

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

CIVIL APPEAL NO. E023 OF 2024

**FRANKLINE
MABAKA.....APPELLANT/APPLICANT**

MUGENDI

VERSUS

**CHARITY MAKENA MICHENI.....1ST
RESPONDENT**

**SIDRA MOTOR SALES & SPARES.....2ND
RESPONDENT**

RULING

1. For determination is the application dated 12th march 2026 seeking the following orders: -

- i. Spent
- ii. That this honorable court be pleased to stay the orders made on 11th March 2026 dismissing the appeal and all consequential orders made in their

entirety pending the hearing and determination of this application.

- iii. That this honourable court be pleased to re-admit the subject appeal together with appeal together with all the consequential orders.
- iv. That the costs of the application be in the cause.

2. The application is founded on the grounds on the face of the motion and on the supporting affidavit of Erastus Mbaka, counsel for the Applicant sworn on even date.

3. He deponed that the appeal was mentioned for compliance on 11th March 2026 and the same was dismissed for non-compliance or non-attendance by the Appellant. That neither the Appellant nor himself as his advocate were aware of the date and thus could not appear before the court on the said date.

4. He stated that failure to attend was an unintended mistake as the Appellant is keen on prosecuting the appeal noting that he complied on 9th December 2025, complied with the orders of this court by depositing in court the decretal sum of Kshs. 876,361.
5. He further stated that they had been unable to file the record of appeal due to difficulties in obtaining the defence file as they came on record after judgment had been entered but they are on the final stages of compiling the record of appeal. That the appeal raises arguable and triable issues and the counsel's mistake should not be visited upon the client.
6. He also stated that the application was made without undue delay and that no prejudice will be suffered by the Respondents as the insurer has already paid a substantial amount of Kshs. 3,000,000/-. Further, that the Appellant is willing to

file the record of appeal within 14 days or any timeline given by the court.

7. The Application was opposed by the 1st Respondent through her sworn affidavit dated 17th March 2025. She deponed that the argument that the Applicant was not aware of the mention date is untrue as the date was taken by consent in open court at the time of the delivery of the ruling dated 25th November 2025.

8. She stated that the Applicant has not provided any credible reasons or sufficient cause for non-attendance on 11th March 2025 thus he cannot benefit from his dishonesty to continue to further delay the enjoyment of fruits of judgment. Further, he has not produced before the court any letter requesting for proceedings or any other documents that constitute a record of appeal.

9. She also stated that the Appellant had filed a declaratory suit (Chuka CMCC No. E125 of 2023)

against his insurer seeking to compel them to settle the decree and in his pleadings he attached the trial court record thus it is untrue that he does not have the defence file as he claims. Thus, nothing has prevented the Appellant from filing the record of the appeal with documents already in their possession in compliance with the final orders of the court as contained in the ruling.

10. She further stated that the Appellant had time to file his appeal within 30 days initially granted by the court on 7th June 2024 and after the ruling of 25th November 2025 but has failed to do so. That re-admission of an appeal is not a matter of right but discretionary which discretion ought to be denied.

11. The Application was canvassed by way of written submissions. The Appellant filed written submissions dated 24th March 2026 raising one

sole issue for determination being whether the appeal may be reinstated.

12. The 1st Respondent filed his written submissions dated 26th March 2026 raising one issue for determination, whether the Applicant was denied the right to a fair trial and the right to be heard.

13. The Applicant submitted that failure to attend for mention on 11th march 2026 was not deliberate as the Applicant had no notice that the matter had been slated for that day. He urged the court to exercise its discretion and readmit the matter. He relied on the case of **Katsuri Limited v Nyeri Wholesalers Limited [2014] KECA 580 (KLR)** where the court noted that it is always prudent for litigation to come to an end when all parties have been heard on merit and substantive justice administered.

14. It was submitted that the delay was occasioned by the Appellant's counsel in an attempt to verify the correctness and completeness of the record of appeal from the file of their predecessors.

15. The 1st Respondent submitted that the Appellant was aware of the mention date as the same had been updated on the CTS and parties notified through SMS. Further, the Appellant was granted 30 days to comply and the mention date was to confirm compliance yet the Appellant took no steps expected to diligently prosecute his appeal.

