



Ngugi v Kibanya (Civil Appeal 181 of 2011) [2026] KEHC 820 (KLR) (30 January 2026) (Ruling)

Neutral citation: [2026] KEHC 820 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 181 OF 2011
JRA WANANDA, J
JANUARY 30, 2026**

BETWEEN

NJUGUNA NGUGI APPELLANT

AND

RICHARD MAINA KIBANYA RESPONDENT

RULING

1. The Application herein is the Appellant’s Notice of Motion dated 9/09/2025. The same is filed through Messrs Anassi Momanyi & Co. Advocates and seeks reinstatement of this Appeal which was dismissed for want of prosecution on 31/05/2021 by S. M. Githinji J.
2. The Application is supported by the Affidavit sworn by the Appellant’s Counsel, Dalton Kimingi Wainaina, in which he deponed that the Appeal was dismissed on a Mention on a date when it was to come up for confirmation that the parties had filed Submissions, which both parties had done and that all that was remaining was delivery of the Judgment. He thus deponed that the Appeal was dismissed on the mistaken belief that the Appellant was not keen on prosecuting it. He urged further that no notice to show cause why the Appeal should not be dismissed for want of prosecution.
3. Although there is a Return of Service on record indicating service of a Hearing Notice for the Application upon the Respondent’s, Advocates, Messrs Nyekwei & Co. Advocates, neither the Respondent nor his Advocates attended Court nor filed any response thereto.

Determination

4. The issue herein is “whether this Appeal, dismissed on 31/05/2021, for want of prosecution, should be reinstated”.
5. Although by the orders made on 31/05/2021 by S.M. Githinji J, the Appeal was recorded to have been dismissed for want of prosecution, the dismissal appears to have been more on the ground of non-attendance. Be that as it may, dismissal of Appeals for default or non-attendance on the part of an



Appellant, and reinstatement thereof are matters governed by Order 42 Rule 20(1) and 21 of the Civil Procedure Act which provide as follows:

20. Dismissal of appeal for appellant's default [Order 42, rule 20]

“(1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, and has not filed a declaration under rule 16, the court may make an order that the appeal be dismissed.

.....

21. Re-admission of appeal dismissed for default [Order 42, rule 21]

Where an appeal is dismissed under rule 20, the appellant may apply to the court to which such appeal is preferred for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing, the court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.

6. In the case of *Ivita vs. Kyumbu* [1984] KLR 441, which was followed in the Court of Appeal case of *Salkas Contractors Ltd v Kenya Petroleum Refineries Ltd* [2004] eKLR, the test to be applied when determining whether to dismiss an action for want of prosecution, which test similarly applies, in my view, to a case of dismissal for non-attendance as herein, was explained in the following terms:

“3. The test applied by the Courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite delay. Thus, even if the delay is prolonged, if the Court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter in the discretion of the Court.”

7. Regarding setting aside its own orders made as a result of non-attendance by a party, or failure to defend a case, the Court possesses a wide discretion, which discretion must however be exercised judiciously as was well-stated in the case of *Shah vs Mbogo* (1979) EA 116 as follows:

“..... this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.”

8. For the Court to exercise its discretion as aforesaid, it must be satisfied that there is “sufficient cause” or “reason” to warrant such setting aside. The term “sufficient Cause” was explained in the case of *The Hon. Attorney General vs the Law Society of Kenya & Another*, Civil Appeal (Application) No. 133 of 2011 (UR), by Musinga, JA as follows:

“28. “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."

9. Similarly, the Court of Appeal, in the case of *CMC Holdings Ltd vs James Mumo Nzioka* (2004) KLR 173, guided as follows:

"The discretion that a court of law has, in deciding whether or not to set aside ex parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error."

10. In this case, the Appeal was filed in November 2011, 14 years ago. The Record of Appeal was then expeditiously filed on 13/07/2012. However, the Appellant thereafter made no serious effort to prosecute the Appeal. The Court, by the letter dated 27/09/2016 notified the Appellant's Advocates that the Appeal was not ready for hearing as the lower Court file had not been supplied. While one would have expected that with this notification, the Appellant's Advocates would quickly initiate steps to pursue or cause forwarding of the lower Court file by, for instance, sending letters to the lower Court to that effect, the record shows zero effort by the Advocates to do so. In view of the persistent inaction by the Appellant, the Court issued the Notice of Dismissal for Want of Prosecution dated 2/06/2017 which the record indicates, was duly served upon the Advocates on record for both parties. However, when the Appeal came up for dismissal on 11/07/2017, despite service, only the Advocate for the Respondent attended Court. The Appellant's Counsel was "a no show". Nonetheless, H. Omondi J (as she then was) did not dismiss the Appeal but instead, directed that the Appellant do take steps to ensure the Appeal is admitted within 90 days and in default, the same would be dismissed.

