

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CIVIL APPEAL NO. E180 OF 2024
MICHAEL OTIENO GONDO.....
.....APPELLANT
VERSUS
KENNEDY OCHIENG OBARA.....
RESPONDENT

RULING

1. The Appellant’s notice of motion is dated 13th October, 2023. I suppose that the date on the motion is erroneous and/or inadvertent considering that the application was filed on 4th March, 2025 and addresses orders made on 2nd December, 2024. Notably, the certificate of urgency accompanying the application is dated 3rd March, 2025. I will in the premises adopt the date of 3rd March, 2025 as the date of the application.

2. The motion is expressed to be brought under *Sections 1A, 1B, 3A and 95 of the Civil Procedure Act, Cap 21 Laws of Kenya and Order 45 Rule 1, Order 42 Rule 21, Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010* and all other enabling provisions of the law and seeks the following orders:

1. [Spent].

- 2. THAT this court be pleased to set aside the orders made on 2nd December, 2024 by Hon. Justice Benjamin Mwikya Musyoki directing that the Appellant's appeal be dismissed if the Appellant fails to file a record of appeal and submissions within a specified time.**
- 3. THAT this appeal be reinstated for hearing and determination in the normal way.**
- 4. THAT this court be pleased to enlarge time directions to file the record of appeal and submissions.**
- 5. THAT upon the grant of prayers 2, 3 and 4 above, the record of appeal dated 10th December, 2024 together with the Appellant's written submissions dated 18th February, 2025 and filed on 31st January, 2025 and 20th February, 2025 respectively be deemed to be properly on record.**
- 6. THAT costs of the application be in the cause.**

3. The grounds upon which the application is premised are set out on its face and are in precis as follows:

- a. That on 2nd December, 2024, this court (Hon. Musyoki, J.) ordered that the Appellant files the record of appeal and submissions within 14 days in default of which the appeal would stand dismissed.**

- b. That the Appellant filed the record of appeal and submissions on 31st January, 2025 and 20th February, 2025 respectively, out of the 14-day timeline as ordered by Musyoki J., which then meant that the appeal stood dismissed, pursuant to the self-executing orders of 2nd December, 2024.
 - c. THAT the failure by the Appellant to comply with the orders of 2nd December, 2024 was inadvertent and beyond the Appellant's control as the Appellant's Advocate had maternity complications and had been in and out of hospital since 2nd December, 2024; and that the mistake of the Advocate should not be visited upon the Appellant/Client.
 - d. THAT the delay in compliance with the orders of 2nd December, 2024 is therefore excusable and that the same is not inordinate, as the application has been made timeously and that the Respondent can in any event be recompensed by an award of costs.
 - e. That it is in the interest of justice that the application be allowed, lest the Appellant suffers immense prejudice.
4. The application is supported by the affidavit of **Christine Musando**, the Appellant's Counsel, sworn on 4th March, 2025.
5. The said deponent restates and expounds on the above grounds in her affidavit.

6. **Ms. Musando** states that the appeal was admitted on 18th October, 2024 whereby **Hon. Aburili J.** issued directions that the Appellant files the record of appeal and submissions within 21 days, whereafter the Respondent was to file submissions within 10 days, which directions Counsel states were not complied with as the trial court's proceedings were not prepared in time. The same, Counsel states, were certified and issued to the Appellant on 24th November, 2024.
7. In her further depositions, Counsel states that the matter was next mentioned on 2nd December, 2024 when **Musyoki J.** issued the orders that are subject of this application's attention.
8. Counsel further states that the Appellant filed the record of appeal and submissions on 31st January, 2025 and 20th February, 2025 respectively, out of the 14-day timeline as ordered by **Musyoki J.**, which then meant that the appeal stood dismissed, pursuant to the self-executing orders of 2nd December, 2024.
9. **Ms. Musando** states that the delay to comply with the orders of 2nd December, 2024, which in her view is neither unreasonable nor unexplained, was inadvertent and beyond the Appellant's control as she had maternity complications and had been in and out of hospital since 2nd December, 2024. She

regrets that position, adding that her mistake should not be visited upon her innocent client.

