

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MIGORI**  
**ELC APPEAL NO. E017 OF 2024**

**DIDAKUS OJWANG ONYANGO .....APPELLANT  
/APPLICANT**

**VERSUS**

**ALEBRT ORONDO TULI.....1<sup>ST</sup>  
RESPONDENT**

**DISTRICT LAND REGISTRAR MIGORI.....2<sup>ND</sup>  
RESPONDENT**

**RULING**

**The application**

**1.** The applicant filed a Notice of Motion application dated 15<sup>th</sup> July 2025, under a certificate of urgency. He seeks ORDERS THAT:

1. This honourable court be pleased to set aside, vary and/or vacate the orders of 20<sup>th</sup> March 2025 which dismissed this appeal and instead substitute the same with an order reinstating the appeal.
2. That upon granting prayer number 1 above, the honourable court be pleased to give appropriate

directions as to compliance, hearing and disposal of the appeal.

3. That costs of this application be in the cause.
- 2.** The application is anchored on the grounds set out on the face of the application as well as the Supporting Affidavit of Didakus Ojwang Onyango, the applicant herein, and which affidavit is sworn on even date.
- 3.** The applicant's account of the events leading the instant application is that, on 29<sup>th</sup> August, 2024, he instructed the firm of Nelson Jura & co Advocates to represent him his appeal. He added that said firm of Advocates filed the instant appeal pursuant to his instructions that the law firm prosecutes the appeal to its logical conclusion.
- 4.** The applicant further stated that he learnt of the dismissal of his appeal on 14<sup>th</sup> July 2025, which appeal was dismissed on 20<sup>th</sup> March 2025. The dismissal was pursuant to the provisions of Order 42 Rule 2 of the Civil Procedure Rules. He added that he realized that his then advocates on record failed to attend court and show cause on his behalf on 20<sup>th</sup> March 2025 when

the appeal had been fixed for notice to show cause why the same should not be dismissed for want of compliance.

- 5.** The applicant blamed his then advocates on record for failing to inform him that the matter had been scheduled for 20<sup>th</sup> March 2025 as well as failing to file a record of appeal on his behalf. The inaction of the said advocates, the applicant contended, was despite the said advocates having been served with court directions/mention notice.
- 6.** Further to the above stated, the applicant stated that he only became aware of the fact of the dismissal of his suit on 14<sup>th</sup> July 2025, when he appointed another advocate to look into Case Tracking System (CTS) and check on the progress of his matter.
- 7.** The applicant stated that he contacted the his then advocates of record sometimes in January 2025. He maintained that the said advocates informed him that they had applied for proceedings, whose proof reading and certification was pending. He added that that firm needed the said proceedings and certification to enable them file a record of appeal on his behalf.

- 8.** The applicant stated that the firm of David Otieno & Associates informed him that his appeal had been dismissed. He also stated that this new firm had entered into a consent with his previous advocates on record to the effect that the new firm takes over the appeal from the previous advocates on record.
- 9.** In addition to the foregoing, the applicant stated that he is desirous of prosecuting his appeal to its logical conclusion and added that his legal team has already obtained copies of the proceedings and prepared a record of appeal in readiness to file it pursuant to this court's directions.
- 10.** The applicant stated that the mistakes of his previous counsel of record should not be visited upon him and that the respondent will suffer no prejudice should the orders he seeks in his application be granted. He concluded his application by stating that it would be in the interest of justice that the orders sought in his application be granted as the same would allow the determination of his appeal on merit.
- 11.** The applicant's supporting affidavit reiterated the contents of the application, which contents the court will not reproduce. However, it is important to note the applicant annexed the

following to his affidavit: a copy of the dismissal order dated 20<sup>th</sup> March 2025; a copy of the lower court decree filed on 17<sup>th</sup> February 2025; copies of letters addressed to the firm of Nelson Jura & Co Advocates; and a copy of consent and notice of change of advocates.

## **Response**

**12.** The 1<sup>st</sup> respondent filed his Replying Affidavit dated 17<sup>th</sup> August 2025 and deponed that the applicant is not motivated by a desire to have the appeal heard and determined expeditiously. Rather, he deponed that the applicant filed the application after learning that he (the 1<sup>st</sup> respondent) has begun subdividing his land with the aim of selling it. He annexed copies of mutation forms in annexure marked AOT 1 to demonstrate that he had already subdivided the suit property.

