John v Adawo (Environment and Land Appeal E027 of 2022)
[2025] KEELC 7725 (KLR) (4 November 2025) (Ruling)

Neutral citation: [2025] KEELC 7725 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ENVIRONMENT AND LAND APPEAL E027 OF 2022

FO NYAGAKA, J

NOVEMBER 4, 2025

BETWEEN

PHILIP ACHIENG JOHN ..... APPELLANT

AND

ELIUD KINGWARA ADAWO ..... RESPONDENT

RULING

Brief Facts

(On setting aside an order of dismissal)

1. The history of this matter, which forms the background of the instant application is important to give here and at the outset. It was ably captured in the earlier Ruling of this Court as give on 26th march 2025. I will do well to repeat the same through an excerpt therefrom which, and indulgence is sought if it appears to be long, as follows:

> "On 27th November, 2023, the Appellant sought the leave of the Court to file a proper Supplementary Record of Appeal, having previously filed one, in person, which was defective. He was granted the leave to have one filed and served within 30 days. On the same date, the Court directed that the appeal to be disposed of by way of written submissions. The Appellant was to begin by filing and serving his within 30 days and the Respondent within 30 days of service of the appellant's. By the 19th February, 2024, the Appellant had still not complied with the orders. The appellant prayed for a further fourteen (14) days to file the Supplementary Record of Appeal. He was granted a further leave.
>
> By 25th February 2025, the Respondent moved the court orally to have the appeal dismissed for want of compliance. At this point the Court takes a deeper look at the record about the filing of this Appeal than it has. The matter was fixed for hearing on 12th July, 2024. On that

date the court, in the usual step of ensuring that parties had complied with its directions and were ready for hearing, fixed a mention date of 26th September, 2024. On the material date the Appellant was not present, the Respondent sought for an adjournment as the counsel was out of the country. The Court granted the same and scheduled the matter for hearing of the Appeal on 25th February, 2025.

Once again, as a way of trying to ensure that no adjournment of the appeal was caused, the Court decided to mention the Appeal on 5th February, 2025 to confirm compliance. Come that date, the Appellant though served did not attend Court. Come the mention date, they had not filed the Supplementary Record of Appeal as directed earlier by the Court. The Court decided to fix the matter for the hearing of a notice to show cause why the appeal should not be dismissed for want of compliance.

However, on the 25th February, 2025, counsel for the Appellant confirmed once more that he had, indeed, not complied with the directions for filing the Supplementary Record of Appeal. He prayed for more time to get documents to use for the Supplementary Record of Appeal. Counsel for the Respondent objected to the request on the ground that the Appellant had been given sufficient time to request for the necessary documents and file and serve the supplementary record in vain. He applied for the Court to dismiss the appeal for non-compliance..."

2. That is the brief background to this application that seeks to reinstate another one which sought to set aside the Ruling. Thus, I now proceed to the instant application.

3. Before me is an application dated 12th May 2025. It is brought by the Appellants under Sections 1A, 1B, and 3A of the *Civil Procedure Act* as read together with Order 51 and Order 12 Rule 7 of the Civil Procedure Rules 2010 and all the enabling provisions of the law. It seeks the following orders:

    1. ...Spent

    2. That this Honorable Court be placed to set aside the order of dismissal issued on 24th April 2025 dismissing the applicant's application dated 4th April 2025 for want of prosecution.

    3. That upon granting prayer 3 above the Applicant's/ Defendants application dated 4th April 2025 be reinstated for hearing on merit.

    4. That the cost of this application be in the cause.

4. The application was based on eleven (11) grounds. These were that the application dated 4th April 2025 was dismissed for want of prosecution on 24th April 2025. On the said date his learned counsel on record logged onto the virtual platform but his device or laptop acted up and developed technical issues, thereby hindering the normal operations of the microphone. The applicant's advocate unsuccessfully struggled to address the court but the technical challenge hindered him from doing so. The honourable court called out the Applicant's counsel on record but he could not respond as a result of his device that acted up (sic) amid this to the virtual proceedings. The Applicant's counsel was contacted was contacted by one Miss Anuro Advocate informing him that the Honorable court was calling him out but he informed her that his device had collapsed and he could not address the court. The applicant's counsel on record was again informed that the application which was coming up for hearing had been dismissed for want of prosecution.

5. The applicants were desirous of prosecuting this matter, save for the technological hitch that caused his advocate on record not to prosecute the application the same date. The applicant had not deliberately sought, whether by evasion or otherwise to obstruct or delay justice. The mistake is excusable and

highly regulated and was not deliberate as the same was occasioned by the failure of technology. The defendant would not suffer prejudice if the applicant was allowed to have the said application heard and prosecuted as this would give chance to both parties to be hard. The application of the applicant raises tribal issues which ought to be heard on merit.

6. The application was supported by the affidavit sworn by one, Barnard D. Achola Advocate on 12th May 2025. He repeated the contents of the grounds in support of the application save that, he added an attachment which was said to be an extract of WhatsApp communication between him and the said Miss Anuro. He annexed it as BDA 01.

