



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Evans v Mutyia alias Sambor & 2 others (Civil Appeal E001 of 2024)
[2026] KEHC 3082 (KLR) (6 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 3082 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KILGORIS
CIVIL APPEAL E001 OF 2024
CM KARIUKI, J
MARCH 6, 2026**

BETWEEN

OINO ORANGI EVANS APPELLANT

AND

KILESI MUTYIA ALIAS SAMBOR OLE MUTYIA 1ST RESPONDENT

CHARLES NAULA 2ND RESPONDENT

JOSEPH NAULA 3RD RESPONDENT

*(Being an appeal from the ruling of the Senior resident Magistrate Hon.W.
C. WASWA delivered on 18/1/2024 in Kilgoris PMCC No. 31 of 2022)*

JUDGMENT

Introduction

1. The appellant, Oino Orangi Evans, filed an appeal challenging the ruling of the Senior Resident Magistrate, Hon. W.C. Waswa, delivered on 18th January 2024 in Kilgoris PMCC No. 31 of 2022. The appeal emanates from the trial court's dismissal of the appellant's Notice of Motion dated 23rd November 2023, which sought to set aside the dismissal order issued on 15th August 2023 under Order 12 Rule 7 of the Civil Procedure Rules.
2. In Oino Orangi Evans v Kilesi Muiyia alias Sambor Ole Muiyia & 2 Others, the Senior Principal Magistrate delivered a ruling on 18th January 2024, dismissing the plaintiff's Notice of Motion dated 23rd November 2023, which sought to set aside the dismissal order issued on 15th August 2023 and to have the suit reinstated for hearing on the merits.
3. The application was premised on the grounds that the plaintiff's advocate failed to attend court on the hearing date due to bereavement, and that the plaintiff himself had attended court but did not see his advocate or the first defendant. The plaintiff contended that the dismissal would prejudice him



and that the defendants would suffer no prejudice if the suit were reinstated. He insisted that the non-attendance was not intentional.

4. The second defendant opposed the application through a replying affidavit, asserting that the plaintiff's counsel had been duly served with the hearing notice via email, that neither the plaintiff nor his counsel attended court on the hearing date, and that no communication was made to explain their absence. It was further contended that the allegation of bereavement was unsupported by evidence, that the court proceedings were conducted virtually and counsel could have logged in or notified the court, and that the plaintiff had demonstrated consistent indolence in prosecuting the suit. The respondent also argued that the application had been filed after an inordinate and unexplained delay.
5. In its determination, the trial court referred to Order 12 Rule 3(1) and Rule 7 of the Civil Procedure Rules, emphasizing that while the court has discretion to set aside a dismissal order, such discretion must be exercised judiciously to avoid injustice, and not to aid a litigant who has deliberately obstructed or delayed the course of justice. The court cited *Mbogo v Shah, Tana & Athi Rivers Development Authority v Jeremiah Kimogho Mwakio & 3 Others*, and *Edney Adaka Ismail v Equity Bank Limited* for the principles governing the exercise of discretion and the duty of litigants to actively follow up their cases.
6. Upon examining the record, the court found that on 15th August 2023, the matter had been called out both virtually and in open court, and the plaintiff, as well as his counsel, were absent. The court had waited until 11:30 a.m. before dismissing the suit. The trial court rejected the plaintiff's assertion that he was present, holding that the court record clearly indicated otherwise. It also noted that no communication had been made to inform the court of counsel's alleged bereavement.
7. Further, the court found that the application for reinstatement had been filed nearly four months after the dismissal without explanation for the delay. A review of the proceedings demonstrated a pattern of non-attendance by the plaintiff, with the defendants' counsel consistently taking mention, hearing dates, and attending court, while the plaintiff had only attended court twice since filing the suit. The court concluded that the plaintiff had failed to demonstrate diligence or sufficient cause to warrant the exercise of discretion in his favour.
8. Accordingly, the court held that the application lacked merit and dismissed it with costs to the 2nd and 3rd defendants.

Grounds of appeal.

9. The appellant, dissatisfied with the trial court's decision, filed an appeal with this Honourable Court via a memorandum of appeal filed on 1st February 2024. The appeal is founded on the contention that the trial magistrate erred both in law and fact in the conduct and determination of the trial.
10. The grounds of appeal assert, inter alia, that:
 - i. The learned trial magistrate erred in law and in dismissing the application without considering the pain of bereavement and assuming that the advocate could conduct the hearing in the circumstances.
 - ii. That the learned trial magistrate erred in law and in fact, without considering that the first respondent was not served with the hearing notice of 15th August 2023, as the plaintiff was served.



