



REPUBLIC OF KENYA



KENYA LAW
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**Kibisu v Joseph & another (Civil Appeal 70 of 2018)
[2025] KEHC 11620 (KLR) (23 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11620 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 70 OF 2018
JM NANG'EA, J
JULY 23, 2025**

BETWEEN

CAROLINE ANDIA KIBISU APPLICANT

AND

NJAGI JOSEPH 1ST RESPONDENT

STANLEY GITAU NDUNGU 2ND RESPONDENT

RULING

1. By Notice of Motion dated 11th December 2023 the Applicant prays for an order setting aside orders issued on 28/2/2022 dismissing this Appeal for want of prosecution and reinstatement of the same. By affidavit in support of the Motion she avers that it had taken long to procure the proceedings of the lower court necessary for compiling the Record of Appeal herein. The Record of Appeal was, however, later prepared and at the request of the Applicant's Advocates a mention date was fixed for 2/10/2023. It then transpired on this date that the Appeal had been dismissed on 28/2/2022 for non-prosecution.
2. The Applicant further contends that notice of intention to dismiss the Appeal was not served upon her Advocates, resulting in dismissal of the Appeal for their non-attendance. She expresses interest and willingness to press on with the Appeal, hence this Application.
3. The Respondents did not appear in court on 3/2/2025 when the Application came up for directions. There is an affidavit of service of the Application sworn on 31st February 2025 and filed online. The Affidavit purports to show that the Application was served upon Invesco Assurance Company Limited by email on 20th November 2024. No reply to the Application has been made.
4. Learned Counsel for the Applicant filed written submissions which I have perused against the Application and the record of this Appeal. The court is being called upon to exercise its discretion to reinstate the Appeal.



5. In *Shah vs Mbogo* and *John Nabasho Mwangi vs Kenya Finance Bank Limited (in liquidation)* [2015] eKLR cited by Counsel for the Applicant, it was underscored that setting aside of ex-parte orders is at the discretion of the court. Articles 159 & 50 of the Constitution are also cited for the proposition that substantive justice and fair hearing shall be accorded to litigants to obviate any prejudice that may be occasioned to a party.
6. The judicial determination in *Utalii Transport Company Limited & 3 Others vs NIC Bank Limited* [2014] eKLR further relied upon by the Applicant lays down the following guiding principles in relation to an application such as before the court setting aside of dismissal for non-prosecution;
 - 1) Any inordinate delay to act.
 - 2) Whether the delay inexcusable.
 - 3) Whether the delay amounts to abuse of the court process.
 - 4) Whether the delay affects fair trial or causes prejudice to defendant.
 - 5) Any prejudice to plaintiff/appellant.
 - 6) Lenient exercise of discretion is advocated for.
7. The Appeal was filed on 14th June 2018 vide Memorandum of Appeal dated 13th June 2018. When it came up for mention on 28/1/2021, around 3 years later, for directions the Applicant's Counsel insisted that there was interest to prosecute the Appeal. The Applicant was then given 14 days to file and serve the Record of Appeal, failure to which the Appeal would "automatically expire".
8. The parties never appeared in court for subsequent mention of the matter, and on 7th December 2020 the court issued a Notice to Show Cause why the Appeal should not be dismissed for want of prosecution. Again, the parties failed to show up in court on 28th February 2022 in obedience to the Notice. Contrary to the Applicant's contention, an email dated 14th December 2021 is on record indicating that Gekong'a and Company Advocates for the Applicant were served with the Notice to Show Cause. The court then proceeded to dismiss the Appeal for non-prosecution.
9. Clearly, the Applicant does not deserve the exercise of the court's discretion in her favour based on her conduct as per the record. The delay of over 7 years to prosecute the Appeal is quite inordinate. The long delay is inexcusable in the circumstances given the Applicant's non-appearance in court on various occasions, even on the date fixed for hearing of the Notice to Show Cause.
10. It is also noted that the Applicant chose to serve the application on an Insurance Company rather than the Respondents' Advocates on record who were previously served with the Appeal documents. The Respondents may not therefore be aware of the Application to reinstate the Appeal.
11. In the result the Application has no merit and is dismissed with no order as to costs.

J. M. NANG'EA, JUDGE.

Ruling delivered virtually this 23rd day of July, 2025 in the presence of:

Applicant's Advocate, Ms Songok for Mr. Gekong'a.

Respondents, Absent

Court Assistant (Jeniffer)

J. M. NANG'EA, JUDGE.

