



**Kiptoo Cheboi (Deceased) v Bisher & others (Civil Appeal
131 of 2011) [2025] KEHC 10175 (KLR) (15 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10175 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 131 OF 2011
RN NYAKUNDI, J
JULY 15, 2025**

BETWEEN

MOHAMED AHMED & HIS BROTHER APPLICANT

AND

ABDULMALIK AHMED BISHER & OTHERS RESPONDENT

RULING

Representation:

Marube & Co. Advocates

D. L Were & Were & Co. Advocates

1. By way of Notice of motion dated 5th June 2025, the applicant seeks the following orders;
 1. Spent
 2. Spent
 3. That the order made on 16/1/2014 dismissing this Appeal be and is hereby set aside and Appeal be reinstated for Hearing on merit.
 4. That any other and further orders that this Honourable Court may deem fit to grant.
 5. That costs be on cause.
2. The application is premised on the grounds on the face of it and the averments of the Applicant in his supporting affidavit. the applicant deponed that he instructed the firm of M/S Chebii and Co Advocates to represent him in the appeal and on 16th January 2024 the firm withdrew the appeal without consulting him. The appeal was then withdrawn with orders that the appellants pay costs. He has been prejudiced by the said dismissal and has been ambushed with threats to attach his property.



He further deponed that he was not served with the bill of costs and prayed for orders for the setting aside of the dismissal orders and urged that a mistake on the part of the advocate cannot be revisited on a litigant.

3. The respondents opposed the application vide a replying affidavit dated 18th June 2025 sworn by Counsel Daniel Lawrence Were. In his affidavit, he stated that the applicant does not deserve the orders sought as the appeal being sought to be reinstated was withdrawn on 16th January 2014 by the request of the applicant. Upon withdrawal, the applicant realised he had made a mistake and sought leave to file a fresh appeal vide Civil Appeal No. 84 of 2014. The appeal has not been heard and determined as it is pending advice from the chief Kadhi. He deponed that it would be superfluous to reinstate the withdrawn appeal since the grounds of appeal are similar to those in Eldoret Civil Appeal No. 84 of 2014. He pointed out that the application has been filed 10 years from the date the appeal was willingly withdrawn and is therefore not made in good faith. Further, that the bill of costs was served upon the applicants advocates n record in Eldoret HCCA No. 131 of 2011. He urged that the delay is inordinate and the appeal lacks merit and therefore it should be dismissed with costs.
4. The parties were directed to file submissions but the only submissions on record are those of the respondent.
5. Counsel for the respondent submitted that the applicants do not deserve the orders sought and essentially regurgitated the contents of the replying affidavit.

Analysis & Determination.

6. The issue that arises for determination is; Whether the order of 16th January 2014 should be reviewed or set aside
7. The Applicants seek to set aside an order of the court that was delivered on 16th January 2014, more than 10 years ago. The applicants have not disclosed the circumstances that lead to the delay to file the present application.
8. Additionally, the appeal arises from Kadhi's Petition no. 13 of 2011 and the respondent has provided evidence that there was leave granted to the appellant vide the ruling dated 10th June 2014 to file an appeal. Pursuant to the said leave, he filed a Memorandum of Appeal and instituted Civil Appeal No. 84 of 2014.
9. The appeal relates to orders relating to the withdrawal of the initial appeal. given that there exists an appeal, it would be of no consequence to reinstate the appeal that was withdrawn. The applicant is encouraged to expedite the hearing of Civil Appeal No. 84 of 2014 to ensure its logical conclusion as the matter is fairly old.
10. In the premises, the application is dismissed with costs to the Respondents.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 15TH DAY OF JULY 2025

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R. NYAKUNDI
JUDGE

