



Ochillo v Ochilo (Suing through his Attorney Joseph Odingo Ochillo) (Environment and Land Appeal 44 of 2021) [2025] KEELC 8411 (KLR) (27 November 2025) (Ruling)

Neutral citation: [2025] KEELC 8411 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND APPEAL 44 OF 2021
FO NYAGAKA, J
NOVEMBER 27, 2025**

BETWEEN

PHILLIP ORWA OCHILLO APPELLANT

AND

SYLVESTER SWAO OCHILO (SUING THROUGH HIS ATTORNEY JOSEPH ODINGO OCHILLO) RESPONDENT

RULING

The Application

1. The Applicant herein filed an application dated 16th September 2024. He brought it under a Certificate of Urgency. He expressed to have brought it under Rules 16 and 17 of the High Court Organizations and Administration) General Rules, 2016. Suffice it to say that the said Rules apply to the procedures in the High Court and not the Environment and Land Court which is of equal status as the former. Nevertheless, the applicant seeks Orders:
 1. ...Spent
 2. ...Spent
 3. That this honourable do set aside and/ or vary its orders given on 9th May 2023 dismissing the appeal;
 4. the appeal dated 1st December 2021 be reinstated and the same be heard on merit;
 5. That there be a stay of execution of lower court judgment pending hearing and determination of this appeal
 6. That costs of this application be in the cause.



2. The application is premised on the grounds set out on the face of the application as well as the sworn affidavit of Phillip Orwa Ochillo, the applicant. The applicant stated that he was dissatisfied with the judgment of Hon. Moses Obiero rendered in the lower court hence he filed the instant appeal.
3. The applicant stated that when the matter came up for mention to confirm the filing of the Record of Appeal, his appeal was dismissed for non-compliance. He maintained that he “just learnt” that his then advocate on record did not attend court on the mention date when the court dismissed his application suo moto. He stated that he is willing to prosecute the matter to its logical conclusion. He urged the court to set aside its orders dismissing the appeal dated 9th May 2023 and admit the appeal upon payment of the requisite court fees.
4. It is the applicant’s further contention that the Respondent will not suffer any prejudice should the appeal be allowed. On the contrary, he maintained that he will suffer prejudice if the orders sought are not granted.
5. Phillip Orwa Ochillo reiterates, in the Supporting Affidavit, some of the contents of the application which this court need not replicate. However, it is important to note that the applicant deponed that the appeal that he now seeks to be reinstated was filed on 1st December 2021 and that the firm of M/S Odingo & Company Advocates acted for him. He also deponed that sometimes in 2022, he appointed the Tom Mboya & Company advocates to take over the matter from Odingo & Company Advocates. As the record shows currently, he as appointed the firm of L. A. Ooro and Company Advocates in that behalf.
6. In addition to the above stated, the applicant deponed that his previous advocate made him believe that all his appeal records were proper. He also deponed that, upon inquiry, he learnt that there was an Environment and Land Court judge in Migori. He added that, his advanced age prevented him from accessing court, including the virtual court since he does not possess digital literacy skills.
7. The applicant deponed that communication between himself and his then advocates on record irretrievably broke down. Further, that when he visited the law courts to peruse his court file, the realized that his appeal had been dismissed for failure to file a record of appeal.
8. The applicant argued that mistakes of counsel should not be visited on an innocent party. He prayed that he be allowed to prosecute the appeal dated 1st December 2021 and therefore the orders of the court dated 9th May 2022 be set aside. He also deponed that he will suffer prejudice if the orders sought are not granted since he has been in occupation of the suit property since 1993.

Response to the Application

9. The Respondent filed a Replying Affidavit dated 26th February 2025 and sworn by Linda Agatha, learned counsel in conduct of his matter. She deponed that she has been authorized by the respondent to swear the said affidavit. But this court did not come across any such written authority. Hence it wondered whether this was not a falsehood, unless counsel only deponed to matters within her knowledge on the file during the practice and conduct of the same.
10. Counsel deponed that the trial court delivered a judgment in Migori CMCC NO. 40 of 2019, Sylvester Ochillo v Phillip Orwa Ochilo on 16th November 2021. She further deponed that the applicant herein, being dissatisfied with the said judgment of the lower court appealed the same vide a Memorandum of Appeal dated 1st December 2021. Counsel further deponed that her client faithfully attended several court sessions for purposes of taking directions of the appeal but neither the applicant nor his counsel on record ever made an appearance.



