Mwangi & another v Koske alias Rosemary Chepkorir Kosgei (Miscellaneous Civil Application E001 of 2024) [2026] KEHC 3881 (KLR) (25 March 2026) (Ruling)

Neutral citation: [2026] KEHC 3881 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

MISCELLANEOUS CIVIL APPLICATION E001 OF 2024

GL NZIOKA, J

MARCH 25, 2026

BETWEEN

FRANCIS NDUNGU MWANGI .... 1ST APPLICANT

EDWARD MBUGUA MUIGAI .... 2ND APPLICANT

AND

ROSEMARY CHEPKORIR KOSKE ALIAS ROSEMARY CHEPKORIR KOSGEI ALIAS ROSEMARY CHEKORI KOSKEY .... RESPONDENT

RULING

1. By an application dated 28th December 2023 brought under the provisions of section 1A, 1B, 3A and 95 of the *Civil Procedure Act* (Cap 21) Laws of Kenya, Order 45 Rule 1, Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010, and all enabling provisions of the law, the applicant is seeking for orders that: -

    a. Spent

    b. Spent

    c. That this Honourable court reinstate the Miscellaneous Application No. E177 of 2023 dated 9th August 2023 for hearing and determination.

    d. That this Honourable court do make any such and further and/or other orders and issue any other relief it may deem just to grant in the interest of justice.

    e. That the costs of this application abide the outcome of the appeal.

2. The application is supported by the grounds thereto and the affidavit of even date sworn by Lawrence Njuguna an Advocate of the High Court in the firm of Kimondo Gachoka & Company Advocates which is seized of the matter.

3. He avers that the applicants filed an application dated 9th August 2023, seeking to reinstate an appeal that had been dismissed for failure to file a record of appeal within time. However, the application was dismissed on 2nd October 2023 for failure of the applicants' Advocate to attend court on that date.

4. That the failure of the Advocate to attend court was occasioned by an error in their online system diary which failed to pick up the date of 2nd October 2023. That it was an inadvertent and unforeseen mistake which should not be visited upon the applicant.

5. He avers the applicants have filed a complete record of appeal an indication that they are desirous of prosecuting the appeal. Further, the appeal raises triable issues that need to be heard and determined by the court. Further, the application has been made without undue and/or unreasonable delay and it will be in the interest of justice that the appeal is heard and determined to its logical conclusion.

6. The respondent did not file a response to the application.

7. Having considered the application, I note that, it is trite law that an order for reinstatement is discretionary and not as a right as held by the Court of Appeal in the case of; Tabuche v Tinga & 2 others (Civil Appeal E003 of 2022) [2024] KECA 551 (KLR) (24 May 2024) (Judgment) the Court of Appeal stated: -

> " 43. The question as to whether the appellant was entitled to reinstatement of his suit as of right finds answer in Black's Law Dictionary (Tenth Edition), which defines judicial discretion as:
>
> "The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right." [Emphasis added]
>
> 44. Reinstatement of a suit dismissed for want of prosecution is a discretionary remedy and not as of right. In any event, each case depends on its own circumstances."

8. In addition, in the case of Kamau & another v Inspector General of Police & another [2026] KEHC 1038 (KLR) the Court of Appeal outlined the factors a court should considered in determining whether to exercise its discretion and held that: -

> " 11. We have carefully considered this application. To set aside an order for dismissal, the applicant must jump two hurdles. The first is to make the application within 30 days from the date of the order of dismissal. The applicant has successfully jumped that hurdle. The second is that the applicant must present sufficient cause for the failure to attend Court on the appointed date. What will constitute sufficient cause depends on the circumstances of each case. But in our perception, sufficient cause connotes an explanation of such quality or value as would justify setting aside the order of dismissal; a reason that is adequate in law, showing why the applicant's request to set aside the order of dismissal should be granted.

9. In the instant matter, the record reveals that a complete record of appeal in the parent matter HCCA E009 of 2023 was certified ready as far as 20th February 2023. On 13th April, 2023, the matter was called

out but there were no parties in court and a notice to show cause why the matter could not be dismissed for want of prosecution issued.

