Shuma v Ochume (Judicial Review Cause E009 of 2022)
[2026] KEHC 4831 (KLR) (15 April 2026) (Ruling)

Neutral citation: [2026] KEHC 4831 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

JUDICIAL REVIEW CAUSE E009 OF 2022

AC BETT, J

APRIL 15, 2026

BETWEEN

JACKLINE AYIKA SHUMA ..... APPLICANT

AND

OTINGA PATRICK OCHUME ..... RESPONDENT

RULING

1. This matter has a checkered history. The Judicial Review application was withdrawn on 30th January 2023 upon receipt by the court of a Notice to withdraw suit dated 8th December 2022 signed and filed by the Ex parte Applicant. The Notice to withdraw the suit was endorsed with no order as to costs.

2. The Respondent was aggrieved with the court's decision and filed an application dated 3rd April 2023 urging the court to set aside its earlier order and award him costs of the Judicial Review application. The said application was dismissed on 14th December 2023 due to absence of the Respondent/Applicant's Advocate.

3. Undeterred, the Respondent/Applicant filed an application to set aside the order of dismissal arguing that he should not be condemned for mistakes of his Counsel who on his end, claimed that he had encountered network difficulties while logging into court and requested a colleague to hold his brief only to discover later that his colleague did not assist him hold brief. The court allowed the application vide a ruling dated 3rd April 2025 and upon reinstating the application dated 3rd April 2023 directed the Respondent/Applicant to file and serve his written submissions in support of the said Notice of Motion within 30 days to enable the Applicant/Respondent file and serve her written submissions within 30 days of service. The order contained a default clause that in default of compliance by the Respondent/Applicant, the application dated 3rd April 2025 would stand dismissed with costs. The directions were made in the presence of Ms. Adeya who said that she was holding brief for Mr. Amasakha for the Applicant and Ms. Juma for the Respondent.

4. On 31st July 2025, the parties' Advocates attended court for Mention when Counsel for the Respondent/Applicant indicated that the submissions appeared not to have been served. The court proceeded to make an order that due to non-compliance with the court's orders dated 3rd April 2025, the application stood dismissed with costs to the Ex parte Applicant.

5. The Respondent/Applicant then filed an application dated 31st July 2025 seeking the reinstatement of his application dated 3rd April 2023. The gravamen of the application is that the Respondent/ Applicant had substantially complied with the court's directions and is desirous of prosecuting the application dated 3rd April 2023 to its logical conclusion.

6. In support of the application, the Respondent/Applicant's Advocate Mr. Robert Ommani swore an affidavit dated 11th October 2025 (sic). He deponed that in compliance with the court's directions, he personally prepared and filed the Applicant's submissions but mistakenly believed that they had been served. He took full responsibility for his oversight which he averred was not deliberate but inadvertent. He deposed that the Applicant is desirous of prosecuting the application and the Ex-parte Applicant will not be prejudiced were the application dated 3rd April 2023 reinstated and heard on its merits.

7. In response, the Respondent/Ex-Parte Applicant filed an affidavit sworn on 21st August 2027 in which she averred that the court was right in dismissing the application dated 3rd April 2023 as the Applicant was guilty of laches and that it would be unfair to allow the application. She contended that the principle that blunders of an advocate should not be visited upon an innocent litigant is not absolute and should not apply to this case which has been unduly delayed by the Applicant's advocates. Finally, the Respondent averred that litigation must come to an end and the court has a duty to uphold its dignity and finality of its orders.

8. The Applicant filed written submissions while the Respondent relied wholly on his affidavit.

9. In his submissions, the Respondent/Applicant states that he duly filed his written submissions in compliance with the court order but due to an inadvertent and honest mistake on the part of the Counsel, failed to serve the Respondent. He submits that no prejudice will be occasioned to the Respondent if the application that had been dismissed were allowed. He cites the case of Philip Kiptoo Chemwolo & Another v. Augustine Kubende [1986] KECA 87 (KLR) and argues that he did not have direct control of the process.

10. The Applicant further submits that the circumstances justify the exercise of the court's discretionary power to reinstate the application and cites Shah v. Mbogo [1967] EA 116.

11. The issues for determination here are:-

    i. Whether the Applicant's breach of the order dated 3rd April 2025 resulted in automatic dismissal of the application.

    ii. Whether the circumstances justify the exercise of the court's discretionary power to reinstate the application.

    iii. Who should bear costs of the application.

12. On 3rd April 2025 in the presence of the Applicant's Advocate, the court issued a peremptory or guillotine order in which it stated:-

> " The Respondent/Applicant shall file and serve written submissions in support of the Notice of Motion dated 3/4/2023 within 30 days from today to enable the Respondent file her written submission within 30 days of service. In default of compliance by the Respondent/

Applicant, the application shall stand dismissed with costs. Mention on 26/6/2025 for compliance. Respondent to serve."

13. A perusal of the Judiciary Case Tracking system (CTS) establishes that the Respondent/Advocate uploaded written submissions on 4th July 2025 which is over 90 days after the court's directions. The order was succinctly clear and was self-executing. Since the Applicant failed to file and serve the written submissions within the stipulated time, he was in breach of the order. The application automatically stood dismissed at the end of 30 days. By the time the parties were attending court for Mention on 26th June 2025, the application was no more.

14. The court's discretion to set aside a dismissal order under Order 12 Rule 7 and Order 51 Rule 15 of the Civil Procedure Rules is well settled as expounded in Shah v. Mbogo (Supra). It is trite that discretion is intended to avoid injustice from excusable error, not to assist those who deliberately seek to obstruct or delay the course of justice. See also Philip Chemwolo & Another v. Augustine Kubende (Supra).