11. Further to the above, counsel deponed that the after almost two years of inaction since the filing of the Memorandum of Appeal, the court issued a Notice to Show Cause why the appeal should not be dismissed for want of prosecution on 3rd April 2024. It was served upon the parties. Ultimately it dismissed the appeal on 9th May 2023 when the applicant again failed to appear.
12. On the basis of the foregoing, counsel deponed that the applicant is not being honest as there is no evidence of any genuine or substantial efforts on the part of the applicant or his counsel to have the appeal heard and determined expeditiously.
13. On the issue of prejudice to be suffered by his client counsel for the respondent argued his client stands to suffer prejudice, having prosecuted the matter diligently at the lower court as well as appearing before this court or purpose until the eventual dismissal of the appeal for want of prosecution. On this account, counsel argued that reinstating the appeal and overlooking the inexcusable mistakes of counsel would cause unwarranted hardship on the part of the respondent while assisting the applicant to obstruct or otherwise undermine the cause of justice.
14. Further counsel deponed that the application was misconceived for reasons that the orders sought by the applicant were discretionary yet the applicant was not candid for failing to explain to the court why the orders sought should be granted.
15. Counsel referred to the Judicial e-filing Public Information Kiosk as well as the court record to depone that the applicant's appeal was in deed dismissed for want of prosecution. Further, he contended that this court issued a Notice to Show Cause why the appeal should not be dismissed while the matter was still active but the appellant took no action.
16. Moreover, counsel deponed that the stay of execution orders being sought by the applicant are equally not merited as the applicant seeks to set aside orders that were issued approximately one year and four months ago.
17. Counsel also deponed that there was inordinate, inexcusable and unexplained delay on the part of the applicant in filing the instant application and stated that delay hinders the expeditious and efficient administration of justice. On the same note, counsel deponed the unexplained delay in filling the application, more especially the applicant's prayer on stay of execution, which was made three years after the impugned judgment was rendered works against the respondent's expectation that he is entitled to the fruits of his judgment without unmerited interference from the applicant.
18. On the basis of the aforestated, counsel prayed on behalf of the respondent that the instant application be dismissed to pave way of execution of the judgment and decree of the lower court.

Parties' Submissions

19. The application was canvassed by way of written submissions. The applicant filed his submissions dated 8th May 2025 in which he emphasized that the mistakes of counsel should not be visited upon an innocent litigant. He also relied on section 3A of the *Civil Procedure Act* to invoke the inherent powers of this court to make orders as is necessary for purposes of meeting the ends of justice.
20. Reliance was placed on the court of appeal decision in *Ivita v Kyumbu* [1984] KLR to highlight the considerations that the court should bear in mind when dealing with reinstatement of dismissed suits. The applicant also submitted that reinstatement of suits is a matter of the court's discretions and argued that such discretion should be exercised judiciously.



