



REPUBLIC OF KENYA



**Kieni v Royal Mabati Factory Limited (Civil Appeal E1387 of 2024)
[2026] KEHC 2670 (KLR) (Civ) (20 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 2670 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1387 OF 2024

WA OKWANY, J

FEBRUARY 20, 2026

BETWEEN

JULIUS MUTHOMI KIENI APPELLANT

AND

ROYAL MABATI FACTORY LIMITED RESPONDENT

*(Being an appeal from the Ruling of the Chief Magistrate's Court
delivered on 31st October 2024, in Milimani MCCC No. 6827 of 2019)*

JUDGMENT

1. The trial court allowed the Respondent's Notice of Motion dated 4th March 2024 and held that the suit stood dismissed by operation of law pursuant to Order 17 Rule 2(5) of the Civil Procedure Rules (CPR).
2. The Appellant challenges that decision on the grounds that the trial court erred in holding that the suit stood automatically dismissed and in failing to consider the explanation tendered for the delay. He further challenges the award of costs.
3. The appeal was canvassed by way of written submissions which I have considered.

The Appellant's Submissions

4. The Appellant submitted that the dismissal was unjustified as the delay in prosecuting the suit was excusable and was occasioned by the mistake and inaction of previous counsel.
5. The Appellant explained that upon discovering his counsel's failure to attend court, he acted promptly and instructed new advocates. The Appellant stated that the court file had at some point been missing leading to the suspension of the issuance of dates which were circumstances beyond his control.



6. It was the Appellant’s case that the trial court erred by rigidly invoking the provisions of Order 17 Rule 2(5) of CPR without exercising judicial discretion yet the Respondent did not demonstrate prejudice.
7. The Appellant relied on the principles in *Ivita vs. Kyumbu* [1984] KLR 441, as cited in *Wanjuki Muchemi vs. Standard Group Limited & 2 others* [2018] eKLR, where Chesoni J stated:

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant... The Defendant must however satisfy the court that it will be prejudiced by the delay... Thus, even if delay is prolonged, if the court is satisfied with the plaintiff’s excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”
8. Reliance was also placed on the case of *Njoroge vs. Kimani* [2022] KECA 1188 (KLR) where the Court defined excusable delay as:

“Excusable delays are delays that are unforeseeable and beyond the control of the party. Non-excusable delays are delays that are foreseeable or within the party’s control.”
9. The Appellant urged the Court to be guided by Article 159(2)(d) of *the Constitution* and cited *Langat & another vs. Muchai* [2022] KEHC 3117 (KLR) where the Court stated:

“The starting point is the provisions of Article 159(2)(d) of *the Constitution* and Section 1A and 1B of the *Civil Procedure Act*. These provisions require the Court to focus on substantive justice, rather than procedural technicalities when administering justice.”
10. On costs, the Appellant argued that since the suit allegedly stood dismissed by operation of law earlier, the subsequent application was superfluous and costs ought not to have been awarded.

The Respondent’s Submissions

11. The Respondent noted that the Appellant did not take any meaningful steps to prosecute the suit for over three years having been instituted on 16th September 2019. He added that by operation of Order 17 Rule 2(5) of the CPR, the suit stood automatically dismissed after two years of inaction as the said provision is couched in mandatory terms and leaves no room for discretion.
12. It was submitted that a litigant is obligated to follow up on his case and cannot hide behind counsel’s mistakes. The Respondent maintained that the delay prejudiced the Respondent and offends the constitutional command against undue delay.
13. The Respondent relied on Order 17 Rule 2(5) which provides that “A suit stands dismissed after two years where no step has been undertaken.”
14. The Respondent further relied on *Rachael Njango Mwangi (Suing as Personal Representative of the Estate of Mwangi Kabaiku) vs. Hannah Wanjiru Kinini & another* [2021] eKLR, where the Court stated:

“The Court recognizes that a case belongs to a party and it is upon that party to follow up on their case and once a party appoints an Advocate, the party then becomes liable for the actions of the said Advocates who was acting on their behalf.”



15. Reliance was also placed on *Savings and Loan Limited vs. Susan Wanjiru Muritu Nairobi* (Milimani) HCCC No. 392 of 2002, where it was held:

“It is trite that a case belongs to a litigant and not her Advocate... It is the duty of the litigant to constantly check with her Advocate on the progress of her case.”