16. He submitted that the Appellant has not been denied the right to heard. He relied on the case of **Union Insurance Co. of Kenya v Ramzan Abdul Dhanji, Civil Application No. 179 of 1998** where the court observed that the law is not that a party must be heard in every litigation. The

law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and not utilized, then the only point on which the party not utilizing the opportunity can be heard is why he did not utilize it.

17. He further submitted that it is not in the interest of justice to re-admit the appeal as the Applicant's conduct has been marked by disinterest, delay and disregard for the rules of procedure and the court's directions and orders.

18. I have considered the application, the rival affidavits as well as the submissions and I find the issue for determination is whether the order for readmission sought is meritorious.

19. The power to set aside an order dismissing a matter for non-attendance or non-compliance is

discretionary. That discretion, however, is not to be exercised capriciously; it must be guided by established principles, foremost being that the Court should aim at doing substantive justice between the parties. In **Shah v Mbogo [1968] EA**, the Court held that such discretion is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake, but not to assist a person who has deliberately sought to obstruct or delay the course of justice.

20. Similarly, in **Esther Wamaita Njihia & two others vs. Safaricom Ltd** [2012] KEHC 5238 (KLR) G.K Kimondo J. cited extensive case law raising the principles that:-

(i) The court discretion exercises the main concern of the courts is to do justice to the parties before it.

(ii) 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 deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice.

(iii) The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court.

(iv) It also goes without saying that the reason for failure to attend should be considered.

21. Applying those principles to the present matter, the Applicant attributes his failure to

attend court on 11th March 2026 to lack of notice of the mention date. The Respondent, on the other hand, contends that the date was taken by consent in open court and that notification was duly effected through the Court's tracking system. I am not persuaded, on the material placed before me, that the explanation by the Applicant is entirely candid. There is weight in the Respondent's contention that the Applicant had notice, or at the very least ought to have had notice, of the mention date.

22. That said, the inquiry does not end there. The Court must consider the totality of the circumstances, including the conduct of the Applicant before and after the dismissal, and whether the Respondent would suffer prejudice incapable of compensation by costs.

23. It is not in dispute that the Applicant deposited the decretal sum of Kshs. 876,361 as ordered by

the Court. That act, in my view, is not consistent with a party who has completely lost interest in the appeal. It demonstrates a measure of willingness to comply with court orders and to prosecute the appeal.

24. However, there has been evident delay in filing the record of appeal. The explanation offered, difficulty in obtaining the defence file from previous advocates is weakened by the Respondent's uncontroverted deposition that the Applicant had access to the trial record in a related declaratory suit. This suggests that, while there may have been some logistical challenges, the delay was not entirely unavoidable.

25. The Court must therefore balance two competing considerations: the need to uphold procedural discipline and the equally important obligation to ensure that disputes are determined on their merits.

26. In the present case, while the Applicant's conduct reveals some degree of laxity, I am not satisfied that it rises to the level of deliberate obstruction of justice. On the other hand, the Respondent's concern regarding delay in enjoying the fruits of judgment is legitimate and must be addressed.

27. In the circumstances, I am persuaded that this is a proper case for the Court to exercise its discretion in favour of the Applicant, albeit on strict terms. To shut out the appeal altogether would be a disproportionate response, particularly where the appeal has not been heard on its merits and where some compliance with court orders has already been demonstrated.

28. Accordingly, I make the following orders:-

- i. The order made on 11th March 2026 dismissing the appeal is hereby set aside.
- ii. The appeal is reinstated for hearing on the merits.
- iii. The Applicant shall file and serve a complete record of appeal within fourteen (14) days from the date hereof. In default, the order reinstating the appeal shall automatically lapse without further reference to the Court.
- iv. The Applicant shall pay thrown away costs to the 1st Respondent of Kshs. 20,000/-.
- v. Costs of the application shall be borne by the Applicant.

**Ruling delivered, dated and signed at Chuka
this 12th day of May, 2026.**

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**R. LAGAT-KORIR
JUDGE**

**Ruling delivered in the absence of the
parties. (Muriuki Court Assistant).**