21. Lastly, the applicant submitted that he willing to prosecute the appeal to its logical conclusion and maintained that when he realized that his former advocates on record were not serving him, he approached his now advocates on record pursue his matter. He noted that he has been very keen on prosecuting his matter only that the mistakes of his counsel have forsaken him and prayed that he be allowed to prosecute his appeal pursuant to the provisions of Article 50 of *the Constitution* of Kenya, 2010.
22. The Respondent on his part filed his submissions dated 19th March 2025. His submissions revolve around the issue of reinstatement of the appeal following its dismissal for want of prosecution and the applicant's prayer on stay of execution pending appeal.
23. On the issue of the reinstatement of the appeal the respondent argued that the applicant had not demonstrated why the appeal should be reinstated, despite the unexplained inordinate delay in filing the instant application. He placed reliance on the Court of Appeal decision of *Shah V Mbogo and Another* [1967] EA 116, to reinforce to argument that the court's discretionary power to set aside an ex-parte judgment should be used to avoid hardship or injustice accruing out of a mistake or accident, inadvertence or excusable mistake and not to aid a party who deliberately evades, obstructs or otherwise seeks to delay the course of justice.
24. It was also submitted for the respondent that the application had not met the threshold for the grant of orders of resentment of the appeal for the reason that there was no sufficient explanation as to why the application was filed almost two years after the dismissal of the appeal. Similarly, the argument that the applicant is advanced age was also criticized by the respondent who argued that the same applicant deponed in his affidavit that he was accessed the court and perused his file.
25. The Respondent equally argued that blaming the applicant's advocate without admitting his (applicant's) inaction in the delay of the prosecution of his matter shows that the application was not made in good faith. To this end, the respondent relied on the Court of Appeal decision in *Leopard Rock Mico Ltd versus Electrical Services Ltd* (2014) eKLR to buttress his argument that litigants are responsible for expediting the disposal of their matters.
26. As to whether the applicant should be granted the stay of exaction orders sough, the respondent argued that the same was not merited as the applicant had not met the conditions for grant of the said orders. He argued that the applicant had not demonstrated sufficient cause, especially considering the fact that granting the orders amounts to depriving the respondent the right to enjoy the fruits of his judgment. This prayer, the respondent argued, was not made in good faith and is a mere afterthought as the applicant has never shown interest in pursuing this cause, almost three years since the impugned judgment was rendered.
27. Further to the above the respondent raised concern over the issue of security and prayed that, should the court be persuaded to grant the stay of execution orders, it should also consider directing the applicant deposit Kshs. 1,000,000/= within 30 days. The respondent prayed that this amount be deposited in a joint interest earning account held by the two advocates of the two parties as security for the due execution of the judgment of the lower court.
28. In his concluding remarks, the respondent submitted that the instant application is only meant to frustrate the execution process and prayed that the same be dismissed with costs.



Issues, Analysis and Determination

29. After analyzing both the application, the response in entirety, the law as well as the submissions filed by both parties, I consider the issues for determination to be whether the application is merited, and who to bear the costs of the same.
30. Article 159 (2) (d) of *the Constitution* as well as the overruling objectives of justice provided in the *Civil Procedure Act* mandate the expeditious disposal of suits. This mandate is placed on courts, advocates and litigants alike. In order to foster the expeditious disposal of suits before courts, Order 17 Rule 2 of the Civil Procedure Rules, 2010 empowers courts to dismiss suits where no action has is taken by a party/ parties for a period one year.
31. An appreciation of the maxims that delay defeats equity as well as justice delayed is justice denied are critical in our judicial system. Thus, where parties file suits and take no action in them for long periods, it thereby resulting not only in case pile ups in courts but also increment of case backlog and ultimately delay in delivery and /or denial of justice to would be successful parties it becomes critical further in calling for remedial actions in form of dismissal of such matters. In *Olumbe v Obayi* (Civil Appeal E014 of 2024) [2025] KEHC 5386(KLR), Musyoka, J qualified dismissal of suits for want of prosecution in the following terms:

Dismissal of suits for want of prosecution turns largely on the delay in getting the suit prosecuted. The overriding principle is the mantra that there ought to be no delay in the dispensation of justice, based on the maxim that justice delayed is justice denied. The justification behind the remedy, of dismissal of suits for want of prosecution, is that litigation must be expedited and concluded by the parties. There can be no justice in filling a cause in court, and then leave it parked there, unprosecuted, hanging over the head of the other party like the famed sword of Damocles. Dismissals help in clearing backlogs in court, created by parties who lack appetite to prosecute their cases. Pendency of unmoving cases create a logjam, which generates a crisis of public mistrust and lack of confidence in the Judiciary. Dismissals reduce the ever-increasing caseloads, and the backlogs, caused by stale suits clogging the judicial system

32. The law is however gracious and offers a silver lining to a litigant who can demonstrate the there was sufficient reason in delaying the prosecution of his suit. In *Ivita v Kyumbu* (1984] KLR the Court of Appeal set out the tests that should guide courts when considering whether or not to reinstate a suit dismissed for want of prosecution as hereunder:

So, the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant; so, both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff/respondent's excuse for the delay and that justice can still be done to the parties notwithstanding the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time. Where the defendant satisfies the court that there has been prolonged delay and the plaintiff does not give sufficient reason for the



delay the court will presume that the delay is not only prolonged but it is also inexcusable and in such case the suit may be dismissed. To put it in the words of Salmon LJ in *Allen v McAlpine*, at p 561, as a rule, when inordinate delay is established until a credible excuse is made out, the natural inference would be that it is inexcusable. It is an all-time saying, which will never wear out however often said that, justice delayed is justice denied.

