



**Ndungu & another (Suing as Legal Representatives of the Estate of
Jonah Muriithi kimotho - Deceased) v Kimathi & another (Civil Appeal
E036 of 2023) [2025] KEHC 17463 (KLR) (28 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 17463 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CIVIL APPEAL E036 OF 2023
AK NDUNG'U, J
NOVEMBER 28, 2025**

BETWEEN

**PETER KIMOTHO NDUNGU 1ST APPELLANT
ZIPPORAH MUTHONI KIMOTHO 2ND APPELLANT
SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF JONAH
MURIITHI KIMOTHO - DECEASED**

AND

**MICHAEL KIMATHI 1ST RESPONDENT
JOHN MUGAMBI ANGAINE 2ND RESPONDENT**

RULING

1. This ruling resolves the application 27/01/2025 in which the Applicants seek orders that this court do set aside, review and/or vary the proceedings of 03/12/2024, the subject appeal be reinstated and or readmitted and the same be set down for directions and hearing and that costs be provided for.
2. The application is based on the grounds on the face thereof and is supported by an affidavit of Shem Kebongo, advocate for the Appellants. He deposed that there were unforeseeable and excusable mistakes that led to the absence of Appellants when the matter was called out in court on 03/12/2024 since the counsel attending in court experienced technical challenges resulting from temporary power outage and internet breakdown. The advocate also learnt that the matter had been dismissed later on the day upon perusing the court's file. That the Appellants have a triable case with high chances of success and they are ready to prosecute the appeal and that the mistake of counsel should not be visited upon an innocent litigant. He deposed that the application has been filed timeously and the Respondents will not be prejudiced if the orders sought are granted and it is the Appellants who stands to suffer prejudice as they will be condemned unheard.



3. In opposing the application, the Respondents filed a replying affidavit dated 23/05/2025 sworn by Collins Mutinda, the Respondents' counsel. He deposed that the application is frivolous and an abuse of the court process as the Appellants have been lax in prosecuting the appeal and the circumstances for non-attendance have not been satisfactorily explained. That the memorandum of appeal was filed on 14/11/2023 and the Appellants were granted 30 days by this court to file record of appeal and on 03/12/2024 when the matter was being mentioned, the Appellants had not filed the record of appeal necessitating the dismissal of the appeal. He deposed that court orders must be obeyed and that reinstatement of a suit dismissed for want of prosecution is discretionary and not as of right and in this case, reinstatement is not deserved in the face of unsatisfactory and inexcusable reason given for failure to attend court on 03/12/2024. That counsel should have procured another counsel to hold their brief or have the file placed aside. That the court should not aid the indolent who filed the appeal and went to slumber for one year.
4. The application was canvassed by way of written submissions. Counsel for the Appellants submitted that this court has jurisdiction to set aside its own orders as section 3A of the *Civil Procedure Act* gives this court inherent power to make such orders as may be necessary for the end of justice to be met and Order 51 rule 15 of the Civil Procedure Rules gives the court power to set aside any order made ex parte. That failure to attend court was due to technical challenges being power outage that led to loss of internet which impeded access to virtual court session. That this was unforeseeable and excusable circumstance not amounting to willful disobedience. Hence, the mistakes of counsel should not be meted upon an innocent litigant and he urged the court to find in favour of the Appellants and not punish them for matters that were beyond their control. He submitted that there was no delay in filing the current application and delay alone is not a ground to deny a party access to justice.
5. Further, the application was filed as soon as reasonably practicable. That the Appellants have taken active steps throughout the pendency of the appeal as there has been no prolonged pendency or abandonment of the matter. That the current application is a continuation of diligent prosecution and not revival after prolonged neglect. Further, the court is enjoined by Article 49 and 159(2)(d) of *the Constitution* to ensure access to justice and to administer justice without undue regard to procedural technicalities. That the delay has been explained, the application is made in good faith and no substantial prejudice is occasioned hence court should reinstate the matter. That the appeal discloses serious and arguable grounds touching on the legal rights of the deceased estate which is evidenced by the memorandum of appeal filed. That to deny reinstatement will be contrary to the Appellants' constitutional right to fair hearing guaranteed under Article 50 of *the Constitution*. Additionally, the Respondents have not demonstrated that they would suffer any prejudice which could not be adequately compensated and it is the Appellants who stands to suffer irreparable harm if the orders sought are not granted.
6. In rejoinder, the Respondents' counsel submitted that the court had ordered the Appellants to file a record of appeal and when the matter came up for mention on 03/12/2024, the Appellants had not yet filed the record and so the appeal was dismissed. That failure to obey court orders is a perilous offence as has been held in various authorities. That the Appellant had not filed the record, one year later after filing the appeal hence the court was right in upholding its dignity and firmly dealing with contemnor such as the Appellants. As to whether the Respondents will suffer any prejudice, he submitted that the Respondents are entitled to peace of mind, equity aids the vigilant and not the indolent and that the law encourages speedy resolution of disputes hence the Appellants should not be allowed to continue holding the Respondents at ramson.
7. He submitted that the affidavit in support of the application was not sworn by the counsel attendant to the matter hence the same is worthless. This is because the affidavit in support to the Appellants'