- iii. That the learned trial magistrate erred in law and in fact, without considering that the respondent could not be prejudiced in the event the application could be allowed in favour of the appellant.
 - iv. The learned trial magistrate erred in law and in fact, without considering that the respondents could be compensated for damages and allow application.
 - v. The learned trial magistrate erred in law and fact in dismissing the appellant's application without giving the appellant an opportunity of being heard in the main suit on merit, hence exercising judicial discretion wrongly.
 - vi. The learned trial magistrate erred in law and fact in dismissing the application on a mistake of non-attendance of the counsel who was bereaved and shifting the mistake to the innocent litigant.
 - vii. That the learned trial magistrate erred in law and fact in dismissing the application with costs to the first respondent, who did not oppose the application.
 - viii. The learned trial magistrate erred in law and fact in dismissing the application with costs.
11. The appellant seeks orders from this Honourable Court allowing the appeal and setting aside, quashing, and/or varying the ruling of the trial magistrate delivered on 18th January 2024. The appellant further prays that the application dated 23rd November 2023 be reconsidered and allowed. Additionally, the appellant requests that the matter be reinstated for hearing on its merits and that the costs of the appeal be borne by the respondents.

Directions of the court.

12. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

13. The appellant contended that the dismissal was premised on non-attendance at court on the scheduled hearing date. While the appellant's counsel did not attend due to bereavement—a circumstance constituting a genuine and excusable reason—the trial court nonetheless dismissed the suit. The appellant argued that this resulted in his case being condemned unheard, thus prejudicing his right to be heard on the merits.
14. The appellant further submitted that the proceedings on 15th August 2023 were initially virtual, followed by open court, and that the absence of his counsel left him unable to effectively navigate the process. He emphasized that he had acted without undue delay, and at no point intended to obstruct or delay justice. The appellant asserted that the dismissal failed to consider the mitigating circumstances of bereavement, which affects a party's ability to participate fully in court proceedings.
15. Relying on the discretionary powers under Order 12 Rule 7 of the Civil Procedure Rules, the appellant urged the appellate court to exercise its discretion in his favor, allowing the appeal, setting aside the dismissal orders, and remitting the matter to the subordinate court for hearing on merit. The appellant emphasized the principle that litigants should not be denied an opportunity to have their cases determined substantively, particularly where non-attendance arises from genuine, unavoidable circumstances.
16. The appellant prayed that the appellate court intervene to ensure that justice is done, allowing the matter to be heard and determined on its substantive merits.



The Respondents' Submissions

17. The respondents submitted that both the appellant and his counsel were fully aware of the hearing date, which had been fixed for 15th August 2023, and duly served via email on 6th July 2023, a fact not disputed by the appellant. Despite this, neither the appellant nor his counsel attended court on the scheduled date. The respondents emphasized that the trial court found the appellant had made minimal effort to prosecute his suit, having attended court only twice since filing, whereas the respondents consistently took mention dates and attended proceedings. Consequently, the trial court dismissed the application with costs.
18. The respondents contended that the appellant's claim of counsel's bereavement did not justify setting aside the dismissal, as the appellant himself failed to attend or adequately communicate his predicament to the court. The respondents argued that the trial court properly exercised its discretion under Order 12 Rule 7, considering the totality of evidence and the procedural history of the case. They submitted the appellant's allegations that his submissions were not considered erroneous and misleading, as the trial court had appropriately evaluated the merits of the application.
19. Further, the respondents emphasized that while appellate courts have jurisdiction to interfere with findings of fact, there was no demonstrable error or illegality in the trial court's decision. The ruling was supported by documentary evidence and procedural records, and the appellant had not established any lawful basis to warrant interference.
20. The respondents therefore urged that the appeal be dismissed with costs, citing Section 27 of the [Civil Procedure Act](#), Cap. 21, which empowers courts to award costs in civil proceedings.

Issues for Determination

21. Having considered the record of appeal, the memorandum of appeal, the ruling of the trial court, and the rival submissions of the parties, the issues that arise for determination are:
 - i. Whether the learned trial magistrate properly exercised his discretion in declining to set aside the dismissal order made on 15th August 2023 under Order 12 Rule 7 of the Civil Procedure Rules.
 - ii. Whether the appellant established sufficient cause to warrant reinstatement of the suit.
 - iii. Whether this Court, as a first appellate court, should interfere with the exercise of discretion by the trial court.
 - iv. Who should bear the costs of the appeal?