7. However, it is important to note here before going to the Response by the Respondent that the annexed copy of the screenshots was not commissioned or signed by the Commissioner for Oaths who commissioned the deponent's Affidavit. He not affix his signature and stamp on it, as required by the law.

The Response

8. The Respondent filed a Replying Affidavit dated 2nd July, 2025. It is the Respondent's assertion that the application dated 4th April 2025 which was dismissed by this court on 24th April, 2025 relates to an appeal which was preferred against a judgment delivered on 4th March 2020. The respondent further deponed that the applicant filed a Memorandum of Appeal on 5th December, 2022, which was 2 years, nine months after the delivery of the impugned judgement and that there was no order granting the appellant leave to file the appeal out of time.

9. On account of the foregoing, the respondent deponed that the applicant's application was fatally defective and amounted to an abuse of the court process. He states that the instant application is premised on sections of the law that do not provide a valid legal basis for the reliefs sought by the appellant. He also depones that the applicant has been indolent and as such, this court's discretion should not be exercised in his favour as the appellant has not provided a reasonable explanation to warrant the reinstatement of his application.

10. Concerning the excuse given by the applicant that the latter's gadget developed technical issues, the respondent wonders why the appellant could not use the chat feature instead of relying on the microphone to explain his predicament to the court. The respondent also faults the applicant for taking 19 days after the dismissal to make the instant application.

11. The Respondent also avers that the instant application is a mere afterthought calculated to re-open litigation through the backdoor. The respondent avers that he would suffer prejudice as a result of the delay in dispensing justice in this matter. He blames this delay on the applicant.

Submissions

12. The applicant filed his brief submissions dated 3rd June, 2025 and reiterated the contents of his application and supporting affidavit which I need not replicate. In addition, the applicant submitted that reinstating the application should be premised on judicial discretion, which should be exercised judiciously and cited the case of Shah v Mbogoh [1979] EA 116 to support his position. The applicant also sought refuge in Article 159 of *the Constitution* of Kenya, 2010. He noted that technological hitches are a common occurrence during virtual court sessions and invited the court to exercise discretion in his favour.

13. On their part, the Respondent's submission dated 2nd July, 2025 also reiterate the contents of the respondent's replying affidavit. As such, I will only highlight that which has not been captured in the replying affidavit.

14. The Respondent faults the applicant for citing the case of Shah v Mbogoh (supra) on the use of judicial discretion conveniently to suit his position and thereby failing to capture the court's sentiments that the judicial discretion should not be used to aid a party who seeks to delay justice either deliberately or by evasion.

15. With regard to Article 159 of *the Constitution*, the respondent relied on Equitable Party & 2 others v the Independent Electoral and Boundaries Commission [2020] eKLR to argue that Article 159 of *the Constitution* does not cure all manner of pitfalls including adherence to procedural aspects mandated by law.

16. The respondent argues that the application by the applicant is not meritorious as it amounts to abuse of the due process of the court and prays that it be dismissed with costs.

Issues, Analysis and determination

17. The main issue for determination is whether the applicant's application dated 12th May, 2025 is meritorious. The minor one is on who to bear the costs of the application.

18. The applicant's application dated 4th May, 2025 was dismissed by this court on account of non-attendance and not for want of prosecution as alleged by the applicant. The applicant now prays that dismissal order be set aside and its application dated 4th May, 2025 be reinstated. The application is brought under Order 12 Rule 7 of the Civil Procedure Rules which provides as follows:

> " Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."

19. The principles governing reinstatement of suits have been enunciated in several precedents. Fundamentally, courts have noted that reinstatement of a suit that has been dismissed for want of prosecution is a subject to judicial discretion, which discretion should be exercised judiciously see Karweru t/a Karweru & Co Advocates v Mburu & and another (Miscellaneous Application 17 of 2021) [2024] KEELC 5094 (KLR), John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation) [2015] eKLR KEHC 6789 (KLR); and Tabuche v Tinga (Civil Appeal e003 of 2022) [2024] KECA 651(KLR).

20. In Tabuche v Tinga (supra), the Court of Appeal noted that

> "reinstatement of a suit dismissed for want of prosecution is a discretionary remedy and not as a matter of right. In any event each case depends on its own circumstances..."

21. In exercising the above stated discretion, courts are called upon to be fair under the circumstances and to be guided by rules and principles of law as was observed in the Court of Appeal in the Tabuche decision (supra). The court must also be satisfied by the reason given by the applicant to warrant the reinstatement and should also consider the prejudice suffered by the respondent.

22. The applicant's advocate maintained that on 24th May 2025 when this matter came up before the court, he joined the virtual court session and tried to address the court. However, he insists that he could not do so because his gadget developed some technological challenges that rendered the microphone of his gadget malfunctional.

23. The Respondent, on the other hand, maintains that the applicant has not been keen on prosecuting his case and has been employing delay tactics, including the excuse now given by the applicant's counsel concerning the malfunctional gadget. Consequently, the respondent avers that he has been prejudiced by the delays occasioned by the applicant and calls for the dismissal of the instant application.