33. What amounts to sufficient reason was explored by the court in *Ithiga v Mwangi* (Environment & Land Case 170 of 2014) [2025] KEELC 305 (KLR) (Angote, J) determined as follows:

The Court in *Wachira Karani vs Bildad Wachira* [2016] eKLR appreciated that the threshold to be met by an Applicant seeking to have the Court set aside its orders as aforesaid is the demonstration of sufficient cause. As to what constitutes sufficient cause, the Court of Appeal in the case of *BML v WM* [2020] eKLR, stated thus:

“What amounts to sufficient cause depends on the circumstances of each case and the court is called upon to exercise its discretion depending on the said circumstances. Musinga, JA in the case of *The Hon. Attorney General v the Law Society of Kenya & Another*, Civil Appeal (Application) No. 133 of 2011 (ur) defined sufficient cause to be:

“Sufficient cause” or “good cause” in law means:the burden placed a litigant (usually by court rule or order) to show why a request should be granted or an action excused”. See *Black’s Law Dictionary*, 9th Edition, page 251. Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”

Similarly, the Supreme Court of India in the case of *Parimal v Veena* [2011] 3 SCC 545 observed that:

“Sufficient cause” is an expression which has been used in large number of statutes. The meaning of the word “sufficient” is “adequate” or “enough”, in as much as may be necessary to answer the purpose intended. Therefore, the word “sufficient” embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, “sufficient cause” means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been “not acting diligently” or “remaining inactive.” However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously.”

34. In the instant matter, both parties agree that there was delay in filing the instant application. The application was brought almost two years after the dismissal of the suit as explained above. However, what is not agreed upon is the explanation offered by the applicant for the inordinate delay in filing the said application, and more importantly, in complying with the procedure and prosecuting the appeal.
35. On his part, the applicant blames his counsel for not filing a record appeal and failing to represent him as well as his old age, which he maintained prevented him from accessing both the virtual and physical court. Further, that it was his then advocates who misled him that all was okay with the appeal while it was not, and that at one time his communication with the said advocates irretrievably broke down until he later discovered the dismissal.



36. The Respondent, on the other part, watered down the above stated reasons and instead argued that the applicant never took any steps to ensure that the appeal was heard and determined expeditiously. He argued that the applicant filed the appeal and never attended court on several occasions for a period of two years until the same was dismissed for want of prosecution. He went on to add that the applicant was served with a Notice to Show Cause why the appeal should not be dismissed and yet took about two years to file the instant application seeking reinstatement of the suit. Further, the respondent argued that the applicant cannot blame his old age since he admitted that he was able to access court and check on the progress of the appeal.
37. It is also important to note that the applicant maintained that the mistakes of his counsel should not be visited upon him and urged this court to exercise its discretion in his favour.
38. I have considered the application, response and submissions tendered by both parties. It is worth noting that the appeal was not prosecuted for long until the court fixed it for notice to show cause why it should not be dismissed for want of prosecution. On the material date no cause had been shown by way of an affidavit explaining the delay or inaction. Thus, the court was right, at the time, in dismissing the appeal as sought by it. This court is, however, enjoined to consider the reason for the delay at the time an application of this nature is made. But even then, the delay in bringing such an application should be considered. Herein, the period is almost two years.
39. The explanation given by the applicant is that his old age prevented him from acting in time. He has not explained how his said age would prevent him, and in any event how his age was indeed an issue at the time of the dismissal and not now, a period even two years later. Further, he says that the communication between him and counsel irretrievably broke down. He does not demonstrate how it broke down: whether the lawyers changed their offices, what efforts he made in writing and calls or other visible ways to reach him in vain. Further, he alleges that the lawyers misled him that all was okay until he realized that the appeal was dismissed. This fact is a total contradiction with the allegation that communication broke down. What I understand the applicant to mean is that he was in constant communication with his lawyers and that was how he was assured that all was fine in the appeal. He attributes the dismissal to a mistake of counsel. I am of the humble view that without there being an affidavit by the advocate, owing to a mistake on their part, the allegations are unsubstantiated and a design to place blame where it is not hence this explanation is wholly insufficient.
40. In sum, I am inclined to state that the reasons advanced by the applicant are not persuasive to this court for the following reasons:
- a. Foremost, the applicant stated that his communication with his then advocate on record irretrievably broke down yet presented no evidence to demonstrate the same to this court. There is not evidence whatsoever showing that the applicant ever attempted to communicate with the said advocates over the appeal and that the said advocates never responded or acted in manner that demonstrated irretrievable breakdown of communication.
 - b. Secondly, the applicant stated that he could not access court owing to old age during the intervening period between when the appeal was filed and when the said appeal was dismissed. The same applicant deponed in his supporting affidavit that he went to the court and perused his file when he realized that his counsel was not representing him. The reason why the applicant could not access the same court earlier is not clear to this court, especially given that his explanation is that he was not in good terms with his advocate as alleged.
 - c. There is no evidence of mistake of the previous counsel on record demonstrated herein.



