

“The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of the *Constitution*. Article 50 coupled with Article 159 of the *Constitution* on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the court. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such acts are comparable only to the proverbial “Sword of the Damocles” which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated.”
9. In this instant suit, the Applicant has illustrated that the Counsel on record had filed a replying affidavit in response to the suit being listed for dismissal on 22.10.2024. That the suit was erroneously diarized in Counsel's diary for 22.11.2024. Further, there is an indication that the Applicant had applied for proceedings and the decree at the Small Claims Court; however, the same took too long. Also, the suit was dismissed on 19.11.2024 and this application was brought on 25.11.2024, about 5 days after dismissal, hence the delay was not inordinate.



10. I am satisfied that the interests of justice warrant the reinstatement of the appeal, albeit subject to stringent conditions. I am equally satisfied that the Respondent shall not suffer any demonstrable prejudice as a result of such reinstatement.
11. Consequently, the order of dismissal is hereby set aside, and the appeal is reinstated.
12. Taking all relevant factors into consideration, I do order that;
 - a. The Appellant is directed to take steps to set down the appeal for hearing within sixty (60) days from the date hereof.
 - b. Failure to comply with this directive shall result in the appeal standing dismissed without the necessity of any further application.
 - c. The costs of this Application will be in the cause.
13. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 23RD DAY OF JUNE 2025

LINUS P. KASSAN

JUDGE

In the presence of: -

Kamwara holding brief Karanja for Appellant

Ohgen Respondent

Carol – Court Assistant

