



REPUBLIC OF KENYA



Kanyiri v Officer Commanding Station Kipkelion Police Station & 4 others (Criminal Appeal E028 of 2024) [2026] KEHC 3778 (KLR) (19 March 2026) (Ruling)

Neutral citation: [2026] KEHC 3778 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CRIMINAL APPEAL E028 OF 2024
JK SERGON, J
MARCH 19, 2026**

BETWEEN

ANTONY KIMANI KANYIRI APPELLANT

AND

**OFFICER COMMANDING STATION KIPKELION POLICE
STATION 1ST RESPONDENT**

BASE COMMANDER KIPKELION POLICE STATION 2ND RESPONDENT

NIKKI AUCTIONEERS 3RD RESPONDENT

AND

GEOFFREY MONTERO MUSINGO 1ST INTERESTED PARTY

JOSEPH KAMAU NDUATI 2ND INTERESTED PARTY

RULING

1. This Court is to determine the Appellant/Applicant's Notice of Motion application dated 13th October 2025. The application seeks orders that this Honourable Court be pleased to set aside its dismissal order of 1st October 2025 and reinstate the Applicant's application dated 14th March 2025, which was dismissed for want of prosecution and/or non-attendance.
2. The application is expressed to be brought under Order 12 Rule 7 of the Civil Procedure Rules, Sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act*, Articles 50 and 159 of *the Constitution*, and all other enabling provisions of the law.
3. The application is supported by the annexed affidavit of Duncan Okatch, Advocate for the Applicant, sworn on 13th October 2025, and the grounds set out on the face of the application.



4. The application is opposed. The 2nd Interested Party, Joseph Kamau Nduati, swore a Replying Affidavit on 30th January 2026, opposing the reinstatement.
5. The Court directed that the application be disposed of by way of written submissions. The Applicant filed their submissions on 15th January 2026. The 2nd Interested Party did not file submissions.
6. The Applicant's case is that on 25th October 2024, Honourable Charles Obulutsa- Chief Magistrate delivered a ruling in Miscellaneous Criminal Application No. E186 of 2024 – Anthony Kimani Kanyiri vs OCS Kipkelion Police Station & 2 Others and Geoffrey Montero and Joseph Kamau Nduati.
7. Being aggrieved by the said ruling, the Applicant filed an appeal and an application dated 30th October 2024 seeking, among other orders, a temporary stay of execution of the said ruling.
8. The Applicant deposes that the matter was scheduled for mention on 1st October 2025 to confirm whether the Respondents had filed their respective responses to the Applicant's application.
9. According to the Applicant, their Advocate was present within the court premises on the said date but requested that the matter be placed aside as he was addressing a different court during the same session. Unfortunately, upon the Advocate recalling the file, he was informed that Counsel for the 2nd Interested Party had called out the file and requested that the same be dismissed for want of prosecution. The Court granted that request and dismissed the application dated 14th March 2025.
10. The Applicant contends that prior to the said date, the matter had been mentioned on three separate occasions where the Applicant was present, and despite evidence that all parties had been served, the Respondents failed to respond, rendering the application unopposed. The Applicant therefore considers the dismissal to have been procedurally unfair and contrary to the principles of natural justice.
11. The Applicant further argues that unless the matter is urgently reinstated, he stands to suffer irreparable prejudice, given that the appeal raises significant legal and factual issues concerning his liberty and right to a fair trial as guaranteed under Article 50 of *the Constitution* of Kenya, 2010.
12. In his written submissions, the Applicant relies on several authorities to buttress his case which I have considered. The Applicant submits that the mistake was that of his Advocate and should not be visited upon an innocent litigant. He urges the Court to allow the application in the interests of justice, with costs in the cause.
13. The 2nd Interested Party opposes the application through his Replying Affidavit sworn on 30th January 2026. He deposes that the ruling in Kericho Criminal Misc Case No. E186 of 2024 was delivered on 25th October 2024, and that the Appeal was filed on 30th October 2024 together with an application seeking stay of execution.
14. The 2nd Interested Party states that the application was set down for inter-parties hearing on 2nd December 2024, whereupon the hearing was adjourned on account of the Applicants failing to serve all parties. A fresh hearing was set for 20th February 2025.
15. On 20th February 2025, counsel for the Applicants were not present in court despite the matter being placed aside and called out later in the day. Due to the non-attendance, the Appeal was dismissed.
16. The 2nd Interested Party further deposes that on 1st April 2025, the Applicant contemporaneously filed another application seeking reinstatement of the appeal. Despite being granted numerous occasions to have the application served, the same was never served upon counsel for the 2nd Interested Party.