10. Counsel urges that the Appellant has a tenable appeal and should be allowed to canvass it in line with *Articles 48, 50 and 159(2)(d)* of the *Constitution*.
11. The application is opposed and to that end the Respondent's Counsel, **Mr. Robert Onyango Okumu** filed a replying affidavit which he swore on 16th April, 2025.
12. In his affidavit, **Mr. Okumu** states that the Appellant's motion is frivolous, vexatious and an abuse of the court process.
13. Mr. Okumu states that **Aburili J.'s** clear directions of 18th October, 2024 were not complied with by the Appellant. The Respondent brought to the attention of **Musyoki J.** the non-compliance by the Appellant and the self-executing orders of 2nd December, 2024 were then issued. The Appellant did not comply with the same and the appeal stood automatically dismissed after the expiry of the 14 days that the court gave the Appellant.
14. Counsel for the Respondent urges that the failure by the Appellant to comply with a court order cannot be deemed to be a technicality curable under *Article 159* of the *Constitution* and that the said provision cannot shield an indolent party.

Counsel noted that the Appellant had been given two opportunities to comply by the two judges but failed to do so.

15. In his further deposition, Counsel for the Respondent states that under *Order 45* of the *Civil Procedure Rules*, the Appellant was mandatorily required to annex to the affidavit in support of the application the order which is sought to be reviewed and set aside and failure to do so renders the application to be defective, fatally.

16. Counsel for the Respondents states that the Appellant ought to have sought leave of the court to either file to either file the record of appeal and submissions out of time or for an order of enlargement of the timeline granted on 2nd December, 2024, which the Appellant failed to do.

17. **Mr. Okumu** further states that being the successful party in the litigation before the lower/trial court, the Respondent should be allowed to enjoy the fruits of the trial court's judgement.

18. The application was canvassed by way of written submissions, which I have had an opportunity to peruse.

19. Having carefully considered the notice of motion, the affidavits on record and the rival written submissions, the court is of the view that the following issues arise for determination:

- i. Whether this court is vested with jurisdiction and discretion to set aside the self-executing orders made on 2nd December, 2024 and to reinstate the appeal.
- ii. Whether the Appellant has established sufficient cause to warrant the setting aside of the said orders and enlargement of time.
- iii. Whether the failure to comply with the court's directions was excusable in the circumstances of the case.
- iv. Whether the objections raised by the Respondent, particularly on the applicability of *Order 45* of the *Civil Procedure Rules*, are well founded.
- v. Whether the interests of justice favour the reinstatement of the appeal and, if so, on what terms.

20. The application before this court is anchored on *Sections 1A, 1B, 3A and 95* of the *Civil Procedure Act* as well as *Order 45 Rule 1, Order 42 Rule 21, Order 50 Rule 6 and Order 51 Rule 1* of the *Civil Procedure Rules*. These provisions collectively clothe the court with wide and unfettered discretion to manage proceedings, enlarge time, review or set

aside its orders and to ensure that justice is administered substantively rather than mechanistically.

21. *Order 42 Rule 21* of the *Civil Procedure Rules* expressly empowers the court to re-admit an appeal dismissed for default upon such terms as may be just.
22. *Section 95* of the *Civil Procedure Act* and *Order 50 Rule 6* further authorize the enlargement of time even where the period originally fixed has expired.
23. These provisions are reinforced by *Sections 1A* and *1B* of the *Act*, which impose upon the court a statutory duty to facilitate the just, expeditious and proportionate resolution of disputes.
24. The principles governing the exercise of discretion to set aside orders are well settled. In ***Mbogo & Another v Shah [1968] EA 93***, the court held that such discretion is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake, but not to assist a party who has deliberately sought to obstruct or delay the course of justice.
25. Similarly, in ***Philip Chemwolo & Another v Augustine Kubende [1986] KLR 495***, the court emphasized that blunders will continue to be made and that, where no

prejudice is occasioned, a litigant should not be denied a hearing on the merits.