**13.** The 1<sup>st</sup> respondent also deponed that he was neither served with a Memorandum of Appeal nor a **Notice of Appeal**, and that he only learnt of the instant appeal when the applicant applied to have the appeal reinstated.

**14.** Concerning the letters alleged to have been written by the applicant to his previous advocates on record inquiring on the

status of his matter, the 1<sup>st</sup> respondent deponed that the same were a fabrication as the applicant told the lower court that he was illiterate. For this reason, the court had to avail an interpreter to enable the applicant participate in **the trial**. He added that the said letters had not been signed by the applicant.

**15.** Moreover, the 1<sup>st</sup> applicant deponed that there are instances where a client cannot run away from the mistakes of his counsel and further deponed that he would suffer prejudice should the court grant the orders sought by the applicant since he has incurred costs associated with subdividing the suit land and that he is in the process of selling the same.

**16.** The 1<sup>st</sup> respondent maintained that he risked being condemned to pay damages for breach of contract should the orders sought by the applicant be granted since he has already engaged buyers over the suit property. He further deponed that the applicant is his neighbor, and that he is aware of the ongoing subdivision of the suit property. He urged the court to order the applicant to deposit ksh.500,000 as indemnity as a condition for the applicant to be granted the prayers he seeks

in his application. He annexed receipts for payments made to a consultancy firm undertaking the said subdivision and well as copies of mutation forms in annexure marked AOT 2.

**17.** Lastly, the 1<sup>st</sup> respondent deponed that the power to reinstate a suit is discretionary and that the court must balance the prejudice to the suffered by the parties when determining whether or not to reinstate such a suit.

### **Submissions**

**18.** The application was canvassed by way of written submissions. The applicant filed his submissions dated 12<sup>th</sup> September 2025. He identified one issue for determination by this court, being, whether his prayer for the reinstatement of his appeal is merited.

**19.** The applicant relied on Order 12 Rule 7 of the Civil Procedure Rules as well as Sections 3 and 3A of the Civil Procedure Act to argue that this court has jurisdiction to reinstate a suit that has been dismissed. However, he argued that the court's discretion to reinstate a dismissed suit should be hinged on satisfactory explanation being offered by the applicant.

**20.** The applicant attributed the dismissal of this appeal to his then counsel on record. He maintained that, although the said advocates were served with notice to show cause why the appeal should not be dismissed, the same was withheld from him and added that he only came to know of the status of his appeal some months after the said appeal had been dismissed.

**21.** Further, the applicant submitted that he filed this application as soon as he became aware of the fact of the dismissal of his appeal. He also submitted that the reinstatement of the suit will not occasion any prejudice to the 1<sup>st</sup> respondent. He maintained that reinstated of the appeal will grant him an opportunity to have his appeal heard on merit.

**22.** The applicant relied on **Philip Chemwolo & another v Augustine Kubede [1982] KAR** as well as **Belinda Murai & 9 others v Amos Wainaina [1982] KLR** to argue that mistake of counsel should not be visited on an innocent litigant. He also relied on **CMC Holdings Ltd v James Mumo Nzioka [2004] KLR** to submit that, in exercising its discretion, the court should ensure that a litigant does not suffer hardship on account of among, others, excusable mistake or error,

particularly where the litigant demonstrates that there was an excusable mistake, inadvertence, accident or error.

**23.** The applicant concluded his submission by urging this court to find his application merited and to reinstate the same in the interest of meeting the ends of justice.

**24.** The 1<sup>st</sup> respondent filed his submissions dated 15<sup>th</sup> August 2025. He framed one issue for determination by this court, being whether the applicant has established sufficient grounds to set aside the dismissal orders and have the suit reinstated. He submitted that the power to reinstate a suit is discretionary and not the right of party. He also submitted that this discretion should be exercised judicially so as to avoid injustice to either party and cited the Court of Appeal decision in **Shah v Mbogoh & another [1967] EA 116** to buttress this argument.

**25.** The 1<sup>st</sup> respondent also submitted that the applicant instituted the appeal in question and did nothing to prosecute the same for a period of seven months. The said appeal was dismissed after the court had issued a notice to show cause why the appeal should not be dismissed. He added that the

applicant took four months to institute the instant application after his appeal had been dismissed.

