

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT SIAYA**  
**CRIMINAL APPEAL NO. 67 OF 2017**

**FRANCIS OHANGA OMBEWA.....**  
**.....APPELLANT/APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The Appellant herein filed a Notice of motion dated 10<sup>th</sup> July 2025 seeking principally an order for review or setting aside orders made on 16<sup>th</sup> October 2018 dismissing the appeal and for the reinstatement of the Applicant's appeal for hearing on merit in the interest of justice.
2. The application is supported by the grounds set out and by the supporting affidavit of the Appellant sworn on even date. The Appellant's gravamen is inter alia; that the Applicant's appeal is arguable and has high chances of success; that the Applicant was misled by his former

counsel on record that the appeal had succeeded, and the Applicant relaxed and didn't follow up the matter anymore; that it was after the Applicant was served with a demand letter dated 5<sup>th</sup> June 2025, that his curiosity was aroused and went to Siaya High Court criminal registry to check; that the delay in making this application is not intentional and is excusable; that the Applicant had and has always nursed a strong desire to have the appeal heard on merit; that there was a serious breakdown between the Appellant's former counsel on record and the Appellant; that the Appellant's right to a fair trial access to justice has been viciously hampered. That being dissatisfied with both conviction and sentence, he instructed his advocate to prefer an appeal to the High Court at Siaya which was done on 28<sup>th</sup> July 2017; that he occasionally visited the advocate at his office for updates on the appeal in the year 2018 and he had promised to update him always; that sometimes in March/2/2019, he lost contact with his advocate due to the Covid -19 pandemic; that he only managed to talk to him in September 2019 and he informed the Appellant that the appeal was over, and that the Appellant had succeeded; that this information comforted the Appellant as he knew that he was free from the charges that he had faced in the lower court; that he honestly never made any attempt to inquire and or bother his advocate again until June 2025 when he was served with a demand letter dated 5/6/2025 from M/s Orego & Odhiambo Company Advocates which

letter required that he give vacant possession, that got his mind spinning and made him urgently visit the registry at Siaya High Court whereupon he discovered that that his appeal was dismissed on 16/6/2019 after it had been put in abeyance during Covid 19 pandemic; that he never received any word from his former counsel on record to the effect that the appeal was coming for hearing on 16/10/2019, or any other day at all; that the court record show that counsel was not present in court on 16/10/2025 and that he is unable to trace his former advocate; that the Sub County Surveyor(PW3) stated on page 13 a boundary dispute between the complainant who owns land Ref No. Uholo Asango/473 registered in his father's land; that PW3 conducted the survey exercise exclusively by the complainant in exclusion of the Appellant/Applicant; that the boundary of L.R. No. Uholo/Asango/473 extends to the river; that the investigating officer confirmed that there was a boundary dispute between the complainant and the family of accused/Appellant; that the Appellant is standard 4 dropout and do not know much about legal and thus no reason to doubt what his counsel had informed him.

3. The Respondent did not file a response but proposed to submit orally while the Appellant filed submissions dated 24<sup>th</sup> October 2025.
4. The Appellant's submissions are inter alia; that there is no statutory limitation for reinstatement of an appeal in

criminal cases as the court has discretion over the same if an Appellant can provide plausible explanation for the delay; that even though the Appellant paid a fine imposed by the trial court the same does not bar him from appealing against the conviction or the legality of sentence and that the payment of the fine does not automatically signify an admission of guilty which surrenders his right of appeal; that the Appellant's former advocates failed to attend the court over the appeal and that the mistakes of that counsel should not be visited upon the Appellant; that the Appellant's right to appeal was curtailed by the dismissal and thus denied a right of access to justice under Article 48; that the Appellant stands to suffer great prejudice as the person with whom he had a dispute with over land has already served him with notice of eviction yet the issue of the boundary dispute remains unsettled. The Appellant's counsel cited the following authorities namely:

- i) Equity Bank Limited vs. West MBO Limited (2013) KLR where Musiga JA stated inter alia;

