



Edward & another v Wahome (Suing as the Legal Representative of the Estate of Lucy Seben) (Civil Appeal E045 of 2024) [2025] KEHC 9523 (KLR) (2 July 2025) (Ruling)

Neutral citation: [2025] KEHC 9523 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E045 OF 2024
AN ONGERI, J
JULY 2, 2025**

BETWEEN

GITONGA NGORE EDWARD 1ST APPELLANT

GEOFFREY KAMAU 2ND APPELLANT

AND

PETER NDIRANGU WAHOME RESPONDENT

SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF LUCY SEBEN

RULING

1. The application coming for consideration in this Ruling is dated 1st May 2025 brought under Section 1A, 1B, 3A and 95 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya and Order 45 Rule 1 Order 42 Rule 6 Order 42 Rule 21 Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law seeking the following prayers:-
 - i. That this application be certified urgent, service be dispensed with thereof and the same be heard ex-parte in the first instance.
 - ii. That pending hearing and determination of this application, there be an order of stay of execution of the Ruling of the Honourable Judge delivered/issued on 14th January 2025 and all consequential orders and proceedings hereto be and is hereby issued.
 - iii. That pending the hearing and determination of this application there be an order of stay of execution of the judgment delivered on 26th April 2024 in Voi CMCC 124 of 2023.
 - iv. That this appeal being VOI HCCA NO. 45 OF 2024 be and is hereby reinstated for hearing and determination on merit.



- v. That this Honourable Court be pleased to stay execution of the judgment and decree in Voi Civil Case No. 124 of 2023 delivered on 26th April 2024 pending the hearing and determination of VOI HCCA NO. 45 OF 2024.
 - vi. That upon prayer (v) being granted the honourable court be pleased to order that the Appellants do provide security up to Kshs. 3,000,000/= being their insurer's statutory limit.
 - vii. That this Honourable Court do make any such further order(s) and issue any other relief it may deem just to grant in the interest of justice.
 - viii. That the costs of the application be in the cause.
2. The application is based on the following grounds:-
- i. That on 16th January 2025 the Appellants appeal was dismissed for non-attendance.
 - ii. That the failure to attend was occasioned by the fact that the memorandum of appeal that is Voi HCCA No. 45 of 2024 had been filed by Mr. Nganga acting at the time on behalf of the Appellants.
 - iii. That Mr. Nganga left employment but inadvertently forgot to tell anyone that they had filed the memo of appeal.
 - iv. That not knowing that an appeal had already been filed an application seeking leave to appeal out of time the judgment in Voi CMCC No. 124 of 2023 was filed by Ms. Otieno that is Voi Misc. App. No. 56 of 2024.
 - v. That the application seeking leave to appeal out of time was withdrawn later on after we realized that there was indeed a substantive appeal.
 - vi. That as such, this appeal was dismissed on 16th January 2025 for non-attendance on behalf of the Appellants who were unable to attend for the aforesaid reasons.
 - vii. That the appeal having been dismissed and the Appellants are now exposed to imminent execution from counsel of the Respondent.
 - viii. That it is only just and fair that the appeal be re-instated and heard in the normal way as the Appellants had has an arguable appeal.
 - ix. That unless the appeal is re-instated the Appellants stand to suffer irreparable loss and damage and their appeal on quantum will be rendered nugatory.
 - x. That it is in the interest of justice that the Appeal be reinstated and the same be heard to a logical conclusion.
 - xi. That this application will not occasion any prejudice to the Respondent or any damage that cannot be compensated by way of costs if this application is allowed.
 - xii. That this application has been made without unreasonable/inordinate delay.
3. The Respondent opposed the application by filing a Replying Affidavit dated 8th May 2025 in which it is deponed as follows:-
4. The parties filed written submissions as follows;
5. The applicants submitted that they are seeking the reinstatement of their appeal (Voi HCCA No. 45 of 2024), which was dismissed on 16th January 2025 due to non-attendance.



6. They explained that the failure to attend was inadvertent, arising from the fact that their former counsel, Mr. Nganga, had filed the memorandum of appeal but left employment without informing anyone, leaving the appellants unaware of the pending appeal.
7. Consequently, they mistakenly filed an application for leave to appeal out of time (Voi Misc App No. 56 of 2024), which was later withdrawn upon discovering the existence of the dismissed appeal.
8. The applicants argued that the dismissal was a procedural technicality that should not override substantive justice, as enshrined in Article 159 of *the Constitution* and the overriding objective principles under Sections 3A and 3B of the Civil Procedure Rules.
9. They relied on judicial precedents, including *Joseph Kinyua v. GO Ombachi* (2019) and *Ngugi v. Thogo* (2021), which emphasized that litigation should be determined on merit and that dismissal for non-attendance should be a last resort.
10. The applicant further submitted that the mistake of counsel should not prejudice an innocent client, as held in *Philip Chemwolo v. Augustine Kubende* (1982-88), where courts affirmed that blunders—unless fraudulent or intentional—should not deny a party their right to a hearing.
11. Further, they cited *Esther Wamaitha Njihia v. Safaricom Ltd.*, which underscores that denying a litigant a hearing is draconian and should only apply where no reasonable explanation exists.
12. In the current case, the applicants asserted they acted in good faith, promptly seeking reinstatement upon discovering the error.
13. They stressed that the opposing party will suffer no prejudice if the appeal is reinstated, whereas the appellants face irreparable harm if denied their day in court.
14. In conclusion, they urged the court to allow the application dated 1st May 2025 and to reinstate the appeal, and grant a stay of execution pending its determination, ensuring justice is served without undue technicality.
15. They propose that costs should follow the cause.
16. The respondent submitted that the appellants' appeal should not be reinstated due to multiple procedural failures and lack of diligence.
17. That the appeal was initially filed out of time without court leave, and subsequent attempts to regularize it were mishandled—the application for leave was unsigned, uncommissioned, unpaid for, and unserved.
18. That despite the court's direction to rectify these issues, the appellants repeatedly failed to comply, including missing court appearances on 17th July 2024 and 16th January 2025, leading to the appeal's dismissal.
19. The respondent contended that the appellants' claim of unawareness is false, as their advocates were notified of proceedings and even appeared in court on 13th November 2024.
20. Further, the appellants delayed taking action until execution efforts began, demonstrating a lack of urgency.
21. The respondent cited case law emphasizing strict adherence to timelines and notes that not all mistakes by counsel are excusable, especially when the litigant shows no diligence.