10. By 23rd May 2023, there was no response to the notice to show cause and the respondent prayed for the appeal to be dismissed. The court concurred with the sentiments of the respondent over the delay in the matter but indicated that in the interest of justice the appeal would not be dismissed. The appellant was given seven (7) days to expedite the hearing of the matter or the appeal would stand dismissed. The matter was stood over to 14th June, 2023.There was no compliance in seven (7) days and the appeal was dismissed and the file ordered closed.

11. The appellant then took to filing multiple applications for reinstatement of the appeal, some were struck out as the record herein will reveal and eventually an application vide HCC Miscellaneous application number E177 of 2023 seeking to reinstate the appeal was dismissed for want of prosecution and now the applicant wants it reinstated.

12. It also suffices to note that the suit that has given rise to the appeal was filed in the year 2019 and judgment delivered in the on 20th May 2022. Hence the matter has been in court for six years. Is this a matter that the court can exercise discretion in favour of the applicants?

13. The legal principle that "equity aids the vigilant, not the indolent" (Latin: vigilantibus non dormientibus jura subveniunt) is a fundamental maxim of equity, indicating that courts will refuse to assist those who have slept upon their rights and failed to pursue their claims in a timely manner. This doctrine, often summarized as "delay defeats equities", focuses on preventing injustice arising from undue, unconscionable delay, known as laches.

14. The core meaning and purpose of the afore principle is: -

    a. Active Pursuit Required: Equity requires that a party whose rights have been infringed must move with reasonable diligence to seek a remedy.

    b. Stale Demands: A court of equity will not entertain "stale demands" or cases where a party has acquiesced to a situation for a long time, suggesting they abandoned their rights.

    c. Conscience and Good Faith: The court is activated by conscience, good faith, and reasonable diligence; where these are absent, the court remains passive.

15. The doctrine of laches on the other hand is an equitable defense that prevents a person from enforcing a claim due to an unreasonable, prejudicial delay. It is not merely about the passage of time, but whether the delay has caused "practical injustice". The elements thereof are: -

    a. Unreasonable Delay: A significant amount of time has passed where action could have been taken.

    b. Prejudice: The delay has resulted in a loss of evidence, death of witnesses, or a change in circumstances that makes it unjust to hear the case, such as the defendant altering their position based on the belief that no claim would be made.

    c. Acquiescence: Delay may be considered evidence of acquiescence, where the plaintiff's inaction suggests they have accepted the breach.

16. To buttress the afore principles the following cases refer:

    a. Smith v. Clay (1767): Lord Camden established that nothing calls forth a court of equity into activity but conscience, good faith, and reasonable diligence.

b. Leaf v. International Galleries (1950): A buyer waited five years to discover a painting was not a genuine Constable. The court held that the delay was too long, and the right to rescind the contract was lost.

17. Consequently, if a party is deemed "indolent", the court will dismiss their claim, even if they might have had a valid case, because their inaction has made it inequitable to grant them relief (see Abaye v Julius [2025] KEHC 12147 (KLR)).

18. Pursuant to the aforesaid, it is the finding of this court that the applicant has been indolent and guilty of laches.

19. Furthermore, the law is settled on reinstatement of a suit or application dismissed by the court. In the case of Shah v Mbogo & another [1967] EA 1116, the court stated as follows:

> " The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberatively sought whether by evasion or otherwise to obstruct or delay the course of justice"

20. The delay in this matter is prolonged and the prejudice the respondent will suffer if the application is allowed overrides the applicants' right to be heard.

21. Consequently, the application is dismissed with costs to the respondent.

DATED, DELIVERED AND SIGNED ON THIS 25TH DAY OF MARCH, 2026

GRACE L. NZIOKA

JUDGE

In the presence of;

N/A for the applicant

Mr. Ndungu for the respondent

Ms. Hannah: court assistant