



REPUBLIC OF KENYA



KENYA LAW
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**Imbiakha v Nduku & another (Civil Appeal E035 of 2023)
[2025] KEHC 17617 (KLR) (26 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 17617 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E035 OF 2023
S MBUNGI, J
NOVEMBER 26, 2025**

BETWEEN

VINCENT IMBIAKHA APPELLANT

AND

JOHN SHOLE NDUKU 1ST DEFENDANT

JOSEPHAT MUSIMBI SHOLE 2ND DEFENDANT

RULING

1. The applicant herein filed a notice of motion application dated 1st November 2024, seeking the following orders;
 - a. That this application be heard exparte in the 1st instance(spent)
 - b. That the Honourable court be pleased to set aside the orders made on the 31st day of October 2024 and reinstate the appeal here for hearing and determination on merit.
 - c. That the Honourable court be pleased to review the orders made on the 22nd day of February 2024 and reinstate the appellant's Appeal for hearing on merit
 - d. That the costs of this application be provided for.
2. The Application is premised on the grounds set out on its face and on the supporting affidavit sworn on the same day as the applicant counsel, who avers that he had appeared before Hon. Justice Otieno to extend an interim order that was granted for 27th July 2023. He stated that in the course of February 2024, he lost his uncle, and they were to appear in court on 22nd February 2024; however, due to an oversight on his part, he failed to diarize the date given.
3. He avers that on the day the matter came before the court on 22nd February 2022, he had travelled from Kakamega to Kisii to bury his uncle. Unfortunately, the Honourable court dismissed the Application



- dated 25th April 2023 and discharged the interim order on record and further directed them to file a written submission within 14 days.
4. He avers that the orders issued in court on 22nd February 2022 were not served upon their firm, and the orders issued were taken back to the lower court at Butali, and warrants of attachment were issued against the Appellant/applicant, which made them file the Application dated 20th March 2024
 5. He avers that the court directed the application to be served for an interparties hearing on 18th April 2024; however, the Honourable court was not sitting, and hence they were not able to address the court.
 6. According to the applicant, on 25th April 2024, they filed a certificate of urgency dated 24th April 2024 after the auctioneers attached the Appellant/ Applicant's properties. The application was heard by Hon. Justice P.J. Otieno, who issued an order for stay of the sale of the Appellant's properties, which had been attached. They stated that on 08th July 2024, the Respondent appeared in person, stating that they had not been served with the Application dated 20th March 2024. He asserts that he served the application to the Applicant, and on 13th August 2024, he was served with a notice of change by the firm of Marisio Luchivya and Company Advocates, removing Tamata Advocate from the record
 7. He contends that the firm of Marisio Luchivya and Company Advocates also filed a replying affidavit dated 20th March 2024, although Mr. Tamata still addressed the court on behalf of the Respondent and prayed for orders to dismiss the Application and Appeal.
 8. According to the applicant's counsel, the appeal is yet to be listed for hearing since the Application is yet to be heard and determined as Mr. Tamata who they claim was not properly on record mislead the court to dismiss the Appellant/ Applicant's Appeal before the application was heard and determined and in the circumstance prays that the application be allowed to give the Applicant a chance to be heard on merit.
 9. They claim that the respondent will not suffer any prejudice if the Appeal is heard and determined on merit upon reinstatement.
 10. Opposing the application, the respondent filed a replying affidavit dated 25th June 2025 states that the application seeking for review has not disclosed any error in the order and avers that the Appeal was dismissed on 31/10/2024 as alleged and that the orders of 31/10/2024 was a follow up on the orders issued on 22/2/2024 and that the application is not seeking to review the orders made on 22/2/2024 which were that;
 - a. The Appellant is directed to file submissions within the next days
 - b. That in default, the appeal will stand dismissed
 - c. That the interim orders given on 25/4/2023 are hereby discarded.
 - d. That mention for compliance on 8/7/2024.
 11. They aver that the appeal was dismissed pursuant to orders of 222/2/2024 by 7th March 2024, and setting aside orders of 31st October 2024 serves no value.
 12. He avers that the case did not point to any error and that the case was not dismissed for non-attendance but non-compliance with the court's directions of 22/2/2024, and as such, the Applicant has not complied with the orders and as such that the application is misconceived, a non-starter and does not meet the threshold to review the same and should be dismissed with costs.