***“Courts of law exist to administer justice and in so doing, they must of necessity balance between competing rights and interests of different parties but within the confines of law to ensure that the ends of justice are met. Inherent over is the authority***

***possessed by court implicitly without it being derived from the constitution or statute, such power enables the judiciary to deliver in its constitutional mandate...inherent power is therefore the natural or essential power conferred upon the court irrespective of any conferment of discretion.”***

ii) Shah vs. Mbogo and Another (1967) E.A 116:

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***“The discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident inadvertence or excusable mistake or error; but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.***

iii) Board of Governors Moi High School Kabarak and Another vs. Malcom Bell (2013) eKLR held that;

***“Inherent powers are endowments to the court as will enable it to remain standing as a constitutional and to ensure its internal mechanisms are functional. It includes such powers as enable court to regulate its intended***

**conduct to safeguard itself against contemplation or descriptive intrusion from elsewhere and to ensure that its mode of disclosure or duty is consumable, fair and just.**

iv) **Section 353 of Criminal Procedure Code states:**

**“If the court does not dismiss the appeal summary; it shall cause notice to be given to the Appellant, or his advocate, and to the Respondent or his advocate of the time and place at which the appeal will be heard and shall furnish the Respondent or his advocate with a copy of proceedings and of the ground of appeal.”**

v) Janet Ngendo kamau vs. Mary Wangari Mwangi, Civil Application No. 338/2002, Waki JA held;

**“Unless there is fraud, intention to overreach, inordinate delay or such other circumstances disentitle a party to the exercise of court’s discretion, the court should in so far as it may be reasonable prefer, in the wider interest of justice namely that where possible cases must be brought to a close after hearing on merits.”**

vi) In Civil application No. E250/2023, Benson Mugo Kariuki - vs- Margaret Wangeci & 7 Others. In this case, mistake of counsel in failing to apply for proceedings was excusable in the wider interest of justice.

vii) **Article 48 of the Kenyan Constitution 2010** states:

***“ 48” The state shall ensure access to justice for all persons and if fee is required, it shall be reasonable and shall not impede justice.***

5. Learned counsel for the Respondent opposed the application and raised several grounds of opposition inter alia; that this court has no jurisdiction since the appeal which had been filed was dismissed and therefore the court became functus officio; that the application has no legal basis for review as the same is not available in criminal appeals as no ground for review have been shown such as new issues, error apparent on the record or any sufficient cause shown to litigate an appeal already dismissed; that there is an unexplained delay of seven years which is extra ordinary and that no good reasons have been given as to why it took that long for the Appellant to react and that it seems the Appellant was awakened upon receipt of a demand letter to vacate the land; that equity aids the vigilant and not the indolent; that the application is a total abuse of court process in

that there must be an end or finality in judicial proceedings; that if the application is allowed then a bad precedent will be set where dismissed appeals will be revived several years later and which will affect the finality of decisions and proper administration of justice; that the Applicant was expected to go to the Court of Appeal and that he cannot come through the back door to disturb a concluded appeal; that the application lacks merit and should be dismissed.

6. I have considered the application and the rival submissions. It is not in dispute that the Appellant's appeal was dismissed by this court after the same remained pending for a long time. It is also not in dispute that upon the dismissal of the appeal on 16/10/2018 it is now over seven years without the Appellant lodging an appeal against the said dismissal. It is also not in dispute that the Appellant herein is not seeking leave to lodge appeal against the dismissal of the appeal to the Court of Appeal. I find the issue for determination is whether the application has merit.

7. It is noted that the Appellant had lodged this appeal against the decision of the trial court vide Ukwala Criminal Case No. 520 of 2015 wherein he was the accused in a charge of forcible detainer contrary to Section 91 of the Penal Code. The particulars of the charge were that during the month of November, 2014 in East Asango Sub Location in Ugunja Sub County within Siaya County being

in possession of Land parcel Uholo/Asango/460 belonging to Margaret Achieng Jowo without colour of right, held possession of the said land in a manner likely to cause a breach of the peace against Margaret Achieng Jowo who was entitled by law to possess the said land. After a full trial the trial court convicted the Appellant and later ordered him to pay a fine of Ksh10,000/= in default to serve three months imprisonment.