24. Further, that whereas the respondent in his replying affidavit as well as submission faults the applicant's application for seeking to reinstate an application that seeks to revive an otherwise defective appeal that was filed out of time, I am alive to the fact that what is before me is the application for the reinstatement of the application dated 4th April 2024.

25. As such, I will restrict myself to the reinstatement as prayed in the applicant's application dated 12th May 2025 and not the merits of the applicant's application dated 4th May 2025 which the Applicant now seeks to reinstate.

26. The applicant's counsel exonerates himself and his client from blame regarding his failure to attended court and cited the case of Shah v Mbogoh (supra) in support of the argument that the applicant merits this court's exercise of judicial discretion in his favour.

27. While it possible that the gadget in question may have developed technical issues, I it was foreseeable on that part of the applicant's counsel that indeed technology fails, which fact he has acknowledged and hence should have taken measures to avert this eventuality.

28. I agree with the Respondent that Article 159 (2) (d) of *the Constitution* should is not be used as refuge for all manner of transgressions. In any event, justice is justice to both the applicant and the respondent. The court must therefore balance the interests of both parties.

29. Since exercise of judicial discretion as submitted by the parties is driven by the need to enhance access to justice by the parties involved. This court has considered the history of. This court has considered the history of this matter as has been summarized above in the first few paragraphs of this ruling above. Has been summarized in the first few paragraphs of this ruling. It has also considered the factual position of the Applicant has at the time the application dated 4th April 2025 was dismissed. It has, in the interest of justice, gone beyond not relying on the screenshots which were annexed as BDA 01 which were not commissioned, contrary to Rules 9 of the Oaths and Statutory Declarations Rules, that is, The Commissioners or Oaths (Fees on Affidavits) Rules as made under Section 6 of the Oaths and Statutory Act, Chapter 15 Laws of Kenya.

30. This is a matter where the appellant seems to be in noncompliance of each step required at each time. The court wonders how long it can indulge him. Litigation must come to an end at one time. There is a time for everything: a time to file and appeal and a time to conclude it; a time to prosecute and a time to leave things take their course. The Appellant appears not to be keen on the timelines set in court, including attending for hearings at the appointed times. The case of Mobile Kitale Service Station v Mobil Oil Kenya Limited & another [2002] KEHC 1185 (KLR) explains the importance of observing the Rules of engagement in matters in court. They are for achieving justice to rival parties. They ought to be followed for good order and balancing justice in all situations. The Rule of law is not observed in vain.

31. Once more this court reminds the applicant that the court is enjoined by the law to administer justice substantively. But this has to be balanced with the interests of an innocent party who acts diligently and an adverse party in those circumstances who fails to comply with the directions and timelines of the court and or acts in a manner as to obstruct or delay the course of justice. The latter cannot be given endless chances as to abuse the process of the court. It is not in dispute that the Appellant has delayed this matter before. Further, it has not been shown that indeed the appellant's

counsel was online at the time the matter was called. And if indeed he was in communication with a learned counsel Mrs Anuro who was in the online court session who knew that the matter was being handled and was about to be dismissed, he could have informed the learned counsel in court to ask the court to indulge him. He did not. Even learned counsel who heard the matter being called and was in communication with the appellant's counsel could have informed the court that indeed she had contacted the appellant's counsel to attend to his matter but he indicated to her that his gadget had failed. She did not either. Furthermore, the purported screenshots relied on to show communication between the two counsel were not commissioned in terms of Rule 9 of the Oaths and Statutory Declarations Rules as to comprise annextures that could support the allegations by learned counsel. That being so, the depositions about communication between the two counsel was at best mere inadmissible hearsay.

32. The above inaction coupled with the earlier observation of this court that even the Memorandum of Appeal herein was unsigned, and the case having found in terms of the case of Vipin Maganlal Shah & another V Investment & Mortgages Bank Limited & 2 others [2001] KECA 357 (KLR) and that of Regina Kavenya Mutuku & 3 others V United Insurance Co Ltd [2002] KEHC 1114 (KLR) an unsigned documents filed is of no avail to any party, it leaves this court to wonder whether even if it set aside the order of dismissal where an defective appeal would lead the court to than the same conclusion that the appeal cannot be sustained.

33. In view of the above authorities, consequently, the application is devoid of merit. It is dismissed with costs to the Respondent. Again, it is worth reminding the parties that finding on the fact that the unsigned memorandum of appeal on record herein is a nullity in law and therefore disregarded or dismissed, still stands. There could be no valid appeal to go back to even if this court were to agree with the applicant. The application is dismissed with costs to the Respondent as was the appeal earlier.

34. It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA THE TEAMS PLATFORM THIS 4TH DAY OF NOVEMBER, 2025.

HON. DR. IUR NYAGAKA

JUDGE

From 1:37 PM, in the presence of,

Court Assistant: Ms. Lola

E. Ongoya Advocate for the Respondent

Kerario Marwa Advocate for Appellant (absent)