16. The Respondent further cited *Habo Agencies Ltd vs. Wilfred Odhiambo Musingo* [2015] eKLR, the Court of Appeal held:

“Whereas it is true in general, mistakes of counsel should not be visited upon a client, it is equally true that counsel as agent who is vested with authority to perform some duties, and does not perform the duty as directed by the principal, such principal should bear the consequences.”

17. The Respondent also cited *Argan Wekesa Okumu vs. Dima College Limited & 2 Others* [2015] eKLR, where the Court observed:

“It must be noted that justice delayed is justice denied. This Court is enjoined by Article 159 2(c) of *the Constitution* of Kenya to determine disputes and render justice without undue delay.”

Issues for Determination

18. From the Record of Appeal and the parties' submissions, I find that the following issues arise for determination:
- a. Whether the Appellant's suit stood dismissed by operation of law under Order 17 Rule 2(5).
 - b. Whether the delay, if any, was excusable.
 - c. Whether the Respondent demonstrated prejudice.
 - d. Whether the trial court properly exercised its discretion.
 - e. Who should bear the costs of the Appeal.

Analysis and Determination

Order 17 Rule 2(5) CPR

19. The Respondent argued that Order 17 Rule 2(5) CPR is self-executing and mandatory. The Appellant contends that the court must still interrogate circumstances before concluding that dismissal has occurred.
20. My finding is that while the wording “stands dismissed” appears mandatory, it cannot be interpreted in isolation from constitutional principles and the broader architecture of Order 17 Rule 2, which under sub-rule (1) contemplates issuance of notice and the exercise of judicial discretion.
21. I find that the purpose of Rule 2(5) was to cure indolence but the court still retains inherent jurisdiction under Sections 1A, 1B and 3A of the *Civil Procedure Act* in order to prevent injustice.



Whether the delay was excusable

22. The period between July 2020 and October 2023 reflects substantial inactivity. The Appellant attributes this to counsel's default and registry challenges. In *Ivita v Kyumbu* [1984] KLR 441 the Court of Appeal laid down the governing test on the issue of delay and held that the test is whether the delay is prolonged and inexcusable, and, if it is, whether justice can be done despite such delay.
23. In the instant case, the explanation advanced places the blame largely on the Appellant's former counsel. The jurisprudence around this issue is clear that while mistakes of counsel may, in appropriate cases, not be visited upon a litigant, a litigant is not entirely absolved of responsibility. This is the position that was taken in *Habo Agencies Ltd v Wilfred Odhiambo Musingo* (supra) where the Court emphasized that such principal/litigant should bear the consequences.
24. This Court finds that while the delay of over three years was inordinate, the court must still consider whether justice can still be done and in doing this, the court will consider whether prejudice was demonstrated.
25. The Respondent claimed that he was prejudiced by the prolonged pendency but beyond generalized assertions, no specific evidentiary prejudice, such as loss of witnesses or documents, was demonstrated.
26. In *Ivita vs. Kyumbu*, (supra) the Court stated that a defendant must show that justice will not be done in the case due to the prolonged delay. In this case, I note that no such concrete demonstration was made.

Exercise of discretion

27. The trial court held that the suit stood dismissed automatically and effectively treated Rule 2(5) as leaving no room for inquiry.
28. With due respect to the trial court's position, I find that even where a rule appears mandatory, a court must still interrogate whether its strict application would occasion injustice, particularly in light of Article 159(2)(d) of *the Constitution*.
29. It is my respectful view that the learned magistrate appears not to have interrogated whether justice could still be done nor whether prejudice was established.
30. In conclusion, I find that even though the delay was prolonged and largely unexplained for a significant period, the Respondent did not demonstrate specific prejudice that would render a fair trial impossible. I find that the trial court erred in treating Order 17 Rule 2(5) of the CPR as eliminating all judicial discretion.
31. In balancing the competing interests, that is the need for expeditious disposal of cases and the right to substantive justice, this Court finds that the ends of justice would be better served by reinstating the suit subject to strict timelines and costs.

Disposition

32. For the reasons that I have stated in this judgment, I find that the instant appeal is merited and I therefore allow it in the following terms: -
 - a. The Ruling delivered on 31st October 2024 is set aside.
 - b. Milimani MCCC No. 6827 of 2019 is reinstated for hearing.



- c. The Appellant shall fix the suit for pre-trial directions within sixty (60) days, failing which the reinstatement shall lapse automatically.
- d. The Appellant shall pay thrown away costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF FEBRUARY, 2026.

HON. W. A. OKWANY

JUDGE

20/02/2026

For Appellant No Appearance

For The Respondent Ms Mincha For Nasimiyu

Court Assistant Abdraziki

File close

