

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

ELC APPEAL NO. E012 OF 2023

SHANO MARSA alias SHANQO TEGEAPPELLANT

VERSUS

MOHAMMED CHUCHU SIKERESPONDENT

RULING

1. What is before me is the Notice of Motion Application dated the **19th September 2025**; brought pursuant to the provisions of Sections **1A, 1B, 3A, 3B, 63 (e) and 80 of the Civil Procedure Act; Order 9 Rule 9; Order 12 Rule 7 and Order 42 Rule 13 of the Civil Procedure Rules; and Article 159 of the Constitution 2010**; and wherein the Applicant has sought the following reliefs:

- (i) *This Application herein be heard Ex-parte in the first instance.*
- (ii) *The Honourable court be pleased to grant leave to the firm of M/s Mukira Mbaya & Co. Advocates to act for the appellant/applicant*
- (iii) *The Honourable court be pleased to vacate its orders dismissing the appeal for want of prosecution.*
- (iv) *The Honourable court be pleased to issue an order for re-opening and reinstating the appellant's appeal*
- (v) *The Honourable court be pleased to grant the appellant/applicant leave to file an amended memorandum of appeal and take directions for the filing of the record of appeal*

(vi) That the costs for this [sic] suit be provided for.

2. The subject application is premised on various grounds which have been enumerated in the body thereof. In particular, the applicant has contended that same had instructed and engaged the firm of Ms. Kiogora Mugambi and Co. Advocates to conduct the subject appeal on his behalf. Nevertheless, it has been posited that the applicant's father was taken ill and thereafter same was admitted to a hospital in Ethiopia. Moreover, the applicant has posited that his father subsequently died on 5th August 2025.
3. Additionally, the applicant has contended that owing to the indisposition of his father [now deceased]; the subsequent admission of same to a hospital in Ethiopia and his ultimate death same [applicant] lost touch with his advocates on record. To this end, it has been contended that the dismissal of the appeal was informed by the applicant's predicament and concentration on the ailment of his deceased father.
4. The instant application is supported by the affidavit of Shano Bore Marsa [the applicant] and wherein the applicant has reiterated the grounds contained in the body of the application. Moreover, the applicant has annexed assorted documents, including the medical treatment/discharge summary; referral letter; radiology report and certificate of death of the deceased.
5. The respondent filed a replying affidavit sworn on 7th October 2025; and wherein same has opposed the subject application. In particular, the respondent has contended that the applicant is being dishonest with the court in contending that same had instructed the firm of Ms. Kiogora

Mugambi & Co. Advocates and that the said advocate remained on record as at the time of the dismissal of the appeal. Furthermore, it has been averred that the firm of M/s Mukira Mbaya & Co. Advocates were the ones who were on record for the applicant as at the time when the appeal was dismissed. In this regard, it has been posited that the applicant has not tendered and or availed plausible explanation as to why his advocate did not attend court on the scheduled date for dismissal.

6. The respondent has further averred that it was incumbent upon the applicant to take appropriate steps to ensure that same was duly represented before the court with a view to informing the court of the predicaments [if any]. Nevertheless, it has been posited that the applicant failed to act proactively and thus has himself to blame.
7. The subject application came up for hearing on 9th October 2025, whereupon the advocate for the parties intimated to the court that same would be keen to adopt and rely on the documents/pleadings filed. To this end, the applicant sought to adopt the grounds contained at the foot of the application; the contents of the supporting affidavit and the annexures thereto.
8. On the other hand, learned counsel for the respondent adopted the contents of the replying affidavit and thereafter posited that the applicant had not proffered a genuine explanation to warrant the exercise of equitable discretion in his favour.

9. Having reviewed the Notice of Motion Application; the supporting affidavit; the annexures thereto; and the response on behalf of the respondent, I come to the conclusion that the determination of the subject matter turns on one [1] key issue, *namely*; whether the applicant has placed before the court sufficient cause/basis to warrant variation of the dismissal orders made on 5th June 2025.

10. What constitutes sufficient cause was expounded, nay explained in the case of *Wachira Karani vs Bildad Wachira (2016) eKLR*, where the court stated thus;

It's important for me to mention that in the above case, the court defined what constitutes *sufficient cause* and in this respect, the following paragraph is highly relevant to the issues before me:-

"Once the defendant satisfies the court on either, the court is under duty to grant the application and make the order setting aside the ex parte decree, subject to any conditions the court may deem fit. However, what constitutes 'sufficient cause' to prevent a defendant from appearing in Court, and what would be 'fit conditions' for the court to impose when granting such an order, necessarily depend on the circumstances of each case.

Although it is an elementary principle of our legal system that a litigant who is represented by an advocate is bound by the acts and omissions of the advocate in

the course of the representation, in applying that principle, courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequences of the advocate's default, unless the litigant is privy to the default, or the default results from failure, on the part of the litigant, to give the advocate due instructions."

The applicant is required to satisfy to the court that he had a good and sufficient cause. What does the term "sufficient cause" mean.? The Court of Appeal of Tanzania in the case of The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others[9], discussing what constitutes sufficient cause, had this to say:-

"It is difficult to attempt to define the meaning of the words 'sufficient cause'. It is generally accepted, however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant" (Emphasis added)

11. My understanding of the excerpt reproduced in the preceding paragraph drives me to the conclusion that sufficient cause denotes genuine, credible, plausible and candid explanation of the reason why the omission sought to be remedied occurred. Furthermore, sufficient cause also highlights the necessity to take appropriate and timeous steps to remedy a default as soon as the occurrence of the default is established and or authenticated. To this end, it behooves a court to not only interrogate the

time lapse; extent of delay but also to discern/decipher the reasons [if any] being preferred by the applicant.

