

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BOMET**

**CIVIL APPEAL NO. E020 OF 2023**

**RICHARD KIPLANGAT BYEGON .....**  
**.....APPELLANT**

**VERSUS**

**EVANCE OMONDO OSEE ..... 1<sup>ST</sup>**  
**RESPONDENT**

**ERICK MUTUKU MUNYAKA ..... 2<sup>ND</sup>**  
**RESPONDENT**

**RANA TEAM SERVICES CO. LTD ..... 3<sup>RD</sup>**  
**RESPONDENT**

**KALIKA JASON KIRIKUA ..... 4<sup>TH</sup>**  
**RESPONDENT**

**KELVIN MUTUA KALIKA ..... 5<sup>TH</sup>**  
**RESPONDENT**

## **RULING**

1. The Applicant filed a Notice of Motion Application dated 27th May 2025 seeking the following orders: -

- I. THAT the order of this Honourable Court made on 7<sup>th</sup> May 2025 dismissing the Appeal for want of prosecution be reviewed, varied and/or set aside.
- II. THAT the Appeal filed herein on 20<sup>th</sup> April 2023 be reinstated for the reasons that the Applicant stands to suffer loss if this Application is not allowed.
- III. THAT upon grant of prayer II above, the Honourable Court be pleased to give an order that the lower court file CMCC Number 64 of 2018 be taken back to the Chief Magistrate's Court for sealing of the Decree.

2. The Application was brought under **sections 3A and 80 of the Civil Procedure Act, Order 17 Rule 2(1) and (2) of the Orders 51 Rule 1 of the Civil Procedure Rules**. The Application was based on the grounds on the face of the

Application and further by the annexed Supporting Affidavit of Orina Moraa Advocate sworn on 28<sup>th</sup> May 2025.

**The Applicant's case.**

3. The Applicant stated that he filed the present Appeal on 20<sup>th</sup> April 2023 and further filed the Record of Appeal on 5<sup>th</sup> November 2024. That the matter came before this court on 26<sup>th</sup> March 2025 and the court granted him time to file a Supplementary Record of Appeal. The Applicant further stated that he had been following up on the execution of the lower court decree but was informed that the same could only be executed once this court gave directions on the transfer of the file to the lower court. That this created the impression that the matter had been set before the Deputy Registrar for mention.

4. It was the Applicant's case that when the matter came up for mention on 7<sup>th</sup> May 2025 to confirm filing of the Supplementary Record of Appeal, he went through the Deputy Registrar's list under the impression that the matter had been listed there. That on 7<sup>th</sup> May 2025, he had proceeded for a study leave and when she got back to the office on 23<sup>rd</sup> May 2025, he was informed that the matter had been dismissed for want of prosecution. It was the Applicant's case that he was keen on prosecuting the Appeal and if it was not reinstated, he would suffer great loss. That the Respondents would not suffer any prejudice if the Appeal was reinstated.

5. Through his written submissions dated 22<sup>nd</sup> August 2025, the Applicant submitted that under **section 1A of the Civil Procedure Act**, courts were mandated to further the overriding objective of the Act which was to facilitate the just, expeditious, proportionate and affordable resolution of

disputes. That in the present case, it was only fair and in the best interest of justice that the Appeal be reinstated.

6. It was the Applicant's submission that the mistake of a counsel should not be visited upon an innocent litigant. He relied on **Jonathan v Njiwa Savings & Credit Co-operative Society [2023] KEHC 2130 (KLR)**.

### **Response**

7. Through their Replying Affidavit dated 22<sup>nd</sup> July 2025, the Respondents stated that on 26<sup>th</sup> June 2024 due to the Applicant's indolence, the court suo moto listed the Appeal for the Applicant to show cause why the Appeal should not be dismissed for want of prosecution. That on 26<sup>th</sup> March 2025, the matter came up for mention and the Applicant was directed to file his Supplementary Record of Appeal within 30 days. The Respondents further submitted that on 7<sup>th</sup> May

2025, the Appeal was dismissed for non-attendance by the Applicant or his advocate.

8. It was the Respondents' case that to date, the Applicant had not filed his Supplementary Record of Appeal and had not offered any reason. That the Applicant slept on his right to be heard and his failure to attend court on 7<sup>th</sup> May 2025 signified his lack of interest in the matter. It was the Respondents' further submission that the Applicant's excuse of not being aware of the mention date of 7<sup>th</sup> May 2025 was not adequate as the date was issued in the Applicant's advocate's presence.

9. The Respondents stated that the Application was a mischievous attempt to circumvent the orders of this court dated 7<sup>th</sup> May 2025. The Respondents further stated that the Application did not meet the settled principles for setting aside or varying a court order and was thus incompetent, misconceived and ought to be dismissed.

10. Through their written submissions dated 7<sup>th</sup> October 2025, the Respondents submitted that the Applicant had not satisfied the legal threshold for a review order. That ignorance of a court date was not a sufficient reason. They relied on **Republic v Advocates Disciplinary Tribunal Ex-parte Apollo Mboya (2019) eKLR**. The Respondents further submitted that the Applicant had failed to demonstrate any excusable mistake.

