Republic v Inspector General, National Police Service & 2 others; Omwoyo (Ex parte Applicant); (Odpp) (Interested Party) (Judicial Review E231 of 2024) [2025] KEHC 8643 (KLR) (Judicial Review) (19 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8643 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW E231 OF 2024

JM CHIGITI, J

JUNE 19, 2025

BETWEEN

REPUBLIC ..... APPLICANT

AND

THE INSPECTOR GENERAL, NATIONAL POLICE SERVICE .... 1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATION ..... 2ND RESPONDENT

SUB-COUNTY DIRECTOR OF CRIMINAL INVESTIGATION OFFICER, KASARANI POLICE STATION ..... 3RD RESPONDENT

AND

OSORO KENNEDY OMWOYO ..... EX PARTE APPLICANT

AND

PROSECUTION (ODPP) ..... INTERESTED PARTY

RULING

1. The Applicantion that is before this Court is the one dated 31st January, 2025 and filed under Under 51 Rule 1 and 2, Order50, Rule 6 of the *Civil Procedure Rules*, Section 3 and 3A of the *Civil Procedure Act* and all other enabling Provisions of the Law.

2. The applicant is seeking the following Orders:

    1. ...spent.

2. That the Honourable Court be pleased to enlarge time for filing substantive application in this suit upon such terms are just.

3. That the Honourable Court be pleased to grant leave for the Ex parte Applicant to file Notice of Motion, Statutory Statement, Verifying Affidavit and annexures thereto as attached to this application.

4. That the attached Notice of Motion, Statutory Statement, Verifying Affidavit and annexures be marked as filed upon payment of the requisite fee.

3. The application is premised on the grounds that on 11th October 2024 this court ordered the Applicant to file a substantive application within a period of 14 days.

4. At the time the Orders were issued, the firm of Nyambura Gichuhi & Co. Advocates was on record and acting on behalf of the Exparte Applicant.

5. The said firm failed to file the substantive Application in time as ordered by the Court. This lapse was not communicate to the Exparte Applicant by counsel

6. The Applicant contends that he made all efforts to pursue/contact his previous advocate in vain.

7. It is his case that the delay in filing the substantive Notice of Motion was due to the mistakes of his previous advocate and prays to this Honourable Court to consider that the mistakes of an advocate ought not to be visited on an innocent litigant.

8. The Applicant places reliance in the case of *Tego v Tego* (Miscellaneous Civil Application E005 of 2023) [2024] KEHC 1501 (KLR) (8 February 2024) (Ruling) Neutral citation: [2024] KEHC 1501 (KLR) where the high court of Kenya at Marsabit has held; -

> " 22. It is my finding that the applicant was let down by his former advocates who failed to file the appeal within the time granted by the court. I do not think that it is proper for the applicant to be punished for a wrong committed by his former advocates. I also do not think that the delay of six months in filing the appeal is inordinate as to cause the applicant to be denied an opportunity of being heard on appeal. The respondent has not shown that the delay has caused him any prejudice in as far as the hearing and determination of the appeal is concerned. In my view justice can still be done despite the delay. The respondent can be compensated by way of costs for any delay. I am thereby inclined to allow the application. In doing so. I am reminded of the sentiments of the Court of Appeal in *Kamlesh Mansukhalal DamkiPatni v Director of Public Prosecution & 3 Others* [2015] eKLR where it was stated that: "It suffices to comment that a court of law should be hesitant at closing the door to the corridors of justice prior to a litigant being heard on his complaint..."

9. It is his submission that under section 3, 1A and 1B of the *Civil Procedure Act* this court has inherent powers to make any orders as may be necessary for the ends of justice and /or to prevent the abuse of due process.

10. The Applicant also invokes, Order 50, rule 6 *Civil Procedure* and Article 159 (d) of the *constitution 2010* which states that justice shall be administered without undue regard to procedural technicalities.

11. Reliance is placed in the case *Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints* [2016] eKLR the court of appeal made the following observation: -

> The extent of inherent powers of the court was eloquently explained by the authors of the Halsbury's Laws of England, 4th Edn. Vol. 37 Para. 14 as follows;
>
> > " "The jurisdiction of the court which is comprised within the term "inherent" is that which enables it to fulfill itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. Page 4
> >
> > The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process... In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties.

12. It is his case that the rules of Natural Justice dictate that both parties must be heard for the court to arrive at just and fair decision.

13. He further argues that his application is unopposed as none of the Respondents filed a Replying Affidavit or Grounds of Opposition.

The Respondents Case:

14. The Respondents had filed a Notice of Preliminary Objection on 10th January 2025 and submissions.

Analysis and Determination;

Upon considering the Application, the issue that falls for determination is whether the motion is merited.

15. In *Wachira Karani v Bildad Wachira* (2016) eKLR as was quoted in the case of *David Gicheru v Gicheha Farms Limited & another* [2020] eKLR the Court held that: -

> " The fundamental duty of the Court is to do justice between the parties. It is in turn, fundamental that to that duty, those parties should each be allowed a proper opportunity to put their cases upon the merits of the matter..."