**26.** In addition to the foregoing, the 1<sup>st</sup> applicant submitted that the delay in prosecuting the appeal as well as filing the instant application was never explained to the court. He equally submitted that the reason (s) as to why the applicant and/or his advocate could not attend court when the court issued a notice to show cause was never explained.

**27.** The 1<sup>st</sup> applicant submitted that the letters annexed to the applicant's affidavit, and which letters the applicant-maintained evidenced his attempts to reach his counsel, were fabricated. He argued that the said letters had not been signed by the applicant. Besides the applicant had not indicated the method used to send the letters to his advocates. In any event, the 1<sup>st</sup> applicant stated there was no explanation as to why the applicant who resides at Rongo could not travel to his advocate's office in Migori following the alleged silence on the part of the said advocate or inquire about the progress of his case from the court registry.

**28.** Further, the 1<sup>st</sup> applicant submitted that the said former advocates had not sworn an affidavit to explain why they did not attend court when the matter was scheduled for notice to show cause as well as the reasons for delay in prosecuting the appeal. He **Cited Tana & Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others [2018] eKLR** where the Court of Appeal held that mistakes of counsel could be excused if doing so would afford a justiciable, expeditious and holistic disposal of the suit.

**29.** In addition of the above stated, the 1<sup>st</sup> applicant contended that mistakes of counsel can only be excused when the errors in question are not negligent and efforts have been made to correct them. Reliance was placed on the **Tana and Athi Rivers Development Authority case** (supra) as well as **Bartholomew Juma Wafula v David Wafula Wepukulu & 5 others, Civil Suit No.55 of 2010** to buttress this argument.

**30.** The 1<sup>st</sup> respondent also relied on **Kettleman & others v Hansel Properties Limited [1998] ALL ER 38** to submit that, justice may be served by the fact of the court not

reinstating a dismissed suit and allowing the consequences of a negligent party to follow.

**31.** Lastly, the 1<sup>st</sup> respondent submitted that he had subdivided the suit and he would suffer prejudice should the application be allowed since the buyers of his land would compel him to pay damages for breach of contract.

### **Issues, analysis and determination**

**32.** The issue for determination in the instant application is whether the applicant's application is merited, and, who should bear the costs of the application.

### **Whether the applicant's application is merited**

**33.** This court has considered the application in totality, the response thereto as well as the submissions filed by the parties. The applicant seeks a reinstatement of his appeal, the same having been dismissed on 20<sup>th</sup> March 2025 for want of compliance. The 1<sup>st</sup> applicant on the other hand opposed the application and argues that the same is not merited, since it is an afterthought, and brought to frustrate the process of subdividing and selling his land, which he had began. He added that he would suffer prejudice if the orders sought by the

applicant are granted since had already incurred expenses associated with sub-dividing the land. He also states that he would be compelled to pay damages for breach of contract to his clients who have already committed to buying the land.

**34.** Order 12 Rule 7 of the Civil Procedure Rules 2010 provides for the reinstatement of suits as follows:

*Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.*

**35.** That provision relates to setting as aside orders of dismissal of suit while they are hearing stage. It should not be confused with the provisions on setting aside of appeals while they are pending hearing. The relevant provision for such a step is Section 3A of the Civil Procedure Act, Chapter 21 Laws of Kenya because the appeal was dismissed or want of compliance with Order 42 Rules 2 and 11 of the Civil Procedure Rules but there is not there is no provision under the Rule to set aside orders made following the default. This is because **Oder 42 Rule 21** provides for reinstatement or readmission of appeals where

they are dismissed, under **Order 42 Rule 20**, for non attendance at the hearing. Other instances of dismissal, such as for want of prosecution, are not provided for.