41. Whereas courts have time and again held that an innocent party should not be punished for the mistakes of his counsel, there is another long line of authorities that place the obligation of following up the progress of suits on litigants since the said suits belong to litigants and not counsel. This position was held in the persuasive authority in *Olumbe v Obayi* (supra) where the court held as hereunder:
9. In this case, the suit had been filed on 1st September 2021. No action had been taken on the matter, until the trial court listed it for dismissal in 2023. The appellants did not attend court, on the date when the same was due for notice to show cause, and their suit was dismissed. In the application to have the suit reinstated, the appellants offered no explanation for the delay or inaction. What they explained was that the offices of their Advocates were inaccessible between 8th February 2023 and 30th June 2023. That amounted to no explanation at all, with respect to why no action had been taken, between when the suit was filed, in September 2021, and February 2023, when their Advocates began to have office challenges.
 10. The appellants appear to blame their Advocates, hence their plea that the sins of the Advocates ought not be visited on them, founded on *Pithon Waweru Maina v Thuka Mugiria* [1983] eKLR [1983] KECA 117 (KLR) (Potter, Kneller JJA & Chesoni Ag JA) and *Patriotic Guards Limited v James Kipchirchir Sambu* [2018] eKLR (Waki, Warsame & Makhandia, JJA). However, there is also the other argument, stated in such cases as *Savings & Loan Limited v Susan Wanjiru Muritu Nairobi Milimani HCCC No. 397 of 2002* (Kimaru, J) (unreported) and *Duale Mary Anne Gurre v Amina Mohamed Mahamood & another* [2014] eKLR (JM Mutungi, J), that the suit belongs to the litigant, who has a duty to pursue prosecution of their case, and to constantly check with their Advocates on the progress of the matter.
 11. The case was in limbo, between September 2021, when it was filed, and April 2023, when it was dismissed. The appellants have provided no proof of the efforts they made to ensure that their Advocates progressed the matter, after filing it, to pre-trial and eventually to full trial. They only became active after the dismissal. I do not think the appellants did much to aid their case. I am not persuaded, therefore, that the trial court improperly exercised discretion, in dismissing the suit, and in declining to have it reinstated.
 12. Overall, I find no merit in the appeal. I, accordingly, dismiss it. There shall be no order on costs. The trial court records shall be returned to the relevant registry, while the appeal file herein shall be closed .
42. The applicant, having offered no convincing explanation for the inordinate delay in prosecuting his appeal, prayer 3 of application is hereby declined. Equally, prayer 4 as set out in the application also fails, the application herein having been declined and there is nothing upon which the stay of execution orders can anchor. It follows that the entire application does not succeed.
43. The applicant is to bear the costs of the application.
44. Orders accordingly.

**RULING DATED SIGNED AND DELIVERED VIRTUALLY VIA THE TEAMS PLATFORM
THIS 27TH DAY OF NOVEMBER 2025**

HON. DR. IUR NYAGAKA

JUDGE

In the presence of,

Mwita Nyangi for the applicant



Ms. Oduor for the Respondent.

