



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CIVIL APPEAL NO. E013 OF 2022

EVERLYNE JENNIFER MWAKHA

APPELLANT/APPLICANT

VERSUS

RONALD ANZELIMO KONGOTI

RESPONDENT

RULING

1. Vide a Notice of Motion application dated 4th March 2024, the applicant seeks the following orders;
 - a) *THAT this application be certified urgent; service be dispensed with, and it be heard ex parte in the first instance due to its urgency. (spent)*
 - b) *THAT the court do exercise its discretion in favour of the Appellant and set aside and/ or review its order issued on the 27th February, 2024, dismissing this suit and thereby reinstate the suit.*

- c) *THAT upon grant of (2) above, the Record of Appeal dated 26th February, 2024, be deemed to be properly filed upon payment of the requisite court fees.*
- d) *THAT any other relief that the court deems fit to so order*
- e) *THAT costs be in the cause.*
2. The application is premised on the grounds set out on its face and on the supporting affidavit sworn on the same date by the Applicant's counsel, who confirmed that she had delayed in filing the record of Appeal as was directed by the court, as her representative had failed to place the record in court within the time stipulated by the court.
3. She avers that he endeavoured to place the record on 26th February 2024 and prays that the court considers the interest of both parties. She contends that she would be prejudiced if the application is not allowed, while the Respondent would not suffer any prejudice.
4. On the court's directions, the application was canvassed through written submissions.

Applicant's Submissions

5. In her submissions, she relies on Article 159 (2)(d) of the Constitution on undue regard to procedural

technicalities and cites the case of ***Republic v Nairobi Milimani Senior Principal Magistrate Ex-Parte Francis Kariuki Muruatetu & another [2015] eKLR.***

6. She prays that the court exercises its inherent jurisdiction under Order 51 Rule 1 for the ends of justice to be met and prays that the mistake of the advocate should not be visited on the clients. She relies on the case of ***Nkuruna vs Republic [1986] KLR 622 and the Court of Appeal case of James Kanyingi Maina v John Nganga Gitau & another [2016] eKLR.***
7. She asserts that the right of appeal is a constitutional right protected under Article 50(1) of the Constitution under the right to a fair hearing. She cites the case of ***Mrao Limited & another v First American Bank of Kenya Limited [2003] eKLR.***
8. According to the Applicant, the Respondent would suffer no irreparable prejudice if the orders sought are granted. In contrast, she would suffer prejudice as she would be denied the opportunity to prosecute the appeal.
9. She denies the claim that she was indolent and disregarded the court orders, claiming that there was a breakdown in communication between her counsel and

his representative. She quotes the case of ***Permanent Secretary, Ministry of Lands & Physical Planning & another v Daniel Kimani Gachie & another [2020] eKLR.***

10. She now states that she has complied, filed the Record of Appeal, submissions, and the matter is ready for hearing, and it should be heard on merit.
11. She prays that the court consider her application and set aside the order for dismissal, and allow the reinstatement of the appeal.

Background

12. On 8/11/2022, the court had directed that the Appellant file her Record of Appeal within thirty (30) days. When the matter came up for mention on 18/1/2023 to confirm compliance, the appellant had not yet complied, and the court ordered that its directions be served on the appellant for compliance.
13. On 22/03/2023, the court directed the Appellant to serve the record of appeal within 28 days to enable the respondent to file their submissions. On 15/6/23, when the matter came up for confirmation of compliance, it was noted that the Appellant had not yet filed or served the record of appeal. The court granted them 21 more

days to file the record and ordered that failure to comply would result in dismissal of the appeal.

14. When the matter came up on 28/2/2024, to confirm if the appellant had complied with the court's directions, it was noted that the Appellant had not filed the record of appeal. The court confirmed that the appellant had failed to file their record of appeal within the stipulated period, the appeal stood dismissed.
15. The Applicant has now filed the application seeking to reinstate the appeal that was dismissed.

Analysis and Determination

16. I have carefully considered the Notice of Motion dated 4/3/2024, the supporting affidavit sworn by learned counsel for the applicant, the submissions and the court records, and the applicable law.
17. The main issue for determination is whether the Applicant has provided sufficient grounds to warrant the setting aside or review of the orders issued on 28/2/2024 dismissing the appeal, and whether the court should exercise its discretion in favour of reinstatement.
18. The Applicant's counsel attributes the delay in putting together the record of appeal to the breakdown of communication between the Applicant and her legal

representative. She prays that her counsel's mistakes should not be visited on her and that she be allowed a chance to ventilate her grievances.

19. I have perused the court records and proceedings and note that there is a pattern of persistent delays and failures to comply with multiple extensions granted by the court. This is not an isolated incident but a series of lapses dating back to November 2022, including failures on 18/1/2023, 22/3/2023, and 15th June 2023. Such conduct amounts to indolence on the part of the applicant and her counsel, which cannot be excused merely by shifting blame to a representative. Nevertheless, it is not clear whether the Applicant's Counsel received the Mention Notice for 8/11/2022. From the record, they had not been served with the court's directions by 18/1/2023.

20. In ***in re Estate of Alfred Gwedeya Luvembe [2025] KEHC 683 (KLR)***, the Court declined to set aside a dismissal order, noting that "***this was one of the rare cases that this court would decline to set aside the orders for dismissal due to the indolence that had been explained,***" highlighting that persistent

delays prejudice the administration of justice and the rights of the other party.