16. In *Karinga Gaciani & 11 Others v Ndege Kabibi Kimanga & Agnes Wangechi* the Supreme court said that it is not enough for a party to simply blame the advocates on record for all manner of transgressions. Courts have always emphasized that parties have a responsibility to show interest in and

to follow up on their cases even when they are represented by counsel, and it does not matter whether the party is literate or not.

17. As held in *Savings and Loans Ltd v Susan Wanjiru Muritu* HCCC No. 397 of 2002;

> "It is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgement that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant."

18. The Court of Appeal in *Kariuki v Wangeci & 7 others* (Civil Application E250 of 2023) [2024] KECA 1692 had the following to say;

> "On behalf of the respondent, reliance was placed on the authorities in *Rajesh Rughani v Fifty Investments Limited & Another* [2016] eKLR for the proposition that it is not enough to blame previous counsel on record without an explanation as to the action taken by the litigant to show that he did not condone or collude in the delay; *Paul Makokha Okoiti v Equity Bank & Attorney General* [2016] eKLR to highlight the position that self-representation is not a panacea or licence to demand that one must get what he asks; and *Nicholas Kiptoo Korir Salat v Independent Electoral and Boundaries Commission & 6 Others* [2013] eKLR to highlight the need to respect the rules and timelines."

19. The Respondents had filed a Notice of Preliminary Objection on 10th January 2025 which is before the application that is before this court for determination was filed. Even though the Respondent makes reference to it in its submissions, it has no bearing on the application and I so hold.

20. The court of Appeal in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR: "Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.

21. The respondent did not file a Reply affidavit. The upshot of the foregoing analysis is that the application is unopposed. From the uncontroverted evidence it is probable that the Applicant had made all efforts to pursue his previous advocate, even went to the extent making numerously visits to the advocate's offices. He ultimately engaged another advocate.

22. Article 48 of the *Constitution* 2010, provides that;

> " The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice."

23. In the same breath, article 159 of the *Constitution* provides for the following;

> " (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.
>
> (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
>
> (a) justice shall be done to all, irrespective of status;
>
> (b) justice shall not be delayed;
>
> (c) alternative forms of dispute resolution including reconciliation, *Constitution of Kenya, 2010* mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
>
> (d) justice shall be administered without undue regard to procedural technicalities; and
>
> (e) the purpose and principles of this *Constitution* shall be protected and promoted."

24. This court therefore has a duty to protect the right as enshrined (*supra*) and the regard for procedural technicalities is disregarded herein to facilitate meeting the ends of justice.

25. In the case of *Choka & another v Nkonge* (Civil Appeal E988 of 2022) [2024] KEHC the court opined in this manner;

> " I associate with the holding of Kimaru J in *Savings and Loans Limited v Susan Wanjiru Muritu* Nairobi Milimani) HCCS No 397 of 2002 where he pronounced thus; 'Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates failure to attend Court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour is an indictment on the defendant.'"

26. The court in *Mokaya v Westland Property Limited* (Civil Appeal 211 of 2020) [2023] KEHC similarly held the position as that;

> " It was submitted that the non-attendance was due to inadvertence mistake by counsel which was admitted and explained to the court. That the Appellant should not be punished for

mistake of counsel. Reliance was made on the case of *Belinda Muras & others v Amos Wainaina* (1978) KLR where Madan JA held as follows: "A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because of a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate."

8. The case of *Philip Chemwolo & another v Augustine Kubede* (1882-1988) KLR 103 at 1040 was cited where Apaloo JA stated that: Blunders will continue to be made from time to time and it does not follow that because a mistake has been made, that a party should suffer the penalty of not having his case heard on merit..."

9. Also cited was the case of *Martha Wangari Karua v IEBC*, Nyeri Civil Appeal No.1 of 2017 where the Court of Appeal stated that: The Rules of natural justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be."

27. It is my finding that the applicant has demonstrate to the satisfaction of the court that he kept himself abreast of the progress of his case.

Disposition;

28. The application has merit.

Order;

The application is allowed in the following terms.

i. The Notice of Preliminary Objection is dismissed.

ii. The time for filing the substantive application in this suit is expanded.

iii. Leave is hereby granted for the Ex parte Applicant to file the Notice of Motion, Statutory Statement, Verifying Affidavit.

iv. The attached Notice of Motion, Statutory Statement, Verifying Affidavit and annexures shall be deemed as duly filed upon payment of the requisite court filing fees which in any event must be within 2 days of today's date.

v. The substantive Notice of Motion shall be served within 3 days thereafter.

vi. The Respondents and the interested Party shall file their responses or further responses if any within seven days of service.

vii. The matter shall be mentioned for purposes of reporting compliance on 14.10.25.

viii. Costs in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF JUNE, 2025

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J. CHIGITI (SC)

JUDGE