**36.** The considerations that must be borne in mind when whether to reinstate a dismissed suit have been elucidated in various precedents. Suffice to note is that the power to reinstate a suit or an appeal is discretionary and courts must exercise this discretion judiciously. **In Olumbe v Obanyi (Civil Appeal E014 of 2024) [2025] KEHC 5386 (KLR) (30 April 2025) (Judgment), Musyoka J determined that:**

*“8. Whether to reinstate a dismissed suit would call for exercise of discretion in line with Articles 50 and 159 of the Constitution, and the oxygen principle in sections 1, 1A and 3A of the Civil Procedure Act, Cap 21, Laws of Kenya. These were discussed in John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation) [2015] eKLR [2015] KEHC 6789 (KLR) (Gikonyo, J), where it was stated that the fundamental principles of justice are enshrined in Article 159 of the Constitution, coupled with Article 50, with respect to the right to be heard, and to serve*

*substantive justice to all. It was underscored that those principles ought to be factored when considering reinstatement of dismissed suits, bearing in mind that dismissal of suits is draconian”*

**37. Further, the court in *Ithiga v Mwangi (Environment & Land Case 170 of 2014) [2025] KEELC 305 (KLR) (30 January 2025) (Ruling)***

*18. The exercise of this discretion is not intended to aid a person who deliberately seeks to obstruct justice but to avoid hardship resulting from an accident, or excusable mistake or error. This position was expressed in the case of **Shah vs Mbogo & Another (1967) EA 116**, where the Court of Appeal of East Africa held that: “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 it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”*

19. More recently, the Court of Appeal in **Patriotic Guards Limited vs James Kipchirchir Sambu [2018]** eKLR stated that: “...It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”

**38.** More importantly, a party seeking reinstatement of a suit must demonstrate sufficient cause for doing so. In **Ithiga v Mwangi** (supra) the court held that:

20. 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 on 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.”*

**39.** The applicant argued that, despite his efforts to contact his then advocates on record for purposes of ascertaining the status of his appeal, they kept silent on the issue until his matter was dismissed. He stated that even after the dismissal, the said advocates still kept him in the dark until that fact was brought to his attention by the advocates now or currently on record.

**40.** To support his explanation, the applicant annexed copies of four hand written letters addressed to the firm of Nelson Jura & Co Advocates. They were dated 20<sup>th</sup> November 2024, 7<sup>th</sup> January 2025, 24<sup>th</sup> March 2025 and 27<sup>th</sup> June 2025. They all were received by an advocate at the firm of Nelson Jura & co Advocates on the same day they were written and hand delivered except that which was dated 24<sup>th</sup> March 2025, which was received the following day. They were not only received but acknowledged by an office stamp dated was affixed on each, and a signature of acknowledgement put against each

stamp. The letters were received by an Advocate or learned counsel and not a clerk of the said firm of advocates.

**41.** I make the finding in the paragraph immediate above because the signature affixed against each stamp and letter on all of them upon receipt is the same signature or very similar to the one affixed on the consent dated 15<sup>th</sup> July 2025 and entered between the firm of Nelson Jura & Co Advocates and M/S David Otieno & Associates allowing the latter to take over the representation of the appellant.

**42.** That view leads to two premises or presuppositions. If one would argue, on the one hand, that the letters were received by a clear in the office and not the advocate, then it means the consent was executed by an incompetent person from that office. That would mean further that the firm of David Otieno did not come on record properly, and the Notice of Change of Advocates they filed and the instant application were incompetent. If he would, on the other hand, argue that the letters were received by an Advocate, as this court finds, then the firm currently on record came properly on record and brought a valid application.

**43.** The latter position of the court being the finding of the court then leads this court to ask two critical questions. One, why did the firm of Nelson Jura & Company Advocates not swear an affidavit to corroborate the applicant's depositions about this grave failure or mistake the applicant presents before this court? Two, how could it be that the same lawyer who received the letters each time could not update the then client real time, especially when he received the request the second, third and fourth time?

**44.** Starting to address the first question, interestingly, the said Nelson Jura & Co Advocates did not swear an affidavit deponing as to the circumstances under which they received four letters from their client and failed to act. Equally surprising is the manner in which the said Nelson Jura & Co Advocates were readily available to execute a consent with another firm for purposes of having the new firm take over the representation of their client by an Advocate who has been practicing in the same law firm, and yet could not respond to the issues raised by their client when he needed it from the said advocates, and importantly when he presented (not by posted) the said letters

to their office and they received the same, were they affixing the stamp and signature blindly?

**45.** The question is, which lawyer or advocate in his right senses or mind does receive communication from a client, not once or twice, but severally and not to act on it either by responding to the client's inquiry or by taking the steps inquired about so as to avoid being sued for professional negligence or malpractice, or at the very least being reprimanded by the professional body, the Law Society of Kenya, for failure to update the client. I believe that there is none.

