Kathambi v Kijuki & another (Civil Appeal E148 of 2023)
[2026] KEHC 1612 (KLR) (13 February 2026) (Ruling)

Neutral citation: [2026] KEHC 1612 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CIVIL APPEAL E148 OF 2023

HM NYAGA, J

FEBRUARY 13, 2026

BETWEEN

JANET KATHAMBI ..... APPLICANT

AND

MERCY MAKENA KIJUKI ..... 1ST RESPONDENT

BRIAN KIMATHI MUTUMA ..... 2ND RESPONDENT

RULING

1. Vide Notice of Motion Application dated the 4th of April 2025, the Appellant/Applicant herein has approached the Honourable court seeking for the following Reliefs;

    a. Spent

    b. That this Honourable Court be pleased to grant leave to the firm of Mutegi Mugambi & Co. Advocates to come on record for the Appellant in place of the firm of Mundia Mwangi & Co. Advocates.

    c. That this Honourable court be pleased to review, vary, set aside the orders of 16th December,2024 dismissing the Applicant's Appeal No. E 148 of 2023 for want of prosecution.

    d. That the Civil Appeal No. E148 of 2023 be reinstated for hearing.

    e. That costs of this suit be provided for.

2. The Application is premised on grounds on its face and supported by an Affidavit of the Applicant, Janet Kathambi, sworn on the even date.

3. She deponed that on 16th December,2024 when this court dismissed Appeal No. E148 of 2023 for want of prosecution, none of the advocates on record was present.

4. She averred that her erstwhile advocate was not keen on following up her matter and she learnt her appeal was dismissed on 17th March,2025 when she was in court following up on another matter.

5. She said her erstwhile advocate did not give her concrete feedback on why he had not followed up on her appeal necessitating her to seek the services of the current counsel.

6. She deponed that she is keen on prosecuting her appeal and prayed that this Application be allowed.

7. Upon being served with the instant Application, the Respondents responded thereto by filing a Replying Affidavit dated 5th May,2025 ,wherein the 1st Respondent, Mercy Makena Kijuki, on her own behalf and on behalf of the second Respondent deponed that the Appellant never took any action to prosecute her appeal from the time she filed the same and as such the court rightly dismissed it for want of prosecution.

8. She asserted that the Applicant is intent on frustrating them on executing the judgement granted in their favour and obstructing the cause of justice through the instant application.

9. She averred that the Applicant has filed another suit being CMCC No. 314 of 2022 against them and her purported insurers wherein she is seeking her insurers to pay the claim as per the judgement in the primary suit herein and as such this appeal was superfluous.

10. In the upshot, it was her deposition that the Appellant does not deserve the orders sought since no explanation has been advanced on why she did not prosecute her appeal for almost 2 years now.

11. She prayed that the Application be dismissed with costs.

12. The Application was canvassed through written submissions. At the time of writing this ruling only the Applicant's submissions were on record.

Appellant's/Applicant's Submissions

13. The Applicant submitted that mistake of an advocate should not be visited upon her. She argued that declining this application is tantamount to condemning her unheard contrary to the provision of Article 50 of *the Constitution*. In buttressing her case, she relied on cases of Karinga Gaciani & 11 others v Ndege Kabibi Kimanga & another [2021] eKLR; Concord Insurance Company Limited vs. Susan Nyambura Hinga Civil Application No. Nai 251 of 2002; Sagoo v Bharij [1990] KEHC 56 (KLR); Kitek (7) Limited v Wanakuta & 8 others (Sued in their capacities as officials of the Salvation Army) [2025] KEHC 13974 (KLR); Hellen Cherono Kimurgor vs Esther Jelagat Kosgei (2008) eKLR; & Global Tours & Travels Limited, Nairobi High Court Winding Up Cause No. 43 of 2000

14. With regards to costs, the Applicant cited Section 27 of the Civil Procedure Rules and submitted that the general rule is that costs follow the event.

Analysis & Determination

15. After careful analysis of the above application, the supporting affidavit, Replying Affidavit and the submissions on record, in my view the main issues for determination are:

    a. Whether the firm of Mutegi Mugambi & Co. Advocates ought to be granted leave to come on record for the applicant.

    b. Whether the Applicant has established and demonstrated sufficient cause to warrant the variation and setting aside of the impugned orders.

Issue no.1

16. Order 9 Rule 9 of the Civil Procedure Rules provides: -

> " When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court: -
>
> i. Upon an application with notice to all the parties; or
>
> ii. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."