Analysis And Determination

(I) Whether the trial court properly exercised its discretion

22. The impugned ruling arose from an application brought under Order 12 Rule 7 of the Civil Procedure Rules, which grants the court discretion to set aside or vary a dismissal order upon such terms as may be just.
23. The principles governing the exercise of such discretion are settled. In *Mbogo v Shah* [1968] EA 93 (East African Court of Appeal), the Court held that an appellate court will not interfere with the exercise of discretion unless it is satisfied that the decision is clearly wrong, because the court



misdirected itself or acted on matters it should not have acted upon, or failed to consider matters it should have considered, thereby arriving at a wrong conclusion.

24. Similarly, in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] eKLR, the Court of Appeal emphasized that the discretion to set aside *ex parte* orders is intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake, but not to assist a person who has deliberately sought to obstruct or delay justice.
25. The trial court considered the record and found that on 15th August 2023, the matter was called out virtually and subsequently in open court; neither the appellant nor his counsel was present. The court further noted that service of the hearing notice was not disputed and that no communication was made to explain counsel's absence on account of bereavement.
26. The trial court also considered the broader conduct of the appellant in prosecuting the suit and found a pattern of non-attendance, with the respondents consistently taking dates and attending court. The learned magistrate concluded that the appellant had not demonstrated diligence or sufficient cause.
27. From the record, it is evident that the trial court considered relevant factors, including service, conduct of the parties, delay in bringing the application, and absence of supporting material regarding the alleged bereavement. There is no indication that the magistrate acted on extraneous matters or misapprehended the law.

Whether the appellant established sufficient cause

28. The appellant's principal explanation for non-attendance was counsel's bereavement. While bereavement is undoubtedly a serious and unfortunate circumstance, the record shows that no communication was made to the court on the hearing date, nor was any documentary proof tendered before the trial court.
29. Further, the application for reinstatement was filed four months after dismissal, without a satisfactory explanation for the delay. In *Tana & Athi Rivers Development Authority v Jeremiah Kimogho Mwakio & 3 Others* [2015] eKLR, the Court reiterated that a litigant has a duty to show interest in and follow up his case even where represented by counsel.
30. Likewise, in *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR, the Court emphasized that a party cannot simply blame counsel for all manners of transgression without proving personal diligence.
31. The trial court found, in fact, that the appellant had attended court only twice since filing the suit and that the respondents had taken the initiative in fixing dates. These findings were supported by the record.
32. While the right to be heard is fundamental, it must be balanced against the obligation of parties to prosecute their cases diligently. In the absence of credible evidence of sufficient cause and in light of the appellant's conduct, the learned magistrate cannot be faulted for concluding that the threshold for reinstatement had not been met.

Whether this Court should interfere with the exercise of discretion

33. This Court, as the first appellate court, is bound to re-evaluate the material on record and draw its own conclusions, bearing in mind that it did not have the advantage of seeing or hearing the parties. See *Selle v Associated Motorboat Co. Ltd* (1968) EA 123.



34. However, where the decision appealed from is an exercise of judicial discretion, interference is limited to instances of misdirection, error of principle, or manifest injustice, as stated in *Mbogo v Shah*.
35. Having independently reviewed the record, this Court finds no misdirection in law or fact. The learned magistrate applied the correct legal principles, considered relevant factors, and arrived at a conclusion supported by the procedural history of the case.
36. The appellant has not demonstrated that the discretion was exercised capriciously, arbitrarily, or on wrong principles. Accordingly, there is no lawful basis upon which this Court can interfere.

Costs

37. Under Section 27 of the *Civil Procedure Act*, costs follow the event unless the court, for good reasons, orders otherwise. No sufficient reason has been advanced to depart from that principle.

Disposition

- i. In the result, the appeal lacks merit. The learned trial magistrate properly exercised his discretion in dismissing the application dated 23rd November 2023.
- ii. The appeal is hereby dismissed with costs to the respondents.

**DATED, SIGNED, AND DELIVERED AT KILGORIS THROUGH MICROSOFT TEAMS
ONLINE APPLICATION THIS 6TH MARCH 2026.**

.....

CHARLES KARIUKI

JUDGE

Top of Form

Bottom of Form

