



**Muiruri v Wambui & Mukami (Suing as Legal Representatives of the Estate of Dennis Gachoka Muiruri) & another (Civil Appeal E039 of 2023) [2026] KEHC 378 (KLR) (23 January 2026) (Ruling)**

Neutral citation: [2026] KEHC 378 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
CIVIL APPEAL E039 OF 2023  
AK NDUNG'U, J  
JANUARY 23, 2026**

**BETWEEN**

**PHILIP GACHOKA MUIRURI ..... APPLICANT**

**AND**

**STELLA MUKAMI WAMBUI & FLORA WAMBUI MUKAMI (SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF DENNIS GACHOKA MUIRURI) ..... 1<sup>ST</sup> RESPONDENT**

**CHRISTOPHER MARK SAID ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Applicant moved this court vide a notice of motion dated 30/04/2025 brought under Section 1A, 1B & 3A of the *Civil Procedure Act*, Order 12 Rule 7, Order 51 Rule 1 of the Civil Procedure Rules seeking an order that the court be pleased to reinstate the appeal and give directions on the same and that costs be in the cause.
2. The application is based on the grounds on the face thereof and is supported by an affidavit of Esther Wangu, the advocate in conduct of this matter. She averred that the Applicant filed a memorandum of appeal on 23/11/2023 and on 12/02/2025, the matter came up for directions but it was dismissed for non- attendance. That failure to attend was not deliberate as she was addressing another court at the time when the matter was called. That unless the suit is reinstated, the Applicant will be deprived of the opportunity to exercise his constitutional right to appeal.
3. The respondents did not file a response to the application despite being served.
4. The Applicant's counsel filed written submissions and she maintained that her absence during court proceedings was not deliberate as she was engaged in another court at the time the matter was called hence the Applicant should not be penalised for this unintentional absence. That the Applicant has at



all material times demonstrated a clear intention and willingness to prosecute the appeal and therefore, it would be unjust to deny the Applicant an opportunity to exercise his right of appeal as the courts have consistently held that mistakes of the counsel should not be visited upon innocent litigants. That the application for reinstatement was filed without inordinate delay and that reinstatement will not occasion the Respondent any prejudice but will serve the ends of justice and upholds the constitutional rights of the Applicant. That it would be unjust to lock out the Applicant from the seat of justice on account of inadvertent mistake by counsel.

5. I have considered the application, the submissions made and the case law cited. The Applicant's quest is for reinstatement of the appeal. The matter came up for mention on 12/02/2025 and this court noted that no action has been taken for over a year and struck out the appeal. There was no attendance by any party. A decision on whether or not to reinstate a suit is discretionary. The Court of Appeal in *Tabuche v Tinga & 2 others (Civil Appeal E003 of 2022) [2024] KECA 551 (KLR) (24 May 2024)* stated that;  

“Reinstatement of a suit dismissed for want of prosecution is a discretionary remedy and not as of right. In any event, each case depends on its own circumstances.”
6. In *Kenya Pipeline Co. Ltd v Maguta Production Ltd [2014] eKLR*, the court held that;  

“... the discretion of the court must always be exercised judiciously with the sole intention of dispensing justice to both or all the parties. Each case must therefore be evaluated on its unique fact and circumstances. Among the factors to be considered is whether the Applicant will suffer any prejudice if denied an opportunity to be heard on merit.”
7. And in *Thathini Development Company Limited v Mombasa Water & Sewerage Company & another [2022] eKLR*, the court stated thus;  

“A suit is dismissed for a want of prosecution, means that the parties therein failed to aid court in meeting its overriding objective. The party seeking to reverse this order must explain sufficiently to court as to why his application is merited and persuade court to exercise its discretion.”
8. Has the Applicant sufficiently explained whether his application is merited? The explanation given by the Applicant's counsel for failure to prosecute the appeal is that she was attending to another matter at the time this matter was called. She has attached the diary for the said date, 12/02/2025. She has however not mentioned which matter she was attending to at the said date as there are several matters listed on her diary. Additionally, she has not explained why it was not possible to have another counsel watch her back by holding her brief.
9. Further, it is noteworthy that the memorandum of appeal was filed on 27/11/2023 and the Applicant's counsel had not even set the matter for mention for directions. The counsel filed the appeal and went to slumber. It is therefore my view that there has been inordinate delay in prosecuting the appeal which delay has not been explained. Needless to emphasize, the Respondents are entitled to an end in the litigation between them and the Appellant.
10. Litigants and their advocates must demonstrate diligence in the conduct of their matters before court so as not to cause obstruction or delay to the cause of justice. Where mistakes of an advocate ought not to be visited upon a litigant, there must be cogent and credible reason/explanation, like as would have been required in this case, as to why the matter was not attended to.



11. To encourage off-hand bare explanations like “I was in another court “would surely expose the administration of justice to real danger of delay and prejudice to other parties involved.
12. Be that as it may, I note that the application before court is one that invites the exercise of the court’s discretion. The same is not opposed. In the circumstances of this case, I find it fitting to afford the Appellant his day in court by allowing the prosecution of the appeal. I discern no serious prejudice on the part of the Respondents.
13. With the result that the application is allowed and I make the following orders;
  1. The appeal herein be and is hereby reinstated.
  2. The applicant to bear the costs of the application.
  3. The appeal be listed on a priority basis for directions.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 23<sup>RD</sup> DAY OF JANUARY 2026.**

**A.K. NDUNG’U**

**JUDGE**