11. It was the Respondents' submission that the Applicant had slept on his right to be heard and was only acting after adverse orders had been issued against him. That the Applicant had a pattern of not prosecuting his suits from the lower court and this conduct constituted an abuse of the court process. They relied on **Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others (2009) eKLR**. It was the Respondents' further submission that the court was justified in dismissing the Appeal.

12.The Respondents submitted that a party's right to be heard was not absolute and reliance was placed on **Utalii Transport Company Limited & 3 others vs NIC Bank & another (2014) eKLR**. The Respondents further submitted that the court should not reward the Applicant's habitual conduct of abandoning suits.

13.I have gone through the record, the Notice of Motion Application dated 27<sup>th</sup> May 2025, the Applicant's written submissions dated 22<sup>nd</sup> August 2025 and the Respondent's written submissions dated 7<sup>th</sup> October 2025. The only issue for my determination was whether the Application has met the requirements for a grant of a Review Order.

14.It is trite law that the High Court has a power of Review. The law on Review is based on **section 80 of the Civil procedure Act** and **Order 45 Rule 1 of the Civil**

**Procedure Rules, 2010.** It is salient to note that this court's power must be exercised within this circumscribed legal framework.

**15. Section 80 of the Civil Procedure Act** provides as follows: -

**Any person who considers himself aggrieved-**

**(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or**

**(b) by a decree or order from which no appeal is allowed by this Act,**

**May apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.**

**16. Order 45 Rule 1 of the Civil Procedure Rules, 2010**

provides as follows: -

**(1) Any person considering himself aggrieved-**

- (a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**
- (b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of**

**judgement to the court which passed the decree or made the order without unreasonable delay.**

17. From the above provisions, it is clear that **section 80 of the Civil Procedure Act** gives the power of Review while **Order 45 of the Civil Procedure Rules 2010**, sets out the rules. The rules limit the grounds applicable for Review as follows: -

- (i) The discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced by him at the time when the Decree was passed or the Order made.
- (ii) On account of some mistake or error apparent on the face of the record.
- (iii) Any other sufficient reason and that the Application has to be made without unreasonable delay.

18.The Court of Appeal in **Tokesi Mambili and others vs Simion Litsanga (2004) eKLR** held: -

***“i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.***

***ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.”*** (Emphasis mine)

19.Having gone through the Application, there was no evidence tendered by the Applicant to indicate discovery of new and

important matter or evidence or a mistake or error apparent on the face of the record. The only ground left to anchor the Application was the ground of any other sufficient reason. The Court of Appeal in Registered **Trustees of the Archdiocese of Dar es salaam vs Chairman of Bunju Village Government & Others, Civil Appeal No. 47 of 2006**, observed that: -

*“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.”*

20.The Court of Appeal in **Pancras T. Swai v Kenya Breweries Limited [2014] KECA 883 (KLR)** held that: -

***“.....As repeatedly pointed out in various decisions of this Court, the words, “for any sufficient reason” must be viewed in the context firstly of Section 80 of the Civil Procedure Act, Cap 21, which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order.”***

21. The Applicant stated that he was not aware that the matter was listed before this court on 7<sup>th</sup> May 2025 (when it was dismissed). That he thought the matter would be mentioned before the Deputy Registrar of this court. I have gone through the record and I have noted that mention date of 7<sup>th</sup> May 2025 was given on 26<sup>th</sup> March 2025 in the presence of the advocates for both the Applicant and the Respondents.

The court did not refer the matter to be mentioned before the Deputy Registrar. This showed that the Applicant's Advocate was aware of the mention date of 7<sup>th</sup> May 2025. I decline to accept the Applicant's reason that he was not aware of the mention date.

22. Damningly, the Applicant's advocate stated that he went on study leave on 7<sup>th</sup> May 2025 for three weeks while knowing he had a mention date on the very same day. The prudent thing to do as is practice, was to instruct another advocate to hold his brief. He chose not to. Further, I have gone through the record and I have noted that this court had issued a Notice to Show Cause why the Appeal should not be dismissed for want of prosecution. The same was dated 26<sup>th</sup> June 2024. This meant that the Appeal had been inactive for a period of one year.

23. Flowing from the above, I agree with the Respondents that the Applicant was indolent in handling this matter and was not keen on prosecuting his Appeal. However, in the interest

of justice, it is prudent to allow the Applicant to have his day in court and have his Appeal determined on merit.

24. In the end, I do allow the Notice of Motion Application dated 27<sup>th</sup> May 2025. Each party to bear its own costs.

**Ruling delivered, dated and signed at Bomet this 19<sup>th</sup> day of November, 2025.**

.....  
**HON. J.K.NG'ARNG'AR**  
**JUDGE**

**Ruling delivered in the presence of;**  
**Siele and Susan (Court Assistants).**  
**Chomiti for the Appellant**  
**Momanyi for the Respondent**