



REPUBLIC OF KENYA



**Chemutai v Mogesi (Civil Appeal 56 of 2019) [2025] KEHC 10786 (KLR) (24 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10786 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL 56 OF 2019  
SM MOHOCHI, J  
JULY 24, 2025**

**BETWEEN**

**VICKY CHEMUTAI ..... APPLICANT**

**AND**

**PETER KIUMU MOGESI ..... RESPONDENT**

**RULING**

1. Before me is an Application for review and setting-aside of orders of dismissal of the Appeal dated 7<sup>th</sup> July 2023 for want of prosecution and to reinstate the same for hearing.
2. The Applicant contends that no formal notice to show cause why the Appeal should not be dismissed for want of prosecution, was served upon them and that the Applicants advocates M/s Gekonga and Co. Advocates had repeatedly and in vain sought for the Appeal to be placed for mention and directions before the judge.
3. The Applicant contends that the court was in err on the 7<sup>th</sup> July 2023 when it dismissed the Appeal for want of prosecution.
4. That, the Applicant was not served with a notice to show cause before the appeal was dismissed for want of prosecution as is required by law.
5. That the Applicant through their advocates on record has written several letters requesting for the matter to be mentioned before the judge to no avail.
6. That the Applicant has always been ready and desirous of prosecuting the appeal herein.
7. That this Court has wide and unfettered discretion to set-aside orders when justice so demands and the Applicant is bound to suffer irreparable harm should the Application be disallowed.



## Analysis & Determination

8. I have carefully considered the Application, Supporting Affidavit, the Applicant's written submissions and note that the motion is unopposed and that the Respondent elected as such despite being afforded an opportunity to make his representation.
9. The only issue which arise for determination is whether the Application has merit to warrant review of the Order of dismissal.
10. In an application for reinstatement of a dismissed suit or application, an applicant appeals to the discretion of the Court. The Court must caution itself not to exercise its discretion in a manner that will result in an injustice. This position is fortified in the case of *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR, where the Court of Appeal stated:

“We agree with those noble principles which go further to establish that the court's discretion to set aside an ex-parte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. We have considered the reasons that were offered by the appellant regarding their failure to attend court on the 10<sup>th</sup> June, 2013 with anxious minds. We have asked ourselves whether failure to attend court on 10<sup>th</sup> June, 2013, constituted an excusable mistake, an error of judgment regarding counsel's failure to diarize the date properly or was it meant to deliberately delay the cause of justice”.
11. The principles for Review and setting-aside were propounded in the matter of *Fredrick Otieno Outa vs Jared Odoyo Okello & 3 others*, SC Petition No 6 of 2014; [2017] eKLR the circumstances under which this Court may review its decisions, either on its own motion, or upon application by a party as follows:
  - a. The judgment, ruling or order is obtained through fraud, deceit or misrepresentation of facts;
  - b. The judgment, ruling or order is a nullity by virtue of being made by a court which was not competent;
  - c. The court was misled into giving judgment, ruling or order under the belief that the parties have consented; and
  - d. The judgment, ruling or order was rendered on the basis of repealed law or as a result of a deliberate concealment of a statutory provision.
12. The circumstances of this case are insufficient to persuade the Court to review its order of dismissal.
13. While the Applicant contends that her Advocates were never served with a notice to show cause why the Appeal should not be dismissed for want of prosecution it is apparent and explicit that on the 17<sup>th</sup> April 2023 the Deputy Registrar issued a notice to show cause together with a cause lists for the said purpose from the 2<sup>nd</sup> May 2023. The email together with the notice was sent to a large number of Advocates including the email address Mongare Gekonga-gekongacoadvocates@gmail.com .
14. I further note that all annexures by the Applicant showcasing her determination to prosecute the Appeal were letters written between the 16<sup>th</sup> July 2020 and 11<sup>th</sup> August 2022 all the letters written to the court were never properly filed but were rather sent as email attachments through the same email:

adressgekongacoadvocates@gmail.com .



15. In the Letter dated 5<sup>th</sup> October 2021 the Applicant was invited to send their representatives to confirm if the Appeal had been admitted and thereafter obtain a hearing date. The Applicant has not made any attempt to explain if this opportunity was ever put to use.
16. I find no fault in the order of dismissal of Appeal for failure to show cause and accordingly find this Application to be without merit.
17. The costs of this Application will be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAKURU ON THIS DAY OF 24<sup>TH</sup> DAY OF JULY, 2025.**

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**MOHOCHI SM**

**JUDGE**