11. Although the Appeal was later admitted when it came up in Court on 4/09/2018 and directions for filing and exchanging of written Submissions given, such admission appears to have been inadvertently done prematurely since the lower Court file had still not yet been supplied. The admission was evidently been done only on the basis of the Record of Appeal filed. Be that as it may, the matter again went dormant for a long time with no effort by the Appellant's Advocates to set it down for directions. Due to this inaction, the Court, suo motu fixed the matter for Mention before the Deputy Registrar more than 1 year later for 29/10/2019 on which date, there was no appearance by both parties. The matter later came up for directions before S.M. Githinji J on 25/11/2020 on which date, yet again, neither of the parties attended Court and the Judge adjourned the same to 31/05/2021. It was therefore against this backdrop that when the parties again failed to appear on 31/05/2020, S.M. Githinji J upon establishing that the Court Process Server had duly served both parties, proceeded to dismiss the Appeal. In making the order, the Judge stated as follows:

"Parties absent. There's indication they were served on 22/4/2021. They could be disinterested in the matter. The Appeal is dismissed for want of prosecution."

12. I have taken time to recount the above long chronology of events to demonstrate that S.M. Githinji J cannot be faulted for dismissing the Appeal. The pattern above demonstrates that the Appellant's Advocates took a shockingly lethargic position in their handling of the matter. The record clearly shows evidence of consistent disinterest in prosecuting the Appeal most amplified by the consistent failure to attend Court. As correctly stated by S.M. Githinji J, the Advocates were served to appear in Court on 31/05/2020 but failed to attend just as they had failed to do on several past occasions. Mr. Wainaina, the deponent of the Supporting Affidavit has steered clear of commenting on this glaring fact and has thus not given any explanation for the non-attendance. How then is the Court expected to exercise its



discretion in the absence of any explanation for the non-attendance on 31/05/2021, and also for the other past occasions?

13. It is therefore clear that the Appellant's Advocates have offered no explanation for their persistent inaction in prosecuting the Appeal and the consistent non-attendance. As aforesaid, to date, and despite being notified by the Court via the letter dated 27/09/2018, the Advocates have still never even bothered to take steps to pursue or cause the forwarding of the lower Court file to the High Court. The Appeal is therefore not even ready for hearing, leave alone for delivery of a Judgment. The fact that the parties had already filed Submissions is therefore neither here nor there. As aforesaid, the Appellant had earlier been served with the Notice of Dismissal for Want of Prosecution dated 2/06/2017 but H. Omondi J (as she then was), in exercising her discretion, chose not to dismiss it but gave the Appellant a second chance. I would have expected the Advocates to have taken this as signal that they needed to up their game and take all steps to act promptly. Unfortunately, there was still no change in approach. The Advocates are therefore clearly the authors of their own misfortune. Under the above circumstances, I have no doubt in my mind that I would have made exactly the same orders made by S.M. Githinji J on 31/05/2020, had I been sitting in his place.
14. In any event, the Appeal having been dismissed 4 years ago on 31/05/2021, the Advocates have offered no explanation whatsoever why it has taken them this long to apply for reinstatement. Is it that they were for 4 years not even aware of the dismissal? Does it mean that their office files do not have some kind of a file "bring-up" mechanism? What about the client? Was he not interested in making any inquiries from his Advocates regarding the progress of his Appeal? If the answers to above questions are in the affirmative, then it just further fuels the conclusion that neither the Advocates nor their client was interested in the Appeal.
15. Further, the Appeal having been dismissed 4 years ago and there being no effort for all that period to apply for reinstatement, the Respondent must have by now moved on in the belief that the same is now a "closed chapter". Would bringing back the Appeal after all this long be really fair to the Respondent? Would it really amount to a judicious exercise of discretion? Of course not.

Final Orders

16. For the foregoing reasons, the Applicant's Notice of Motion dated 9/9/2025 is hereby dismissed with no order costs as the Respondent never participated in the Application.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 30TH DAY OF JANUARY 2026

.....

WANANDA JOHN R. ANURO

JUDGE

Delivered in the presence of:

Mr. Wainaina for the Appellant

Mr. N/A for the Respondent

Court Assistant: Brain Kimathi