22. The respondent also argued that there was no competent appeal to reinstate, as the appellants never regularized it, and the application inaccurately referenced non-existent orders.
23. Finally, the respondent asserted that the appellants have not met the conditions for a stay order and suggests that, at minimum, they should deposit the judgment sum (Kshs. 4,329,446) into a joint account to mitigate further prejudice.
24. The respondent urged the court to dismiss the application with costs, citing its lack of merit and the appellants' disregard for court processes.
25. The issues for determination in this application are as follows;
 - i. Whether the appeal should be reinstated for hearing.
 - ii. Who pays the costs of the application?
26. The court has a wide discretion to reinstate a matter that has been dismissed subject to certain conditions.
27. The court, in exercising its discretion to reinstate an appeal dismissed for non-attendance, must balance procedural fairness with the overriding objective of doing substantive justice as enshrined in Article 159(2)(d) of *the Constitution* of Kenya, which mandates courts to administer justice without undue regard to technicalities.
28. This principle is further reinforced under Sections 1A, 1B, and 3A of the *Civil Procedure Act*, which emphasize the expeditious and just determination of cases.
29. The appellants' explanation for their non-attendance—that their former counsel, Mr. Nganga, filed the appeal but left employment without notifying them, leading to inadvertent ignorance of the hearing—constitutes a plausible and bona fide reason for their default.
30. Courts have consistently held that mistakes of counsel, unless fraudulent or deliberate, should not be visited upon innocent litigants.
31. In *Philip Chemwolo & Another v Augustine Kubende* [1982-88] 1 KAR 103, the Court of Appeal emphasized that blunders by advocates should not deprive a party of their right to a hearing, provided the error is not egregious or intended to obstruct justice.
32. Similarly, in *Esther Wamaitha Njihia & 2 Others v Safaricom Ltd* [2014] eKLR, the court underscored that dismissing a case for non-attendance is a draconian measure that should only be employed as a last resort where no reasonable explanation exists.
33. The appellants' conduct further demonstrates good faith and prompt action upon discovering the error.
34. The appellants withdrew their misconceived application for leave to appeal out of time (Voi Misc App No. 56 of 2024) upon realizing the existence of the substantive appeal and promptly sought reinstatement.
35. This aligns with the holding in *Joseph Kinyua v G.O. Ombachi* [2019] eKLR, where the court reinstated a dismissed appeal, noting that litigation should be determined on merit rather than procedural technicalities.
36. The appellants' appeal raises arguable grounds on quantum, and denying them a hearing would render their right to appeal nugatory, causing irreparable harm.



- 37. Conversely, the respondent will suffer no prejudice beyond what can be remedied by costs if the appeal is reinstated.
- 38. Regarding the respondent’s objections, while it is true that the appellants failed to comply with certain procedural steps, these lapses stemmed from the initial oversight by their former counsel and do not reflect a pattern of deliberate disregard for court processes.
- 39. The respondent’s reliance on cases such as Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR, which stresses strict adherence to timelines, is distinguishable.
- 40. In the current case, the appellants’ default was inadvertent, and their subsequent actions demonstrate diligence in rectifying the error.
- 41. The court’s discretion to reinstate should be exercised in favour of hearing the appeal on its merits, as held in Ngugi v Thogo [2021] eKLR, where the court emphasized that justice demands litigants be afforded an opportunity to present their case.
- 42. On the issue of costs, the principle that “costs follow the event” under Section 27 of the Civil Procedure Act applies.
- 43. The applicant to pay the respondent thrown away costs of Kshs. 30,000 before the appeal is heard.
- 44. In conclusion, the application dated 1st May 2025 is allowed in the following terms:
 - i. That the appeal in Voi HCCA No. 45 of 2024 is hereby reinstated for hearing and determination on merit.
 - ii. That the appellant pays the respondent thrown away costs of Kshs. 30,000 within 30 days of this date.
 - iii. That stay of execution of the judgment and decree in Voi CMCC No. 124 of 2023 is granted pending the hearing and determination of the appeal on condition that the appellants providing security in the form of a bank guarantee or depositing Kshs. 3,000,000 (their insurer’s statutory limit) into a joint interest-earning account within 30 days of this ruling.
 - iv. That the appeal be prosecuted within 60 days failure to which the appeal to stand automatically dismissed.
 - v. That the costs of this application shall be in the cause.

DATED, SIGNED AND DELIVERED THIS 2ND DAY OF JULY, 2025 VIRTUALLY VIA MT AT VOI HIGH COURT.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Millicent

.....for Appellants/Applicants

.....for Respondent

