



REPUBLIC OF KENYA



**KENYA LAW**  
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**Co-operative Bank of Kenya v Maroko (Civil Appeal (Application)  
338 of 2019) [2025] KECA 228 (KLR) (7 February 2025) (Ruling)**

Neutral citation: [2025] KECA 228 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) 338 OF 2019  
K M'INOTI, F TUIYOTT & FA OCHIENG, JJA  
FEBRUARY 7, 2025**

**BETWEEN**

**CO-OPERATIVE BANK OF KENYA ..... APPLICANT**

**AND**

**ONESMUS OMWENGA MAROKO ..... RESPONDENT**

*(Being an application for review of the decision of the Court of Appeal at Nairobi (Gatembu, Lesit & Nyamweya, JJ.A.) issued on 29th July 2024 arising from Employment and Labour Relations Court at Nairobi (Nzioki wa Makau, J.) delivered on 10th February 2015 in ELRC Cause No. 449 of 2013)*

**RULING**

1. On 29<sup>th</sup> July 2024, this Court (differently constituted) dismissed the substantive appeal on the grounds that the appellant had failed to attend court on the date when the said appeal was scheduled for hearing.
2. The application now before the Court is supported by the affidavit sworn by Roy Mwenesi, the learned advocate who has the conduct of the applicant's case.
3. In a nutshell, counsel deponed that the applicant was never served with the hearing notice. It is the applicant's case that it failed to attend court for the appeal hearing because it was unaware that the appeal was coming up for hearing.
4. Consequently, the applicant filed the application herein, seeking the reinstatement of the appeal. The applicant also sought the setting aside of all orders which were consequential to the dismissal of the appeal.



5. In an endeavor to demonstrate the lack of service, the applicant procured from the court, the emails through which the hearing notice had been served. The particulars of the said emails are as follows:

- “(a) attorney.sichangi@gmail.com
- b. pknjiiriadvocates@gmail.com
- c. sichangi@advocates.com
- d. kariuki@yahoo.com
- e. cc: serem1972@gmail.com
- f. joan\_namrome@yahoo.com
- g. deputyregistrar.ogombe@gmail.com
- h. courtofappealnairobi@court.go.ke
- i. kennjeff2012@gmail.com”

6. According to the applicant, none of the above email addresses belong to the advocates representing it. Counsel for the applicant drew the attention of the Court to his address, as reflected on the notice of appeal; which is; “hillteam@sichangi.com”.

7. When the application came up for hearing on 2<sup>nd</sup> October 2024, the applicant was represented by Mr. Roy Mwenesi, Advocate. However, the respondent was not present, either in person or through an advocate, though his advocate was duly served with the hearing notice.

8. Given the nature of the application and the fact that the respondent had not controverted the applicant’s assertion concerning non-service of the hearing notice, the Court urged Mr. Mwenesi Advocate to seek out his colleague.

9. Ultimately, Mr. Njiiri Advocate joined the court and informed us that he was acting for the respondent. However, even though the Court had exceptionally gone out of its way to wait for counsel when he came to Court, Mr. Njiiri Advocate was not robbed.

10. The Court extended one more, (exceptional) courtesy to counsel, on the understanding that if he would have robbed by the time when the applicant had concluded the process of highlighting its submissions, this Court would grant audience to counsel. As matters turned out, Mr. Njiiri was not ready to address the Court, immediately after the applicant had concluded its submissions.

11. However, as the respondent had already filed both a replying affidavit and his written submissions, the Court was obliged to give due consideration to the same. The submissions of the respondent largely mirrored his replying affidavit. He complained that the applicant had never been keen to canvass its appeal. He stated that;

“The appellants have never been keen in prosecuting their appeal despite service and all the hearings have been initiated by the respondents.”

12. The Court was further told that the respondent died whilst the appeal was still pending. In the said circumstances, the “respondent” accused the appellant of frustrating the widow, by barring her from enjoying the fruits of the judgment which had been granted in favour of the respondent.



13. This Court was invited to dismiss the application because any further delay in the execution of the judgment would constitute the denial of justice, that the respondent deserved.
14. To buttress his submissions, the respondent cited two authorities, Michael Ntouthi Mitheu vs Abraham Kivondo Musau [2021] eKLR; and Mbogo & Another vs Shah [1968] E.A 93.
15. It was the respondent's case that the Court was enjoined to give consideration to the twin overriding principles of proportionality and equality of arms, which are aimed at placing parties on an equal footing.
16. As the respondent pointed out, those are matters to be taken into account when the Court is called upon to determine whether or not to grant an order for stay of proceedings.
17. We agree with the respondent that;

“It is therefore important that the court takes into consideration the likely effect of granting the stay of the proceedings in question.”
18. However, the respondent did not demonstrate to us how the said reasoning was applicable to this case, in which the applicant was not seeking a stay of proceedings.
19. The respondent's further submission was as follows;

“... A Court of Appeal should not interfere with the exercise of the discretion of a single Judge, unless it is satisfied that the Judge, in exercising his discretion has misdirected himself in some matter, and as a result, has arrived at a wrong decision or unless it is manifested from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice ...”
20. Based upon that submission, the respondent concluded that there were no grounds that would warrant the review of the decision through which the appeal had been dismissed.
21. In this case, the decision to dismiss the appeal was not made by a single Judge. Secondly, the applicant herein had not asserted either that the Court had misdirected itself, or that it had been clearly wrong in the exercise of its discretion when it dismissed the appeal.
22. The applicant's position was that the hearing notice had not been served upon it; and that therefore the applicant was condemned unheard.
23. A close examination of the email addresses to which the hearing notice was sent, reveals that the said notice was not sent to the applicant.
24. The respondent may have been proactive in taking steps calculated to move forward with the hearing of the appeal, but there is no doubt that the applicant was not served with the hearing notice.
25. A look at the Order made on 29<sup>th</sup> July 2024 reveals the basis upon which the appeal was dismissed. The Order is in the following terms;

“When this appeal was called out for hearing this morning, there was no appearance from both the appellant and the respondents although having been served with a hearing notice for today, on 3<sup>rd</sup> July 2024 and no submissions have been filed.

In the premises, this appeal is hereby dismissed for non-attendance.”



- 26. Whereas neither of the parties indeed attended Court for the hearing of the appeal, the failure by the applicant to attend Court was attributable to the fact that the hearing notice had not been served upon it.
- 27. Accordingly, we are satisfied that the applicant has demonstrated sufficient reason for its failure to attend Court on the material date. In the circumstances, justice demands that we set aside, as we now hereby do, the Order made on 29<sup>th</sup> July 2024. In the result, the appeal is hereby reinstated for hearing.
- 28. As regards costs, we would ordinarily have ordered that the same be in the cause, in the substantive appeal. However, as the respondent made a conscious choice to mount an opposition to the application, yet he did not make any attempt to controvert the only factual foundation upon which the said application was anchored, we order that the respondent shall pay to the applicant, the costs of this application.

**DATED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**K. M'INOTI**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

.....

**JUDGE OF APPEAL**

**F. OCHIENG**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR.**

