



**APA Insurance Company Limited v Buruke (Civil Appeal
E073 of 2024) [2026] KEHC 4794 (KLR) (10 April 2026) (Ruling)**

Neutral citation: [2026] KEHC 4794 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E073 OF 2024**

**M THANDE, J
APRIL 10, 2026**

BETWEEN

APA INSURANCE COMPANY LIMITED APPELLANT

AND

DAVID EMASE BURUKE RESPONDENT

RULING

1. Before this Court for determination is a Notice of Motion dated 14.3.25 seeking the setting aside of the orders 4.3.25 dismissing the appeal herein and reinstatement of the same.
2. The grounds upon which the Application is premised are that failure to attend Court on 4.3.35 to confirm filing of submissions is that the counsel who had conduct of the matter mistakenly diarized the matter as coming up on 14.3.25; that failure to attend Court was honest, inadvertent and unintended; that the Appellant will suffer great prejudice if the Appeal is not reinstated; that the Appellant learnt of the dismissal orders on 14.3.25 and filed the present Application without unreasonable delay.
3. The Respondent opposed the Application through a replying affidavit sworn on 28.3.25 by his counsel, Harun Gathuthi Kariuki. He averred that in spite of directions being given on 14.10.24 that the Appeal be canvassed by way of written submissions, the Appellant has never filed the record of appeal or submissions and has not given any reasons for failing to do so; that the Appellant has been indolent and the Court should not exercise discretion in its favour. The Respondent urged that the Application be dismissed with costs.
4. Directions were given for the filing of written submission. While the Appellant filed submissions, the Respondent did not.



5. The law relating to setting aside judgment or dismissal is found in 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.

6. The Orders sought by the Applicant are discretionary. The rule does not provide the conditions that must be met for reinstatement of dismissed suits. The Court thus has wide discretion to grant orders on terms. The terms must however be just.
7. The record shows that the Appeal was filed on 11.6.24. when the matter came up on 14.10.24, the Appellant's counsel informed the Court that the record of appeal had been filed. The court then directed that submissions be filed and exchanged and gave each party 14 days to do so with mention on 4.3.25 for compliance. On that date however, neither party attended Court and submissions had not been filed as directed. The Court proceeded to dismiss the appeal for non-attendance and non-compliance with the directions given.
8. The Appellant has stated that counsel made a genuine mistake of mis-diarizing the mention date as 14.3.25 instead of 4.3.25. Reliance was placed on the cases of *Belinda Murai & 9 others v Amos Wainaina* [1978] KECA 23 (KLR) and *Philip Keipto Chemwolo & another v Augustine Kubende* [1986] eKLR to buttress the position that mistake of counsel should not be visited upon an innocent litigant. While the Court is prepared to accept this explanation as reasonable, failure to attend Court is not the only reason for dismissal of the appeal. The Appeal was also dismissed for non-compliance with the directions of the Court to file submissions close to 5 months after directions were given. Notably, the Appellant has not given any reasons for failure to comply with the clear directions of the Court. To date, the said submissions are yet to be filed.
9. It is trite that parties to a dispute must adhere to the directions given by the court. In the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR Kiage, JA stated:

This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned.

10. The prayers sought herein are an equitable remedy and not a right of a party. In the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, the Supreme Court stated that extension of time is not a right of a party but an equitable remedy that is only available to a deserving party at the discretion of the court. By parity of reasoning, the setting aside the dismissal of the appeal herein and reinstatement of the same, being an equitable remedy, may only be granted if the Court is satisfied that the Appellant is deserving of the same. The Appellant has by disobedience of the directions of 14.10.24 demonstrated that it is not deserving of the orders sought.



11. The law enjoins parties to assist the court in ensuring that court directions are complied with and that justice is dispensed expeditiously. In the case of Tana Teachers' Cooperative and Credit Society Limited v Andriano Muchiri [2018] eKLR, the Court of Appeal spoke to this issue and stated:

Although parties are always in haste to invoke the “overriding principle” when seeking favourable exercise of discretion by the courts or covering up for some infractions they may have committed, they tend to forget that Section 1A (3) *Civil Procedure Act* as well as section 3A *Appellate Jurisdiction Act* enjoins them to assist the court in ensuring that court directions are complied with and that justice is dispensed expeditiously. A party cannot egregiously fail or refuse to comply with directions of the court claiming that the said directions were salutary and not accompanied by any sanctions and hope to seek refuge in the overriding principle. That in our view amounts to gross abuse of court process. There must be an end to litigation and it behoves this Court to tell the appellant that its journey ends at this point.

12. This Court did on 14.10.24 direct the Appellant to file submissions within 14 days, with mention fixed for 4.3.25 for compliance. The Appellant neither filed submissions nor attended Court on the appointed day. To date, submissions are yet to be filed.
13. By its conduct therefore, the Appellant derogated from the overriding objective of the expeditious, fair, just proportionate and economic disposal of the matter herein. This Court should therefore not provide succour and cover to the Appellant given its conduct. (see Nicholas Kiptoo Arap Korir Salat (supra).
14. In the end and in view of the foregoing, this Court declines to exercise its discretion in the Appellant's favour. The Application dated 14.3.25 lacks merit and the same is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 10TH DAY OF APRIL 2026

M. THANDE

JUDGE