8. This court waited for the Applicant to prosecute his said appeal but to no avail and thus the same was dismissed for want of prosecution. Ordinarily, upon such dismissals or further orders, an aggrieved party is required to move to the Court of Appeal. It is noted that the Applicant did not do the same despite the fact that he was represented by learned counsel. Upon the dismissal of appeal this court ordered the file closed as it was the view of the court that the Applicant having served sentence might have lost interest in his appeal. It is noted that the Applicant is now laying blame against his former advocate for not prosecuting the appeal and advising him accordingly. It is instructive that it is the Applicant who had hired the advocate in question as his legal representative in this matter and therefore he was bound by the instructions of his said counsel. The Applicant further wants this court not to punish him for the mistakes of his advocate in failing to prosecute the appeal to conclusion. It is also noted that the Applicant's present counsel is seeking for review of

the dismissal order so as to enable the Applicant to canvass his appeal on merits. Learned counsel seems to appear to rely on provisions of Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules which deal with matters of revision. Further, he seems to rely on provisions of Section 348 A, 353 and 354 of the Criminal Procedure Code as well as Articles 48, 50 and 159 of the Constitution. However, the key issue in this matter is whether an Appellant has a right to have a second bite at the cherry in criminal matters such as this one. It is my considered view that there is no such provision in criminal cases. In the present case, the Applicant is not seeking to be granted leave to lodge appeal at the Court of Appeal against the dismissal made on 16/10/2018. I find that the appeal having been dismissed, the Applicant was required to lodge an appeal against the same and that in the event of delay to do so, then he was expected to file an appropriate application for leave to lodge appeal out of time to the Court of Appeal.

9. This court having determined the Applicant's appeal on 16/10/2018, it has become functus officio and that it lacks jurisdiction to entertain the present application. Further, the application is misconceived in that the Applicant has confused the right to seek an order of revision from a lower court with a review before the court seized with the matter. The grounds in support of the application for review are misplaced since this is a criminal matter and

not a civil suit. The Applicant was supposed to go to the Court of Appeal against the order of dismissal of his appeal and therefore the present application appears to indicate that he wishes to approach this court through the back door in an attempt to disturb a concluded appeal.

10. Even if this court was to entertain the application, the same would not succeed for the reason that the Applicant has not rendered a plausible explanation for the delay of over seven years. The Applicant could not have stayed for that long without even engaging his lawyers regarding the progress of his appeal. It seems the Applicant has been awakened from slumber upon being served with a letter to vacate the land that he had forcibly occupied against the rights of the registered proprietor who was entitled by law to possess the said land. It is my view that the Applicant has not been vigilant since equity aids the vigilant and not the indolent. It is obvious that the Applicant would not have approached this court to resurrect the dismissed appeal had the Complainant not taken a move to commence eviction proceedings against him. Hence, the Applicant wishes to revive the appeal and to weaponize it with a view to using the same as a form of an injunction or stay against the registered proprietor of the land. I need to point out that even reviving the appeal would not assist the Applicant in that the Civil matter is completely different from a criminal case. It seems that it has dawned on the Applicant that he should revive the appeal

so as to seek to overturn the conviction by the lower court and thereafter extricate himself from any form of negligence over the civil suit.

11. Finally, it is my view that the application is an abuse of the court process as there is need for finality in court proceedings. Indeed, if the application is allowed, then the same will set a bad precedent wherein disgruntled litigants over dismissed appeals would approach the courts several years later and seek to revive those appeals. This will interfere with the doctrine of finality in court decisions and proper administration of justice.

12. In the result, it is my finding that the Applicant's application dated 10/7/2025 lacks merit. The same is dismissed.

**Dated and delivered at Siaya this 15<sup>th</sup> day of December 2025.**

**D. KEMEI**

**JUDGE**

**In the presence of:**

**Ondari.....for Appellant/Applicant**

**Soita.....Respondent**

**Maureen.....Court Assistant.**

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