26. In the present case, the dismissal of the appeal arose from non-compliance with the self-executing orders issued on 2nd December, 2024. The Appellant concedes the default but attributes it to circumstances beyond her control, namely, that her Counsel suffered maternity-related medical complications and had been in and out of hospital during the material period. This explanation is deponed to on oath by Counsel herself.

27. Notably, the Respondent did not controvert, rebut or otherwise challenge this explanation. The replying affidavit filed on behalf of the Respondent confines itself to assertions of indolence and abuse of process but is conspicuously silent on the alleged illness of Counsel.

28. In the absence of any rebuttal, the court has no basis upon which to disregard the explanation tendered. The court is guided by the principle that unchallenged evidence, particularly on matters of fact, is generally deemed admitted.

29. The delay complained of, though regrettable, cannot be described as inordinate. The record of appeal and submissions have since been filed, and the appeal is ripe for hearing. There is no suggestion that the Respondent's ability to prosecute or

defend the appeal has been impaired. Any inconvenience occasioned by the delay is compensable by an award of costs.

30. The Respondent argued that *Article 159(2)(d)* of the *Constitution* cannot be invoked to cure non-compliance with court orders. While that proposition is correct in principle, it must be applied contextually.

31. In ***Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others [2014] eKLR***, the Supreme Court underscored that procedural rules are handmaidens of justice and not its mistress. The court retains discretion to excuse non-compliance where sufficient cause is shown and where no prejudice is occasioned.

32. The court is further persuaded by the long-standing position that the mistake of counsel should not, in appropriate circumstances, be visited upon an innocent litigant.

33. In the case of ***Belinda Murai & Others v Amos Wainaina [1979] eKLR***, it was held that a litigant ought not to suffer for the inadvertence or error of counsel where the interests of justice demand otherwise. This principle applies with equal force where the default arises from Counsel's ill health, a circumstance that cannot reasonably be described as wilful or negligent conduct.

34. The Respondent's objection based on *Order 45* of the *Civil Procedure Rules* does not find favour with the court. While *Order 45* contemplates annexing the order sought to be reviewed, the substance and tenor of the impugned orders are not in dispute and are readily ascertainable from the court record.
35. Moreover, the application is not solely grounded on review but also invokes the court's powers under *Order 42 Rule 21* and *Order 50 Rule 6* of the *Civil Procedure Rules* and *Section 95* of the *Civil Procedure Act* and the inherent jurisdiction preserved under *Section 3A* of the *Civil Procedure Act*. To elevate form over substance in such circumstances would offend the overriding objective of the law.
36. The Respondent further urged that, as the successful party in the lower court, it is entitled to enjoy the fruits of its judgment. While that is a legitimate consideration, it must be balanced against the Appellant's right of appeal and the constitutional guarantees of access to justice and a fair hearing under *Articles 48* and *50* of the *Constitution*. As was stated in the case of ***Ivita v Kyumbu [1984] KLR 441***, the court must consider whether justice can still be done notwithstanding the delay, and whether any prejudice caused can be adequately compensated.

37. Weighing all the circumstances of this case, this court is satisfied that the Appellant has demonstrated sufficient cause to warrant the exercise of discretion in her favour. The explanation that Counsel was unwell stands unrebutted, the delay is not inordinate and the Respondent will suffer no irreparable prejudice if the appeal is reinstated.
38. In the result, the notice of motion dated 3rd March, 2025 is merited and is hereby allowed. The orders made on 2nd December, 2024 are reviewed and set aside and the appeal is reinstated for hearing and determination.
39. The record of appeal dated 10th December, 2024 and the Appellant's written submissions dated 18th February, 2025 are hereby deemed to be properly on record.
40. The Respondent shall file and serve submissions on the appeal within 21 days.
41. This appeal will be mentioned on 8th April, 2026 for further orders.
42. Costs of the application shall abide the outcome of the appeal.
43. Orders accordingly.

DELIVERED (virtually), DATED & SIGNED this 9th day of
February, 2026.

JOE M. OMIDO.

JUDGE

FOR APPELLANT: No appearance.

FOR RESPONDENT: **Ms. Ochieng.**

COURT ASSISTANTS: **Mr. Ngoge & Mr. Juma.**