



Macharia & another v Namboka & another (Suing as the Legal Representative of the Estate of the Late Brian Werunga Masoni) & another (Civil Appeal E037 of 2024) [2025] KEHC 13178 (KLR) (24 September 2025) (Ruling)

Neutral citation: [2025] KEHC 13178 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E037 OF 2024
RN NYAKUNDI, J
SEPTEMBER 24, 2025**

BETWEEN

JOHN MWANGI MACHARIA 1ST APPELLANT

NORTH RIFT SHUTTLE 2ND APPELLANT

AND

CELENCIA NAMBOKA & ERIC MASONNI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE BRIAN WERUNGA MASONI) 1ST RESPONDENT

CAR & GENERAL (TRADING) LIMITED 2ND RESPONDENT

RULING

1. Before the Court is a Notice of Motion under Certificate of Urgency dated 21st day of July 2025 seeking the following orders:
 - a. That leave be granted to the firm of Messrs Kairu & McCourt Co. Advocates to come on record for the Applicants.
 - b. That the application be certified urgent and service be dispensed with at first instance.
 - c. This Honourable Court be pleased to reinstate the Appeal herein.
 - d. That upon the grant of prayer 3 above, the Court be pleased to set the Appeal for directions with specific timelines for its disposal.
 - e. That costs of this application be in the cause.
2. Which application is based on the following grounds set out as hereunder and the annexed affidavit of Anthony Amihanda and upon further grounds hereunder:



- a. That on 25/06/2025, the matter herein was set for the Notice to show cause as to why a dismissal order should not issue.
- b. That Counsel for the Appellants attended Court virtually in chambers which are located within the Eldoret CBD at Zion Mall Building.
- c. That it is of note that there were nationwide demonstrations on the material date, which also affected the normal conduct of business in various towns and cities across the country.
- d. That at around 2 pm, the general state of the environment in the CBD became dangerous and hostile as demonstrators engaged in running battles with security agencies and as such, Counsel for the Applicants had to abandon the office premises in a bid to get to a safer environment hence could not stay online and attend to the matter herein.
- e. That later on perusing the Judiciary CTS it was noted that the Court proceeded to dismiss the Appeal as Counsel for the Appellants was not present when the same was called out.
- f. That all circumstances considered, the non-attendance was not out of want and/or deliberate, but was caused by factors out of the Applicant's and their Counsel's control.
- g. That the Applicants/Appellants are desirous of prosecuting the appeal to its logical conclusion and have indeed lodged the Record of appeal.
- h. That the Appellant is apprehensive that the 1st Respondent shall proceed to levy execution and thereby compel the Appellants to meet the sum of the judgment award in the subordinate Court which sum is significantly large i.e. Kshs 1,706,050/= whereas the appeal is both on liability and quantum.
- i. That the Appellant/Applicant should be granted a right to access justice and a fair hearing as envisaged under Articles 48 & 50 of the Constitution 2010 respectively.
- j. That the Respondent will suffer great prejudice if this application is not allowed.

Decision

3. The gist of this application is based on the dismissal order dated 25th day of June 2025 in which the Court pronounced itself as follows:

“This matter has been pending without action over one (1) year. Notice to show cause has been issued to the parties herein to activate this matter and parties having failed to take action to further prosecute this matter, this matter is hereby dismissed under Order 17 Rule 2 of the Civil Procedure Code as read with Section 1(A), 1(B) and 3(A) of the Civil Procedure Act. Matter marked as closed and the same shall not be activated without special leave of the Court.”

4. Notwithstanding these provisions of the law, it has not left the litigants without a safety net and the powers of the Court to set aside an *ex parte* order or judgment. The objective of that jurisdiction judiciously exercised is well outlined in the cases of *Mbogo v Shah* [1968] EA and *Kimani v McConnell* [1966] EA 547.

“The main concern if the court is to do justice to the parties, and the Court will not impose conditions on itself to fetter the wide discretion given to it by the rules. Where it is a regular judgment the Court will not usually set aside the judgment unless it is satisfied that there is



a defence on the merits. However, “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

In law the discretion that a Court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle...”

5. In the affidavit filed by the Applicant has averred sufficient reasons why he was not able to attend Court or his legal Counsel which include: That Counsel for the Appellants attended Court virtually in chambers which are located within the Eldoret CBD at Zion Mall Building. That it is of note that there were nationwide demonstrations on the material date, which also affected the normal conduct of business in various towns and cities across the country. That at around 2 pm, the general state of the environment in the CBD became dangerous and hostile as demonstrators engaged in running battles with security agencies and as such, Counsel for the Applicants had to abandon the Office premises in a bid to get to a safer environment hence could not stay online and attend to the matter herein.
6. The background of this application is well set out in the ruling of the court delivered on 26th June 2025. It is also a constitutional imperative under Article 50 as read with 48 of the Constitution that every litigant has a right to be heard and be given an opportunity to canvass his or her issues before any level of court in Kenya. It has been demonstrated that the applicant did not deliberately or intentionally delay the course of administration of justice. It is for those reasons I will invoke Section 80 of the Civil Procedure Act under Order 45 Rule 1 of the Civil Procedure Rules to review the dismissal order and reinstate the appeal to be heard on merits.
7. Taking into account the entire circumstances of the appeal the following directions abide:
 - a. That the appeal be and is hereby admitted for hearing.
 - b. That the appeal shall be canvassed by way of written submissions.
 - c. That the appellant shall have a right to begin to serve the record of appeal accompanied by written submissions within 11 days from today’s date.
 - d. Thereafter the Respondent shall be at liberty to file rejoinder legal typologies arising out of the memorandum of appeal and submissions by the appellant within 10 days of being served by the appellant.
 - e. Highlighting of submissions on 30th of October 2025.
 - f. Compliance with these directions are indispensable.
8. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 24TH DAY OF SEPTEMBER 2025.

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R. NYAKUNDI

JUDGE**