17. A perusal of the Application precisely the orders sought show that the firm of Mundia Mwangi & Co. Advocates was on record for the Applicant. There is no evidence on record that the firm of Mutegi Mugambi & Co. Advocates served the aforesaid firm of Mundia Mwangi & Co Advocates with this application for leave. As such, the firm of Mutegi Mugambi & Co. Advocates has not complied with the requirement for leave to come on record for the applicant as required under Order 9 Rule 9 of the Civil Procedure Rules. It was the duty of the new advocate to show the court through an affidavit of service that it had served the firm of Mundia Mwangi & Co Advocates with the present application but he has failed to do so.

18. For reasons of non-compliance with mandatory provisions of the Rules, the order sought for the said law firm to come on record for the applicant is thus incapable of being granted.

19. There being no orders granted allowing the advocate to take over the matter after judgment, it is my view that the application was filed by a stranger, and ought to be struck out at this stage.

20. However, there are authorities that seem to suggest that striking out of such pleadings may not be the only course to be taken by the court at all times.

21. In Violet Wanjiru Kanyiri vs Kuku Foods Limited [2022] eKLR the Court considered a similar situation. It held as follows;

> " From the Application filed in Court there is no indication that the firm of Coulson Harney LLP Advocates served the firm of Nyandoro & Company Advocates with its application dated 16th March, 2021. No mention has been made of any attempts to obtain consent of the said firm which was declined. There is further no affidavit of service of the application upon the further advocates. The Respondent/Applicant has not met the threshold as set out in Order 9 Rule 9 of the Civil Procedure Rules, 2010. This is sufficient reason to dismiss the application. I will however also consider the substantive prayers in the application."

22. There is also an argument that an "appeal" is a new matter and that leave may not be necessary.

23. This was the case in Tobias M. Wafubwa vs. Ben Butali [2017] eKLR, where the court was of this view:

> " We are of the same view, and would adopt the same approach in its entirety in matters concerning appeal. Once a judgment is entered, save for matters such as applications for review or execution or stay of execution inter alia, an appeal to an appellate court is not a continuation of proceedings in the lower court, but a commencement of new proceedings in another court, where different rules may be applicable, for instance, the Court of Appeal Rules, 2010 or the Supreme Court Rules 2010. Parties should therefore have the right to

choose whether to remain with the same counsel or to engage other counsel on appeal without being required to file a Notice to Change of Advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous advocate.

We would go further to add that, provided that where the failure to comply with the Rule 9 did not undermine the jurisdiction of the court or affect the core of the dispute in question, or prejudice either of the parties in any way as to lead to a miscarriage of justice, then, Article 159 of *the Constitution* and the overriding principles could be called upon to aid the court to dispense substantive justice through just, efficient and timely disposal of proceedings."

24. Taking cue from the above decisions, I will proceed to look at the other issue raised.

Issue No.2

25. It is not in doubt that this court issued a notice to show cause why the Appeal should not be dismissed to the Applicant on 25th September,2024.

26. On the date of the hearing of the said notice, neither the Applicant nor her advocate was present and this court dismissed the Appeal for want of prosecution on 16th February,2024.

27. In urging this court to allow this Application, the Applicant has blamed her previous advocate for not being keen on prosecuting her Appeal.

28. It is thus proper for this court to verify whether inaction on the part of the advocate would amount to sufficient reason to warrant this court exercise its discretion in favour of the Applicant.

29. In the case of Rajesh Rughani -vs Fifty Investment Ltd & Another [2005] eKLR, the Court of Appeal had this to say:-

> " It is not enough simply to accuse the Advocate of failure to inform as if there is no duty on the client to pursue his matter. If the Advocate was simply guilty of inaction that is not excusable mistake which the Court may consider with some sympathy."

30. In the case of Habo Agencies Ltd -v- Wilfred Odhiambo Musingo [2015] eKLR, Waki J.A cited the case of Bains Constructions Ltd -v- John Mzare Ogowe [2011] eKLR where the court held that:-

> " It is to some extent true to say mistakes of counsel as is the present case should not be visited upon a party but it is equally true when Counsel as agent is vested with authority to perform some duties and does not perform it, surely such principal should bear the consequences."