**46.** The court is also perplexed at how the letters purported to have been written by the applicant were received the same day they were written, but a response, even an oral one, could also not be generated in a like manner. Given the above set of events, the applicant blames his then counsel on record and argues that the mistakes of counsel should not be visited upon him. This court has interrogated the circumstances of this case and is not convinced that there is a sufficient reason to allow the application.

**47.** The court is not convinced that the said letters emanated from the applicant herein, and even if they did, there it is not clear why the applicant could not get an instant response to the said letters, just as immediate as the letters were received. Besides, the applicant in one of the letters refers to a telephone conversation between himself and the said advocates.

**48.** Noteworthy is that all the letters were not signed by the Appellant. they were only written. The allegation that the appellant claimed in the lower court that he was illiterate thus causing the court to get for an interpreter, was not challenged. The grammar in them was as good as that of a person who was schooled well. It means therefore that if the letters were authored by the appellant himself he knew how to read and write and therefore misled the trial court that he was not and even wanted to be given an interpreter who actually was called to assist him. If he was not the one who authored them, then they were not letters to be relied on by this court because they were not even signed: they were mere pieces of paper which could not pass as letters. Lastly, he ought to have asked to be

informed verbally by the advocate the position of his file whenever he presented the letters to him in person.

**49.** Thus, the applicant does not explain why he could not still communicate instantaneously with his advocates. Equally, the applicant has not demonstrated the efforts he made to get the information he needed, especially when his letters were ignored by his counsel, court registry. He has not explained why he could not approach the registry or attempt to change his advocates.

**50.** In **Olumbe v Obanyi** (supra), the court held that:

*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.*

**51.** Even if the applicant checked on his advocates as alleged, he had a duty to act, especially when he did not get a response from the said advocates on several occasions. He did not act. He knew the matter was coming for dismissal. This is because his letter dated 24<sup>th</sup> March 2025 confirms that the applicant was informed much earlier that the appeal was coming to show cause for want of compliance but neither him nor his advocate, both of whom knew the matter was coming up for notice to show cause but failed to attend court.

**52.** As previously noted, the firm of Nelson Jura & Co Advocates did not explain the circumstances surrounding their alleged inaction. In **Patriotic Guards Limited v James Kipchirchir Sambu [2018] KECA 799 KLR** held that the mistakes of counsel should not be visited upon a client. In this matter, the court expressed itself as hereunder:

**“In this case however, counsel for the appellant explained himself as to why he was late in availing himself in court. the reason was plausible. clearly, this is a case where the sins of counsel should not have been visited upon a litigant.”**

**53.** In **Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others [2015] eKLR**, the court held that ;-

***“From past decisions of this court, it is without doubt that courts will readily excuse mistake of counsel if it affords a justifiable, expeditious and holistic disposal of a matter.”***

**54.** If in deed the said firm of advocates did not act for the applicant despite persistent inquires, the firm acted negligently and their conduct constitutes professional malpractice. The applicant is not precluded from suing the said firm for the said negligent conduct and malpractice.

**55.** The court also notes that the 1<sup>st</sup> respondent has provided evidence showing that he has already subdivided the suit property and is in the process of disposing the same. had the applicant prosecuted his appeal expeditiously this situation would have been arrested. Thus, granting the orders sought by the applicant would amount to prejudice on the part of the 1<sup>st</sup> respondent.

**56.** The upshot of the foregoing is that payer 1 and 2 of the applicant's application dated 15<sup>th</sup> July 2025 are hereby disallowed.

### **On costs of the application**

**57.** Section 27 of the Civil Procedure Act provides for the power of courts to grant costs. The 1<sup>st</sup> respondent, having succeed in this application shall have the costs of the same.

**58.** Orders accordingly

Ruling **dated, signed and delivered virtually** via the **Teams Platform this 28<sup>th</sup> day of January 2026.**

**HON. DR. IUR NYAGAKA**

## **JUDGE**

### **In the presence of,**

N. Jura Advocate holding brief for D. Otieno for the  
Appellant/Applicant

1<sup>st</sup> Respondent (Orondo) present

No appearance for the 2<sup>nd</sup> Respondent