17. The application filed on 1st April 2025 was mentioned on five (5) occasions: 07/04/2025, 12/05/2025, 21/07/2025, 17/09/2025, and 01/10/2025. On each occasion, the Applicant was allowed an opportunity to ensure proof of service upon all Respondents and Interested Parties, to no avail. Consequently, the matter was once again dismissed on 1st October 2025 want of prosecution.
18. The 2nd Interested Party contends that the Applicant has neglected to prosecute his Appeal and subsequent applications on numerous occasions, hence leading to the afore-mentioned dismissals. He argues that the Applicant is hell-bent on wasting the court's time and not prosecuting the appeal to the detriment of the Respondents and Interested Parties.
19. The 2nd Interested Party further argues that the Applicant cannot now be heard claiming that the dismissal was unprocedural or illegal, as he failed to prosecute his appeal and subsequent applications within the stipulated timelines. He also notes that the Applicant has failed to fully explain the inordinate delay, instead blaming the court for issuing "irregular and un-procedural orders."
20. The 2nd Interested Party invokes the principle that litigation ought to come to an end, and that this Honourable Court should not allow a party to abuse the court's discretion to reinstate an appeal which has been abandoned by the Appellant's conduct and behaviour. He urges the Court to dismiss the instant application.
21. From the application, the response, and the submissions filed, the following issues arise for determination;
 - a) Whether the Applicant has satisfactorily explained the reason for the non-attendance on 1st October 2025 and the history of delay in prosecuting the matter;
 - b) Whether this Honourable Court should exercise its discretion to set aside the dismissal order of 1st October 2025 and reinstate the application dated 14th March 2025;
 - c) Who should bear the costs of this application.
22. The application is brought under, among others, Order 12 Rule 7 of the Civil Procedure Rules, which 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.”
22. The Court's discretion to set aside a dismissal order is unfettered, but it must be exercised judicially and upon defined principles. The primary purpose of the discretion is to do justice to the parties and to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error.
23. In the case of *Patel v EA Cargo Handling Services Ltd* [1974] EA 75, the Court held;

“The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules.”
24. In *Shah v Mbogo* [1967] EA 116, the Court further stated;

“The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice.”