31. In the said case of Bains Construction Co Ltd v John Mzare Ogowe (supra) the Court observed as follows: -

> " It is to some extent true to say mistakes of Counsel as is the present case should not be visited upon a party but it is equally true when Counsel as agent is vested with authority to perform some duties and does not perform as principal and does not perform it, surely such principal should bear the consequences".

32. In Alice Mumbi Nyanga vs. Danson Chege Nyanga & Another (2006) eKLR, the Court stated that:-

> " a Civil case once filed is owned by a Litigant and not his advocate. It behoves the litigant to always follow up his case and check its progress."

33. In Bi-Mach Engineers Limited vs James Kahoro Mwangi [2011] eKLR the Court of Appeal held:

> " The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. The client has a remedy against such an advocate. It would also appear that there was unnecessary and unexplained delay after 30th December, 2010 and the filing of the motion on 2nd February, 2011. Without explanation, there would be no basis for the exercise of any discretion. The filing of a notice of appeal is a simple and mechanical task and could even have been done on 30th December, 2010 or soon after the applicant became aware of the judgment. Such conduct militates against the overriding objective and the principles stated above."

34. It is patent from the above authorities that it is no longer fashionable for any litigant, to merely lay blame on his/her previous advocates and thereafter expect sympathy of the court. Duty to follow up a case lies in the litigants as well as their advocates. A litigant at all times must monitor his/her case.

35. Additionally, Pursuant to Article 159(2) (d) of *the Constitution*, litigants and their advocates should assist and collaborate with the court to facilitate the expeditious disposal of suits.

36. The Court of Appeal in the case of Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 others [2015] eKLR, where the Court of Appeal stated as hereunder;

> "Justice shall not be delayed" is no longer a mere legal maxim in Kenya but a constitutional principle that emphasizes the duty of the advocates, litigants and other court users to assist the court to ensure the timely and efficient disposal of cases. The principles which are reiterated by sections 1A and 1B of the *Civil Procedure Act* are intended to facilitate the just, expeditious, proportionate and affordable resolution of disputes. The principle cannot therefore be a panacea which heals every sore in litigation, neither is it a licence to parties to ignore or contravene the law and rules of procedure. .."

37. In the case of Nicholas Kiptoo Arap Korir Salat -v- IEBC & others [2013] eKLR, Kiage J. stated as follows:-

> "...I am not in the least persuaded that Article 159 of *the Constitution* and the Oxygen principles which both command Courts to do substantial justice in an efficient, proportionate and cost effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for all in the administration of justice. This Court, indeed all Courts, must never provide succor and cover to parties who exhibit scant respect for rules and timeliness. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and shifting of goal posts for, while I apprehend that it is in the even-handed and dispassionate application of rules that Courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with

a measure of confidence, certainty and clarity where issues of rules and their application are concerned."

38. The appeal herein was dismissed on 16th December 2024, after a period of one year and three months from its date of filing on 15th September 2023. The Applicant other than blaming her erstwhile advocate has not disclosed to court what efforts she took to have her appeal determined expeditiously.

39. This Court, when faced with a similar scenario as the one herein in the case of Geoffrey Mwongera Murungi (Suing as Administrator and Personal Representative of the estate of Josphat Kithiru Murungi-Deceased vs Moses Njeru Ireri, Misc. Application No. E069 of 2025, held that it ought not to be harsh on the litigant on account of inactivity on the part of his advocates. This court stated as follows: -

> "In light of the above, I find the Applicant has not given plausible explanation to the satisfaction of the court to exercise its discretion and grant the orders sought. The delay in filing the application was inordinate as it has been filed five (5) months after the said Ruling and eleven (11) months after the impugned judgement. Be it as it may, I think that the applicant deserves a chance to canvass his appeal, a right provided by the law. The court should not be harsh on him on account of inactivity on the part of his advocates."

40. From the foregoing and in the interests of justice, I am inclined to allow the Application in terms of prayers 3 and 4.

41. Consequently, the order of 16th December,2024 is hereby set aside and the appeal is reinstated on condition that;

    a. The appellant /applicant to file and serve the record of appeal, if not done already, within the next 30 days, in default of which the appeal will stand dismissed automatically.

    b. The matter to be listed for directions on the appeal on a date to be given shortly upon delivery of this ruling.

    c. The applicant shall bear the costs of this application.

42. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 13TH DAY OF FEBRUARY, 2026.

HESTON M. NYAGA

JUDGE

In the presence of;

Mrs. Mutegi for Applicant

Mr. G. Anampiu for respondent