15. On the other hand, the right of a party to be heard is sacrosanct and there are myriad authorities in support of the view that no party should be condemned for mistakes of Counsel. In Branco Arabe Espanol v. Bank of Uganda [1999] 2 EA 22, quoted with approval in Lucy Bosire v. Kehancha Div. Land Disputes Tribunal and 2 others [2013] KEHC 681 (KLR), the court stated that:-

> " The administration of justice should normally require that the substance of all disputes should be investigated and decided on all their merits and that errors, lapses should not necessarily debar a litigant from the pursuit of his right and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely, the hearing and determination of disputes should be fostered rather than hindered."

16. Additionally, in Richard Nchapi Leiyagu v. IEBC Civil Appeal No. 18/2013, the Court held:-

> " The right to a hearing has always been a well protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality."

17. The circumstances herein are unique as this was not the first time the application was being dismissed over the default of the Applicant. The defaults mean that the Respondent has been exposed to a prolonged delay in the determination of a matter which she had withdrawn on 30th January 2023.

18. The Applicant relies on Article 159 (2) of *the Constitution* and Section 1A, 1B & 3A of the Civil Procedure Rules to advance his case and entreats this court to reinstate his application to avoid denying him the right to be heard on account of a technicality. With respect, the second dismissal of the application is beyond a mere technicality. This was a situation where the Applicant was given a second chance and squandered that chance as he was late in complying with the court's order by more than 60 days. Such delay was inordinate considering the circumstances of the case. In Jacob Nyaga Njeru v. Njeru Kinanda [2022] KECA 946 (KLR), the Court of Appeal held:-

> " The matter before us can hardly be categorised as one in which the learned Judge had "undue regard to procedural technicalities". Far from it, the appellant was given ample time to take steps to prosecute his case. Instead, he sat back. It matters not that the dispute related to land, which learned counsel termed as "emotive", the more reason why the appellant should have

taken steps to prosecute his claim without delay. Indeed, the subject matter of the dispute is not relevant to the exercise by a court of its discretion in determination of applications made under order 17 rule 2(1) and (3) of the Civil Procedure Rules. That settles the 2nd issue before us."

19. The discretion to set aside an order of dismissal is an equitable remedy and equity aids the vigilant and not the indolent. In any event, it has been established that Article 159 of *the Constitution* is not a panacea for all ills. See Zacharia Okoth Obado v. Edward Akong'o Oyugi & 2 Others [2014] KESC 25 (KLR) where the Supreme court rendered itself thus:-

> "Indeed, this Court has had occasion to remind litigants that article 159(2)(d) of *the Constitution* is not a panacea for all procedural shortfalls. All that the Courts are obliged to do is to be guided by the principle that "justice shall be administered without undue regard to technicalities." It is plain to us that article 159 (2)(d) is applicable on a case- by-case basis Raila Odinga and 5 others v IEBC and 3 others; Petition No 5 of 2013,[2013] e KLR".

20. In the case of Tana and Athi Rivers Development Authority v. Jeremiah Kimigho Mwakio and 3 others [2015] KECA 674 (KLR), the Court of Appeal stated thus:-

> "From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side."

21. Additionally, in the case of Alice Mumbi Nganga v. Danson Chege Nganga & Another [2006] KEHC 1523 (KLR), the court held that mistakes by Counsel do not automatically justify setting aside an adverse order as any case belongs to the litigant and not the advocate. The court stated that:-

> "...This court has unfettered discretion to set aside any order which was entered exparte. This discretion however, has to be exercised judicially. The applicant must satisfy this court that she has good reasons why she failed to attend court when the said application for dismissal was heard and determined in her absence. In the present case, I am not satisfied that the applicant has advanced sufficient reasons to enable this court exercise discretion in her favour. In the first place, she cannot blame her counsel who was then on record for failing to attend court when the said application was listed for hearing. This court has ruled in several cases that a civil case once filed, is owned by a litigant and not his advocate. It behoves the litigant to always follow up his case and check its progress. He cannot come to court and say that he was let down by his advocate when a decision adverse to him is made by the court due to lack of diligence on the part of his advocate. I think it has been ruled by the Court of Appeal that where an advocate fails to prosecute a case to the satisfaction of his client then such a litigant has an option of suing such an advocate for professional negligence. The mistake of counsel will not, per se, make this court to exercise its discretion in favour of an aggrieved litigant..."

22. In Habo Agencies Limited v. Wilfred Odhiambo Musingo [2015] KECA 987 (KLR), the Court of Appeal considered an application for reinstatement of an appeal and held that:-

> "It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel."

23. It is the court's considered view that the Applicant's Advocate was either laggard or did not take the express orders of the court seriously and the delay in complying with the orders of the court undermined its authority. Once the application had been dismissed, it was incumbent on the Applicant to closely follow up his Counsel to forestall another dismissal. That his Counsel failed to file submissions that long predated the date of filing is a pointer to lack of keen follow up by the Respondent/Applicant. The application was a delicate one as it had an unfortunate history and ought to have attracted extra cautionary measures from both the Respondent/Applicant and his Counsel to forestall a repeat of the earlier mistake that led to dismissal.

24. Taking into account the history of this case, I am of the view that to grant the Respondent/Applicant further indulgence would weigh against the rules of natural justice. His default demonstrates a level of laches that exceeds the "excusable mistake" principle. To grant a second reinstatement would be to treat the court's orders as mere suggestions and would be inimical to the administration of justice and to the principle that there must be an end to litigation.

Final Orders

25. The court finds no merit in the application dated 31st July 2025. It is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 15TH DAY OF APRIL, 2026.

A. C. BETT

JUDGE

In the presence of:

No appearance for Respondent/Applicant

Mr. Amasakha for Respondent/Ex Parte Applicant

Court Assistant: Polycap