

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**[MILIMANI LAW COURTS]**  
**THE CIVIL APPELLATE DIVISION**  
***(Coram: A.C. Mrima, J.)***  
**CIVIL APPEAL NO. 569 OF 2011**

**-between-**

**RICHARD KIEMA MUTISO.....APPLICANT**

**-versus-**

**UNITED NATIONS SACCO LTD .....1<sup>st</sup>  
RESPONDENT**

**JOSEPH NYUTU KAMAU t/a PHTUMA  
AUCTIONEERS.....2<sup>nd</sup>  
RESPONDENT**

**RULING**

1. This is a consolidated ruling on two applications both by way of Notices of Motion dated 13<sup>th</sup> May 2025 and 19<sup>th</sup> May 2025 respectively. Both applications were filed by the Applicant herein.
2. The Notice of Motion dated 13<sup>th</sup> May 2025 sought the following orders: -
  1. *Spent.*
  2. *THAT this Honourable court be pleased to re-open this suit.*
  3. *Spent.*
  4. *Spent.*
  5. *THAT this Honourable Court make and order for the forensic audit for all the Loan accounts the Applicant had with the 1st Respondent.*
  6. *THAT this Honourable Court do order the 1<sup>st</sup> Respondent to give an account of all the shares and savings the Applicant had with the 1st Respondent.*
  7. *THAT this Honourable Court be pleased to issue such further orders or directions as it deems fit in the circumstances.*
  8. *THAT costs of this Application be borne by the Respondents herein.*

3. The Notice of Motion dated 19<sup>th</sup> May 2025 sought the following orders: -
  1. *Spent.*
  2. *THAT this Court be pleased reinstate this current appeal.*
  3. *THAT this Court be pleased to review its orders of 16<sup>th</sup>. May 2025 and issue injunctive orders against the auction and sale of the Appellant's property known as L.R. No Kajiado/Kitengela/2112 situate at Kajiado.*
  4. *THAT costs of this application be in the cause.*
4. Both applications were supported by the grounds on their faces and the Supporting Affidavits of *Richard Kiema Mutiso*. The Applicant mainly alleged failure by his Counsel to attend to the matter and to inform him accordingly. He, therefore, sought the plethora of orders in the two applications.
5. The 1<sup>st</sup> Respondent vehemently opposed to the applications by filing a Replying Affidavit sworn by *Moses* on 14<sup>th</sup> July 2025. The 1<sup>st</sup> Respondent posited mainly that the Applicant had gravely been indolent and that the Court should not exercise any discretion in his favour since litigation should come to end.
6. The applications were canvassed by way of written submissions. The Applicant filed two sets of written submissions both dated 29<sup>th</sup> May 2025, whereas the 1<sup>st</sup> Respondent's submissions were dated 25<sup>th</sup> July 2025. The gist of these submissions will be ingrained in the latter part of this ruling.
7. Having carefully considered the applications, the Affidavits in Support, the Responses, the written submissions together with the decisions referred thereto, at the heart of these applications is whether the appeal ought to be reinstatement. A look at the facts in this matter, hence, suffices. The appeal was in Court on 20<sup>th</sup> July 2016 where a ruling was delivered in the presence of the parties. Following inactivity in the matter since delivery of that

ruling, the Court issued a Notice to show cause why the suit should not be dismissed for want of prosecution dated 30<sup>th</sup> July 2019 to the firms of *Owang & Associates Advocates* who were the Advocates on record then for the Applicant and the firm of *Ombonya & Company Advocates*, for the 1<sup>st</sup> Respondent. When the matter came up for hearing of the dismissal application on 4<sup>th</sup> October 2019, the Applicant as well as his Counsel were absent and consequently having shown no cause, the appeal was dismissed for want of prosecution with costs. Six years later, the Applicant filed the instant applications. The Applicant averred that he was not aware that the appeal was dismissed for want of prosecution as his Advocates then on record failed to inform him and that he only became aware of it upon service of Notification of sale by the 2<sup>nd</sup> Respondent. He submitted that this amounted to sufficient cause and argued that he was not indolent and moved the Court immediately upon discovery of the auction notice.

8. From the record, the Notice to show cause was served upon and received by the then Applicant's Advocates on 6<sup>th</sup> August 2019. The instant applications for reinstatement of the appeal were filed in May, 2025. That was around 6 years later from the date the appeal was dismissed. It is, therefore, possible that despite the lapse on the part of the Advocates, the Applicant still did not seek to find out the state of his appeal from his Advocates for a whole 6 years. Had he done so, may be the position would be different now.
9. Going forward, this Court will now ascertain whether the Applicant's justification is plausible. In other words, this Court will find out if it is prudent to set aside the dismissal order. That is a discretionary order on the part of this Court. Some of the factors to be considered in such instances as discussed by the Court of Appeal in ***Paul Wanjohi Mathenge -vs- Duncan Gichane Mathenge*** [2013] eKLR include *first*, the length of the delay; *secondly*, the reason for the delay; *thirdly* (possibly), the chances of the appeal succeeding if the application is granted; and,

*fourthly*, the degree of prejudice to the Respondent if the application is granted.

10. As stated, the period of delay was 6 years. The reason was that the Applicant was not made aware of the status of his appeal by his Advocates and only learnt of the dismissal when he was served with the execution process. On prejudice, the appeal was filed in 2011 and there was inaction until when the Court dismissed the matter on its own motion on 4<sup>th</sup> October 2019. There was a further delay on the part of the Applicant until when he was served with the execution process and filed the instant applications in May 2025. To date, the appeal has been in Court for 14 years. As pointed out above, both the Applicant and his Counsel contributed to the inaction on this matter. To this Court, the Applicant's explanation is still inadequate. If this Court were to re-open the matter, the Applicant will have another bite of the cherry long after *going to slumber* since 2019. This will no doubt prejudice the Respondent since litigation has to come to an end. This Court, therefore, finds that the Applicant's explanation is not sufficient for this Court to exercise its discretion in favour of the Applicant.
11. Having said as much, the upshot is that the Applicant has failed to meet the threshold for reinstatement of the appeal. Consequently, the following final orders do hereby issue: -

**[a] The Notice of Motion dated 13<sup>th</sup> May 2025 and the Notice of Motion dated 19<sup>th</sup> May 2025 are hereby dismissed with costs.**

**[b] Costs are hereby assessed at Kshs. 30,000/= [Thirty Thousand Only] to the 1<sup>st</sup> Respondent payable within 30 days in default execution to issue.**

Orders accordingly.

**DELIVERED, DATED and SIGNED at NAIROBI this 29<sup>th</sup> day of January, 2026.**

**A. C. MRIMA  
JUDGE**

**Ruling virtually delivered in the presence of:**

**Mr Wachira, Learned Counsel for the 1<sup>st</sup> Respondent.**

**Michael/Amina - Court Assistants.**