21. The Applicant has quoted Article 50(1) of the Constitution of Kenya, 2010, which guarantees the right to have any dispute resolved by a fair hearing within a reasonable time. However, this right is not absolute and must be balanced against the Respondent's right to a timely conclusion of a case. Article 159(2) of the Constitution provides that in exercising judicial authority, courts shall be guided by principles, including that "*(b) justice shall not be delayed*" and "*(d) justice shall be administered without undue regard to procedural technicalities.*" As expounded in **Raila Odinga & 5 Others v IEBC & Others [2013] eKLR**, "*Article 159(2)(d) of the Constitution simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the courts of law.*"

22. Having said that, I note that at the time the Appeal was dismissed, the trial court file had not been forwarded to

this court. Even as at the time of writing this ruling, the lower court record has not been received.

23. Under Order 42 Rule 13 (4) (d) of the Civil Procedure Rules, the original trial file is part of the record of appeal and the court must first be satisfied that the said file is in the court record before the appeal can go to hearing. The Order 42 Rule 13 provides:-

“(4)Before allowing the appeal to go for hearing, the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—

(a)the memorandum of appeal;

(b)the pleadings;

(c)the notes of the trial magistrate made at the hearing;

(d)the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;

(e)all affidavits, maps and other documents whatsoever put in evidence before the magistrate;

(f)the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

Provided that—

(i)a translation into English shall be provided of any document not in that language;

(ii)the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).”

24. The absence of the original trial record in a first appeal compromises the first appellate court’s ability to exercise its jurisdiction to re-evaluate and re-analyse the evidence, as the court may need to refer to original documents produced, the trial magistrate’s handwritten notes and the original pleadings. It must be noted that the Record of Appeal is compiled by the Appellant alone and the absence of the original trial file could result in a miscarriage of justice. The original lower court file enables the court to properly review the case, and its absence renders the record incomplete, notwithstanding the presence of a record of appeal. In the case of **Richard Koisok Cherutich v. Benson**

Theuri [2024] KEHC 10544 (KLR), W. M. Musyoka, Judge, considered the legal implications of an incomplete record and stated that:-

“Sitting as an appellate court, I could still resolve the appeal based on the original trial court notes, by ignoring the incomplete record of appeal. The risk with that, however, would be that either of the parties could be aggrieved with my verdict, as an appellate court, and may wish to escalate the dispute to the Court of Appeal, which does not usually act on original trial court records, but on records of appeal filed by the parties. It would be most likely that the incomplete record of appeal filed herein, of the proceedings at the trial court, could be filed at the Court of Appeal, denying it a chance to have access to the true record of what transpired at trial, presenting a real chance of miscarriage of justice.”

25. In **Kenya Commercial Bank Limited & another v Muiri Coffee Estate Limited & 3 others [2016] KESC 6 (KLR)**, the Supreme Court considered the importance of court records and held that:-

“The importance of the record of a Court, particularly for a Court of record, such as the High Court, cannot be gainsaid. We agree with learned counsel for respondent, Mr. Muite, that the record of a Court of record is a fundamental reference-point in the administration of justice. We have perused the Court of Appeal Ruling granting certification, and we find no fault with its observations and findings, as regards this vital question of the availability of a record of a Court of record. The Court of Appeal in granting leave, indeed reinforced the public-interest element in this issue, that speaks to its nature, as a matter of general public importance, when it held thus:

“...we must also concede that upon hearing the forceful submissions made before us by Mr. Muite for the applicant, we cannot but conclude that the issue of the character of superior Courts as Courts of record and the consequences of absence or incompleteness of the record, where rights are determined with finality on the basis of what ought to be on

that very record, is neither shallow nor idle. Rather, formulated in the precise manner in which it was before us, the issue appears to us to have far-reaching consequences and implications on the integrity of the adjudicative processes of the Courts...”

26. I have carefully considered the application and taken into account the fact that at the point of dismissal of the appeal, the lower court record was yet to be received. This was an administrative lapse by the court but it rendered the court record incomplete. That means that the appeal was premature and would not have proceeded to hearing. I find that the principles of justice dictate that this court’s discretion tilts towards substantial justice rather than technicalities. Having regard to the entire circumstances of the case, I find that the series of delays was not inordinate and that some of them were due to administrative lapses on the part of the court.

27. In the persuasive case of **John Gachanja Mundia v Francis Muriira alias Francis Muthika & Another [2016] KEHC 7140 (KLR)**, the court held that:-

“...Courts of law have said that, with the entry of the overriding principle in our law and the anchorage of substantive justice in the Constitution as a principle of justice, courts should always take the wider sense of justice in interpreting the prescriptions of law designed for grant of relief. ”

28. There is no doubt that this court has inherent power to grant the orders sought in exercise of its discretion provided the discretion is exercised judicially. Consequently, I find that the Applicant is deserving of the orders sought and therefore allow the application as prayed.
29. The orders issued on 27/2/2024 are hereby reviewed and set aside and the appeal reinstated. The Record of Appeal dated 26/2/2024 shall be deemed as properly filed upon payment of the requisite fees.
30. The Deputy Registrar shall urgently call for the lower court file to enable this court to proceed with the appeal. The Appellant shall bear the costs of the application.

Dated, signed and delivered at Kakamega, this 19th day of February 2026.

**A. C. BETT
JUDGE**

In the presence of:

No appearance for the Parties

Court Assistant: Polycap

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