12. In the case of *Njoroge v Kimani (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) (28 October 2022) (Ruling)*; the court considered some of the elements/ingredients that underpin the exercise of the discretion of the court.

13. For coherence, the court stated as hereunder;

12. In order to exercise its discretion whether or not to grant condonation, the court must be appraised of all the facts and circumstances relating to the delay. The applicant for condonation must therefore provide a satisfactory explanation for each period of delay. An unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the applicant's prospects of success. Condonation cannot be had for the mere asking. An applicant is required to make out a case entitling him to the court's indulgence by showing sufficient cause, and giving a full, detailed and accurate account of the causes of the delay. In the end, the explanation must be reasonable enough to excuse the default.

13. Equally important is that an application for condonation must be filed without delay and/or as soon as an applicant becomes aware of the need to do so. Thus, where the applicant delays filing the application for condonation despite being aware of the need to do so, or despite being put on terms, the court may take a dim view, absent a proper and satisfactory explanation for the further delays.

14. Guided by the principles highlighted in the decisions [supra], I am now disposed to interrogate the facts of the case and to discern whether the applicant has indeed accounted for the default leading to the dismissal of the appeal for want of prosecution. To start with, the applicant has posited that his father was taken ill and as a result of the indisposition same [applicant] was constrained to take his father for treatment in Ethiopia. The applicant has exhibited assorted medical documents underpinning the fact that his father was indeed admitted to a hospital in Ethiopia.

15. Additionally, the applicant has averred that his father subsequently passed on. To this end, the applicant has contended that same was engaged with the sickness of his father and the subsequent death. In this regard, the applicant has posited that he was unable to link up with his advocates on record. For good measure, the applicant has contended that the dismissal of the appeal was also because of the personal engagements and predicament arising from the indisposition of his father, followed by his ultimate death.

16. The explanations that have been highlighted by the applicant are candid, genuine and believable. Further, and in any event, I have not heard the respondent to deny the veracity of the medical documents that have been exhibited by the applicants. Perhaps the respondent is conceding and acknowledging the emotional distress and pain that come with prolonged indisposition of a loved one and followed with death.

17. On my part, I beg to state that the reasons that have been advanced by the applicant are plausible, credible and concrete. Same constitutes sufficient cause to warrant invocation and deployment of the court's machinery to vary the dismissal orders.

18. Moreover, it is not lost on me that this court, just like other courts of law, are seized of the inherent, intrinsic and residual jurisdiction to ensure that justice is done and served to the parties. The Supreme Court in the case of Narok County Government vs Livingstone Kunini Ntutu (2018) eKLR, highlighted the scope and extent of inherent jurisdiction of a court.

19. For coherence, the apex court stated thus;

99. Further in Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited [2014] eKLR the Court of Appeal set out the principles to guide the Court in exercising inherent jurisdiction in these words; “The jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that where the Court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities, this is

jurisdiction that should be invoked with circumspection...”
(Emphasis added.)

100. The conclusion drawn from the above citations is that this court, indeed any other appellate court, even where there are no specific provisions to do an act, has inherent and/or residual powers to act in a fair or equitable manner in the interest of justice and/or to ensure the observance of the due process of the law. Therein also lies the power for the court to act to prevent abuse of court process by one party so that fairness is maintained between all parties.

20. The circumstances underpinning the subject matter are such that the court ought to intervene and set aside the impugned orders. The applicant herein ought not to be subjected to denial or deprivation of his right of access to justice merely because his father was indisposed and that same had to attend to the sick father.

FINAL DISPOSITION.

21. Flowing from the foregoing analysis, I come to the conclusion that the applicant herein has indeed tendered credible explanation to warrant the exercise of judicial discretion in his favour. I am duly persuaded.

22. In the premises, and for the reason[s] alluded to; the final orders that commend themselves to the Court are as hereunder;

- (i) The Application dated 19th September 2025; be and is hereby allowed.**
- (ii) The orders dismissing the appeal for want of prosecution issued on 5th June 2025 be and are hereby set aside.**

- (iii) The appeal be and is hereby reinstated for hearing and determination on merits.**
- (iv) The Costs of the application shall abide the outcome of the appeal.**
- (v) The Appellant be and is hereby ordered to compile and file the record of appeal within 30 days from the date hereof.**
- (vi) The Appeal shall thereafter be subjected to directions in line with Order 42 Rule 13 of the Civil Procedure Rules 2010.**
- (vii) The Appeal shall also be heard on priority basis.**

23.It is so ordered.

**DATED, SIGNED AND DELIVERED AT ISIOLO, 16TH DAY OF
OCTOBER 2025.**

OGUTTU MBOYA, FCI Arb; CPM [MTI-EA].

JUDGE

In the presence of:

Hussein/Mukami - Court Assistants

Mr. Abdullahi holding brief for Mr. Mwirigi Mbaya for the applicant

Mr. Behaillu for the respondent