Analysis and determination

13. I have analysed the application, the replying affidavit and submissions. The main issues for determination is whether the court should set aside the orders made on the 31st day of October 2024 and reinstate the appeal here for hearing and determination on merit, and whether to review the orders made on the 22nd day of February 2024 and reinstate the appellant's Appeal for hearing on merit.
14. This application invokes the inherent powers of the court under Sections 3A and 3B of the *Civil Procedure Act*, Cap 21, which empower the court to make such orders as may be necessary for the ends of justice and to prevent abuse of the court process. Order 45 of the Civil Procedure Rules, 2010, provides for review of judgments or orders on grounds such as discovery of new and important matter, mistake or error apparent on the face of the record, or for any other sufficient reason.
15. Section 80 of the *Civil Procedure Act* further allows any person aggrieved by a decree or order from which no appeal has been preferred or is allowed to apply for review, with the court empowered to make such order as it thinks fit.
16. The principles governing applications to set aside dismissals for non-compliance with court directions, or to review and reinstate appeals, are well-settled in Kenyan jurisprudence. In *Njue Njagi v. Ephantus Njiru & Another* [2016] eKLR, the Court held that dismissal of a suit or appeal for non-attendance or want of prosecution amounts to a judgment, and the court has discretion to set it aside to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake. Similarly, in *Bouchard International (Services) Ltd v. M'mwereria* [1987] KLR 193, the Court of Appeal emphasised that the discretion to set aside ex parte orders or dismissals is intended to ensure justice is done, provided there is no deliberate obstruction of the course of justice. The court must consider all facts and circumstances, including the merits of the case, to prevent undue hardship.
17. The applicant's counsel deposes that at the time of the mention, he had lost his uncle and was out of town and that there was an oversight on his part as he failed to diarize the given dates. This explanation is not challenged by the respondent and amounts to excusable neglect, arising as it does from genuine human error during a time of personal grief rather than from willful or reckless disregard of court processes. The assertion that the orders of 22nd February 2024 were never served on the applicant's law firm added the grounds for review, since non-service constitutes an error apparent on the face of the record that offends procedural fairness under Order 45 Rule 1(1)(c) of the Civil Procedure Rules.
18. The respondent's contention that the dismissal on 31st October 2024 was merely consequential to the non-compliance with the 14 days submissions deadline under the 22nd February 2024 orders is noted. However, this ignores the chain of events that the interim stay granted on 8th April 2024 by Hon. Justice Otieno preserved the status quo amid attachment of properties, and the subsequent change of advocates when the notice was served on 13th August 2024 introduced procedural confusion, with Mr. Tamata addressing the court despite the change of advocates. The respondent's replying affidavit, filed by a new firm on 20th March 2024, does not cure the service defect. In *Naftali Opondo Onyango v. National Bank of Kenya Ltd* [2005] eKLR, the court reinstated a matter dismissed for want of prosecution where delay was explained and no prejudice was shown, emphasising that courts should be slow to dismiss if a hearing can proceed without further delay.
19. The applicant demonstrates arguable merit in his memorandum of appeal, as evidenced by the interim orders protecting properties from auction, suggesting triable issues in the original suit. The respondent will suffer no substantial prejudice from reinstatement, as the matter has not proceeded to execution beyond the stayed attachments, and any delay that is from February to November 2024 has been explained. In *Pancras T. Swai v. Kenya Breweries Limited* [2014] eKLR, the Court of Appeal clarified



that "any sufficient reason" under Order 45 r.1 is not exhaustive and includes unfettered discretion under s.80 to prevent injustice, viewing such reasons in light of access to justice.

20. The respondent's contention that setting aside the orders of 31st October 2024 "adds no value" cannot stand, as it would merely sustain a dismissal rendered in breach of natural justice. The application is properly before the court and cannot be dismissed as misguided or incompetent; it satisfies the requirements of sufficient cause, excusable error, and lack of prejudice to the respondent. Declining it would elevate procedural technicalities above substantive justice, in contravention of Article 159(2) (b) and (d) of *the Constitution*.
21. In the result, I find the application merited. The orders of 22nd February 2024 are reviewed and varied to the extent of reinstating the appeal; the dismissal orders of 31st October 2024 are set aside; and the appeal is reinstated for hearing on merits
22. For the foregoing reasons, the notice of motion dated 1st November 2024 is allowed as prayed, save for costs, which I direct be in the cause.
23. Orders entered accordingly.
24. Mention 18.3.2026 for directions on the Appeal.
25. Right of Appeal 30 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 26TH DAY OF NOVEMBER, 2025.

S.MBUNGI

JUDGE

In the presence of:-

CA: Angong'a

Mr Orute holding brief for Manyoni for the Applicant present online.

Tamata for Respondent, absent

