



REPUBLIC OF KENYA



**KENYA LAW**  
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**Igutura v Njeru & another (Civil Miscellaneous E069 of 2025)  
[2026] KEHC 3004 (KLR) (4 March 2026) (Ruling)**

Neutral citation: [2026] KEHC 3004 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL MISCELLANEOUS E069 OF 2025  
RM MWONGO, J  
MARCH 4, 2026**

**BETWEEN**

**JOYADAMS MUNENE IGUTURA ..... APPLICANT**

**AND**

**RACHAEL MUNYIVA NJERU ..... 1<sup>ST</sup> RESPONDENT**

**KHUSHI MOTORS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**The Application**

1. By an application dated 29<sup>th</sup> September 2025, the applicant seeks the following orders:
  1. Spent;
  2. That this Honourable Court be pleased to review and/or set aside the Ruling/Order delivered on 22<sup>nd</sup> September, 2025 dismissing the Applicant's Application dated 1<sup>st</sup> August, 2025 for want of prosecution;
  3. That this Honourable court be pleased to reinstate and/or re-admit the Application dated 1<sup>st</sup> August, 2025 and the same be determined on merit;
  4. That this Honourable Court be pleased to make any such further Order(s) and issue any other relief it may deem just to grant in the interest of justice; and
  5. That the costs of this Application be in the cause.
2. The application was premised on grounds appearing on its face and in the supporting affidavit thereof.
3. The applicant's Advocates had filed an application dated 01<sup>st</sup> August 2025 but failed to appear before court to prosecute it because they asserted, the matter was inadvertently misdiarised on their end. The



court thus dismissed the application, through which the applicant was seeking stay of execution and leave to appeal out of time. The applicant is now apprehensive that if the application is not reinstated, and the respondents having already begun execution, she will suffer substantial loss.

### **Replying Affidavit**

4. In the replying affidavit deposed by counsel for the 1<sup>st</sup> respondent, he termed the applicant as an indolent litigant whose actions cannot be forgiven. That on the day when the application was dismissed, the date had been taken by consent of the parties and that any act of omission should be borne by the applicant as the litigant instead of blaming his advocate. He denied that the 1<sup>st</sup> respondent is in the process of executing, and he produced a letter to the applicant tabulating costs of the lower court suit. He stated that the court should allow this litigation to come to an end by dismissing the application herein.

### **Parties' Submissions**

5. The respondents opted to rely on the replying affidavit filed and they did not file any written submissions. The applicant, on the other hand, filed written submissions.
6. In her submissions, the applicant relied on the cases of Philip Keipto Chemwolo & another v Augustine Kubende [1986] KECA 87 (KLR) and Belinda Murai & 9 others v Amos Wainaina [1978] KECA 23 (KLR) and argued that mistakes are bound to happen and that in his case, the advocate failed to properly diarize the case, hence he failed to appear in court to prosecute the application. She urged the court to consider the application and disregard the technicalities, in light of *the Constitution* and Sections 1A, 1B and 3A of the *Civil Procedure Act*.
7. She urged the court to enlarge time for him to appeal out of time and he referred to Order 50 Rule 6 of the Civil Procedure Rules. She further relied on the case of Omar Shurie v Marian Rashe Yafar [2020] KECA 492 (KLR) where the court cited case of Leo Sila Mutiso v Rose Hellen Wangari Mwangi [1999] 2EA 331. It was her argument that the delay is not inordinate and was caused by change in representation by counsel.
8. She also relied on Order 42 Rule 6 of the Civil Procedure Rules and the case of Esther Wamaitha Njihia & 2 others v Safaricom Limited [2014] KEHC 6699 (KLR) in support of her argument that the stay of execution orders are necessary to preserve the subject matter of the intended appeal. She offered to deposit the decretal amount in court as security for costs. Further reliance was placed on the case of Stanley Kangethe Kinyanjui v Tony Ketter & 5 others [2013] eKLR.

### **Issue for Determination**

9. The issue for determination is whether the court should review its ruling delivered on 22<sup>nd</sup> September 2020 and reinstated the Application dated 1<sup>st</sup> August, 2025.

### **Analysis and Determination**

10. Review is provided for under Section 80 of the *Civil Procedure Act* as follows:

“ Any person who considers himself aggrieved—

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or



- (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

11. Similarly, Order 45 Rule 1 of the Civil Procedure Rules provides:

- “(1) 1) Any person considering himself aggrieved—
- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
  - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

12. There are only 3 factors for the court to consider before reviewing its findings, these are:

- a. That there has been discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed; or
- b. That there has been some mistake or error apparent on the face of the record; or
- c. Any other sufficient reason.”

13. The application dated 1<sup>st</sup> August, 2025 sought, inter alia, leave to appeal out of time and stay of execution. That application was dismissed by the court for non-prosecution because on the day when it was scheduled for hearing, the applicant’s advocate was not present in court. Through this application, he stated that he misdiarized the case and inadvertently missed the court date.

14. In her replying affidavit, the 1<sup>st</sup> respondent stated that the said court date had been taken by consent of the parties and on that basis, the inadvertence should not be excused by the court. She vehemently opposed the application. The arguments presented should be assessed considering the various interests of the parties herein, and to the ends of justice. As pleaded by the applicant, the advocate misdiarized the matter and that is why he failed to attend court on the date agreed, causing the matter to be dismissed for want of prosecution.

15. Article 48 of *the Constitution* guarantees justice for all parties while Article 159(2)(d) cautions the court against paying undue regard to procedural technicalities in the dispensation of justice. While it is true that litigation must come to an end at some point, mistakes, such as the one herein are bound to happen, and the law gives recourse in the form of room for review by the same forum. This can be done by invoking section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules.



16. The test of whether the alleged inadvertence is excusable, lies in whether or not the error cannot be compensated with costs or if there is fraud or overreach in the matter. In *Philip Keipto Chemwolo & another v Augustine Kubende (supra)*, Apaloo, JA stated as follows:

“I think a distinguished equity judge has said:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits.”

I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline...”

17. In this case, the applicant pleaded that the case was misdiarized and that is why the advocate failed to prosecute it. She has offered goodwill by stating that she is willing to provide security for costs in the event that the stay application will be reinstated. She is keen on prosecuting the intended appeal.

18. Order 12 of the Civil Procedure Rules provides for hearing and consequence of non-attendance. Order 12 Rule 7 thereof provides:

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

19. I must balance the parties’ rights to access to justice as provided under Article 48 of *the Constitution* in light of the spirit of the oxygen principle under section 1A, 1B and 3A of the *Civil Procedure Act*.

### **Disposition**

20. Ultimately, I am persuaded to allow the application, which I hereby do, and I make the following orders:

- a. The court’s order made on 22<sup>nd</sup> September 2025 dismissing the application dated 01<sup>st</sup> August 2025 for want of prosecution, is hereby set aside and the application dated 1<sup>st</sup> August 2025 is hereby reinstated;
- b. The application dated 01<sup>st</sup> August 2025 shall be set down for hearing without further delay, and be prosecuted within 30 days of the ruling herein;
- c. Stay of execution is granted on condition that the applicant shall deposit the decretal sum into court within twenty-one (21) days of the date hereof, failing which execution may proceed.
- d. Costs shall be in the cause.

21. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 04<sup>TH</sup> DAY OF MARCH, 2026.**

**R. MWONGO**

**JUDGE**

Delivered in the presence of:



Kinyua holding brief for Kalamu for Applicant

No Representation for KRK Advocates

Francis Munyao - Court Assistant