application gives an impression that Appellants' counsel experienced challenges however, the counsel who swore the affidavit has never appeared in this suit. That the said counsel cannot clearly explain the alleged electronic and internet challenges faced. He submitted that the Appellants are not deserving this court's discretion by having failed to help it achieve its overriding objective which is to facilitate just and expeditious conclusion of matters.

8. I have considered the application, the response by the Respondents, the submissions and the cases relied on by the parties. The Appellants seeks setting aside the order of this court dismissing its appeal and that the appeal be reinstated. A decision on whether or not to reinstate a suit is discretionary. The Court of Appeal in *Tabuche v Tinga & 2 others (Civil Appeal E003 of 2022) [2024] KECA 551 (KLR)* (24 May 2024) stated that;

“Reinstatement of a suit dismissed for want of prosecution is a discretionary remedy and not as of right. In any event, each case depends on its own circumstances.”

9. In *Kenya Pipeline Co. Ltd v Maguta Production Ltd [2014] eKLR*, the court held that;

“... the discretion of the court must always be exercised judiciously with the sole intention of dispensing justice to both or all the parties. Each case must therefore be evaluated on its unique fact and circumstances. Among the factors to be considered is whether the Applicant will suffer any prejudice if denied an opportunity to be heard on merit.”

10. And in *Thathini Development Company Limited v Mombasa Water & Sewerage Company & another [2022] eKLR*, the court stated thus;

“A suit is dismissed for a want of prosecution, means that the parties therein failed to aid court in meeting its overriding objective. The party seeking to reverse this order must explain sufficiently to court as to why his application is merited and persuade court to exercise its discretion.”

11. Have the Appellants sufficiently explained that their application is merited? The explanation given by the Appellants' counsel for failure to prosecute the appeal is that counsel attending to the matter experienced technical challenges with the online court system when the matter was coming up for mention on 03/12/2024. It is to be noted that on 19/09/2024, this court directed that the record of appeal be filed within 30 days. When the matter came up for mention on 03/12/2024, the record was yet to be filed meaning that the Appellants failed to comply with this court's orders and their counsel was absent. This necessitated this court to dismiss the appeal.

12. The Appellants' counsel has not explained why he failed to file the record of appeal as ordered by this court. He now seeks reinstatement of the appeal yet he has not complied with the orders of this court. Our courts have always emphasized that court orders are not made in vain. In *Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County (Ex Parte David Mugo Mwangi) [2018] eKLR*, the Court made the following observations;

“It must however be remembered that Court orders are not made in vain and are meant to be complied with. If for any reason a party has difficulty in complying therewith, the honorable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal.”



13. More poignant is the fact that counsel who has deponed to the facts surrounding the failure to appear on the material date lacks capacity to explain the circumstances that led to the non-appearance since he is not the one who encountered the alleged technical hitches. His affidavit evidence is thus hearsay and within the rules of evidence, inadmissible.
14. Reinstatement of a suit is at the discretion of the court, which discretion ought to be exercised in a just manner, as was held in *Bilha Ngonyo Isaac vs. Kembu Farm Ltd & another & another* [2018] eKLR which echoed the decision of the court in *Shah vs. Mbogo & Another* (1967) EA 116.
15. The exercise of the discretion must of necessity be informed by convincing reasons advanced by a party demonstrating that they deserve the orders of setting aside and the reinstatement of the suit. It cannot be done in a vacuum.
16. In the present case, and while appreciating the technical challenges that arise from time to time in our virtual proceedings, it is clear in my mind that without the counsel who is alleged to have encountered the challenges giving evidence of the same, the application is left clutching on straws and the orders sought become elusive.
17. With the result that the application lacks merit and is dismissed with costs to the respondent.

DATED SIGNED AND DELIVERED THIS 28TH DAY OF NOVEMBER 2025.

A.K NDUNG’U

JUDGE