25. This Court is also guided by the constitutional imperative in Article 159(2)(d) of *the Constitution* of Kenya, 2010, which mandates that justice shall be administered without undue regard to procedural technicalities.
26. This Court is presented with two starkly different accounts of the procedural history of this matter. The Applicant's narrative is brief and seeks to portray the dismissal of 1st October 2025 as an isolated incident arising from his Advocate being elsewhere in the court precincts. The 2nd Interested Party, however, presents a detailed chronology spanning several months, demonstrating a pattern of delay, non-attendance, and failure to serve.
27. Having carefully perused the 2nd Interested Party's Replying Affidavit, which is uncontroverted by any further affidavit from the Applicant, this Court is inclined to accept the chronology presented by the 2nd Interested Party.
28. The Applicant's explanation for the non-attendance on 1st October 2025 is that his Advocate was present within the court premises but was addressing a different court during the same session. While this may, in some circumstances, constitute an excusable mistake, the explanation must be considered in the broader context of the matter's history.
29. This was not the first time the matter had been dismissed. It was not the first time the Applicant had failed to attend court. It was not the first time the Applicant had failed to serve parties despite being granted multiple opportunities.
30. The principles set out in *Shah v Mbogo* (supra) draw a clear distinction between an "excusable mistake or error" and conduct that "deliberately seeks, whether by evasion or otherwise, to obstruct or delay the cause of justice." While this Court is not prepared to find that the Applicant's conduct amounts to deliberate obstruction, the pattern of repeated failures to comply with court directions and to prosecute the matter cannot be characterized as a mere "excusable mistake."
31. In *Mwangi v Kenya Airways Ltd* [2003] eKLR, the Court of Appeal held that a litigant who is represented by counsel remains under an obligation to take an interest in his or her own case and to follow up on its progress. The Applicant in this case appears to have left everything to his counsel, who has, on multiple occasions, failed to attend court or to comply with directions.
32. The Applicant has invoked his right to a fair hearing under Article 50 of *the Constitution*. This right is fundamental and must be protected. However, the right to a fair hearing is not absolute in the sense that it permits a litigant to drag another party through the courts indefinitely without prosecution.
33. The 2nd Interested Party has invoked the principle that litigation must come to an end. This principle, often expressed in the maxim *interest reipublicae ut sit finis litium*, is as important as the right to be heard. There comes a point when the court must say "enough is enough" and decline to exercise its discretion in favour of a party who has had multiple opportunities but has failed to utilize them.
34. In *Utalii Transport Company Ltd & 3 Others v NIC Bank Ltd & Another* [2014] eKLR, the Court held;

“The court's discretion to set aside an ex parte judgment or order is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but it is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice.”
35. The Applicant has had several opportunities to prosecute his matter.



36. To now grant yet another opportunity for reinstatement would be to condone a pattern of neglect and to permit the Applicant to hold the Respondents and Interested Parties in perpetual suspense. This would be contrary to the overriding objective under Sections 1A and 1B of the Civil Procedure Act, which requires the court to facilitate the just, expeditious, proportionate, and affordable resolution of disputes.
37. While the Court is sympathetic to the principle that a mistake of counsel should not be visited upon an innocent litigant (see Philip v Augustine Kibe and Muwanga Estates), this principle must be balanced against the need for finality in litigation and the prejudice caused to the other parties who have been forced to attend court on multiple occasions only to have the matter adjourned or dismissed due to the Applicant's failures.
38. In the instant case, it is not a single mistake by counsel that has caused the delay. It is a series of failures spanning nearly a year. The Court cannot, in good conscience, exercise its discretion in favour of a party who has demonstrated such a persistent lack of diligence.
39. The Applicant argues that he will suffer irreparable prejudice if the application is not allowed, as his appeal raises issues concerning his liberty and right to a fair trial. The 2nd Interested Party, on the other hand, argues that he has been forced to attend court on multiple occasions and that the Applicant's conduct amounts to an abuse of the court process.
40. The Court has weighed these competing interests. While the Applicant's concerns regarding his liberty are not trivial, the Court notes that the Applicant has had ample opportunity to pursue his appeal. The continued delays and failures to prosecute cannot be justified solely by reference to the seriousness of the issues raised. If the issues were truly as serious as the Applicant claims, one would expect a greater degree of diligence in prosecuting the matter.
41. The 2nd Interested Party is entitled to finality. He should not be required to continue attending court indefinitely while the Applicant and his counsel fail to take the necessary steps to move the matter forward.
42. The upshot of the foregoing is that the Applicant's Notice of Motion application dated 13th October 2025 lacks merit and is hereby dismissed. The Applicant to have costs of this application, to be paid to the 2nd Interested Party.

**DATED, SIGNED AND DELIVERED AT KERICHO THIS 19TH DAY
OF MARCH, 2026**

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J. K. SERGON

JUDGE

In the presence of:

C/Assistant – Rutoh

Prosecutor – Kimaru

Appellant – No Appearance

Kirui holding brief for Okatch for Appellant

Morata for 3rd & 4th Respondent

