



REPUBLIC OF KENYA



**KENYA LAW**  
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**JMO v EAA (Family Appeal E004 of 2020)  
[2025] KEHC 13924 (KLR) (25 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13924 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
FAMILY APPEAL E004 OF 2020  
JM OMIDO, J  
SEPTEMBER 25, 2025**

**BETWEEN**

**JMO ..... APPELLANT**

**AND**

**EAA ..... RESPONDENT**

**RULING**

1. A brief history preceding this ruling is that the appeal herein was commenced vide the memorandum of appeal dated 1<sup>st</sup> October, 2020 and filed in court on 2<sup>nd</sup> October, 2020.
2. When the matter was placed before Ochieng' J. (as he then was) on 11<sup>th</sup> March, 2021, the court ordered that the appeal would proceed on 20<sup>th</sup> May, 2021. That appeal was in the intervening period referred to court annexed mediation but it would seem from the record that no agreement was reached between the parties.
3. The Appellant filed the record of appeal on 28<sup>th</sup> May, 2021. It is instructive from the record that the appeal was never admitted and that no directions were issued on how the same was to proceed. That notwithstanding, the Appellant filed his submissions on the appeal on 18<sup>th</sup> November, 2021. The record does not bear the Respondent's submissions on the appeal.
4. It is on record that the appeal was listed for dismissal of the appeal on 29<sup>th</sup> November, 2022, on which day the parties did not appear before the court. Noting that there was no evidence of service upon the parties, this court (Kamau J.) listed the matter for mention on 21<sup>st</sup> February, 2023, on which day the parties were again absent. Notably, my learned sister did not sit on that day. The matter was then listed for a further mention on 25<sup>th</sup> April, 2023 by the Deputy Registrar, Hon. W.K. Onkonya.



5. The record bears it that when the matter was called out on 25<sup>th</sup> April, 2023, the parties were again absent. Nevertheless, the court (Shariff J.) proceeded to render a brief ruling as follows:

“This matter was scheduled for dismissal on 29<sup>th</sup> January, 2023 (the correct date is 29<sup>th</sup> November, 2022) but due to want of service, the same was fixed for mention on 21<sup>st</sup> February, 2023. Parties were served but did not attend court. The Deputy Registrar fixed it for mention today and duly issued notices to the parties through their email addresses. The parties are not in court today. It is apparent that the Appellant has lost interest in this appeal and the same is dismissed for want of prosecution.

This file is marked as closed.”

6. Prompted by the above ruling that dismissed the appeal, the Appellant filed the notice of motion dated 24<sup>th</sup> May, 2024 expressed to be brought under Order 17 Rule 2 and Order 51 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act seeking the following orders:
1. That this Honourable Court be pleased to set aside or vary (the) orders of dismissal of the appeal issued on 25<sup>th</sup> April, 2023 and the appeal be reinstated for hearing.
  2. That costs be in the cause.
7. The grounds upon which the application is premised are in precis that the Appellant was not informed of the mention date of 25<sup>th</sup> April, 2024 and that his counsel did not attend court as he was indisposed. The Appellant urges that it is in the interest of justice that the court positively considers his application.
8. The application is supported by the Appellant’s affidavit sworn on 24<sup>th</sup> May 2024 in which he restates and expounds on the above grounds, adding that he did not fail to prosecute his appeal as he had filed submissions on the same before the dismissal order was made.
9. The Respondent resists the application and to that end filed a replying affidavit in which she stated that the Appellant exhibited lack of interest in the appeal by failing to attend court severally and the dismissal order was therefore apt, in the circumstances.
10. This court directed that the application proceeds by way of written submissions and both parties filed their respective submissions.
11. Having considered the application, the response, the parties’ respective submissions and the record in its entirety, and having taken into consideration that this is an appeal that concerns children, I discern the issues for determination to be as follows:
- i. Whether sufficient cause has been shown to warrant the setting aside of the order of dismissal of the appeal made on 25<sup>th</sup> April, 2023.
  - ii. A determination as to costs.
12. I will begin by first disclaiming that being a court of concurrent jurisdiction with the court that issued the order for dismissal of the appeal for want of prosecution (Shariff J.), it is not within my province to fault the learned Judge. However, the application before me being one for setting aside the said order, I am entitled to note down my views, as to whether the dismissal was proper and thus determine whether or not to allow the application.
13. On the first issue for determination, I have noted above that the instant appeal was never admitted. Section 79B of the Civil Procedure Act emphasizes, in my understanding, that admission is a necessary procedural step before an appeal is considered ripe and before the same proceeds to hearing or



prosecution. In other words, a party can only properly prosecute his appeal once the same has been admitted.

14. The case here is that the appeal was nor ripe for prosecution as the same had not been admitted. As held in *Housing Finance Company of Kenya v Embakasi Youth Development Project* [2021] eKLR, an appeal that has not been admitted under Section 79B of the *Civil Procedure Act* is not ripe for prosecution and any dismissal on that basis is premature and irregular. In *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] 2 EA 231 the Court of Appeal held that the process of admission of an appeal must first be concluded before the appeal can be considered ready for hearing. Only thereafter can failure to prosecute arise.
15. I have further noted above that the order for dismissal of the appeal was made on a mention date and not on a date set for the Appellant to show cause why the appeal should not be dismissed for want of prosecution. The view I take is that the Appellant has made a good point on that ground.
16. The third point that I have noted is that although the court did not issue directions on how the appeal was to proceed, the Appellant filed submissions on the appeal. Was this then an unprosecuted appeal? I do not think so.
17. The appellant now seeks reinstatement of this appeal, which was dismissed and my view, based on the above reasons, is that he has a meritorious application. I will then proceed to allow the motion by notice dated 24<sup>th</sup> May, 2024 as follows:
  - a. The order issued on 25<sup>th</sup> April, 2023 dismissing the instant appeal is hereby set aside.
  - b. The instant appeal is hereby reinstated for hearing and I proceed to admit it.
  - c. This appeal will be mentioned on 26<sup>th</sup> November, 2025 for directions as to the disposal thereof.
  - d. On the second issue, which regards costs of the application, considering that this is a matter that concerns children, each party shall bear their own costs.

**DELIVERED (VIRTUALLY), DATED & SIGNED THIS 25<sup>TH</sup> DAY OF SEPTEMBER, 2025.**

**JOE M. OMIDO**

**JUDGE**

For Appellant: No Appearance.

For Respondent: Ms. Imbaya.

Court Assistants: Mr. Ngoge & Mr. Juma.

Court: A mention notice to be served upon the Appellant.

