



Ondong' (Suing on His Own Behalf and on Behalf of the Estate of William Odhiambo Ondong) v Kenyatta National Hospital (Civil Appeal E824 of 2021) [2025] KEHC 712 (KLR) (Civ) (30 January 2025) (Ruling)

Neutral citation: [2025] KEHC 712 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E824 OF 2021

JN MULWA, J

JANUARY 30, 2025

BETWEEN

LUCAS OTIENO ONDONG' (SUING ON HIS OWN BEHALF AND ON BEHALF OF THE ESTATE OF WILLIAM ODHIAMBO ONDONG) APPLICANT

AND

KENYATTA NATIONAL HOSPITAL RESPONDENT

RULING

1. The Notice of Motion before this court is dated 22nd September, 2023. It has been brought by Lucas Otiemo Ondong' (Suing on his own behalf and on behalf of the estate of William Odhiambo Ondong'-Deceased) (hereafter the Applicant) and seeking an order to the effect that the court be pleased to reinstate the present appeal for hearing and determination; and a further order that the draft record of appeal annexed thereto, be deemed to be properly on record.
2. The Motion which is expressed to be brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* (CPA); Order 51, Rule 1 of the Civil Procedure Rules (CPR); and Articles 50(1) and 159(2) of *the Constitution* of Kenya, 2010 is premised on the grounds featured on its face and amplified in the supporting sworn by the Applicant's advocate, Munyalo Muli.
3. Kenyatta National Hospital (hereafter the Respondent) resisted the Motion by way of a replying affidavit sworn by its advocate, Pamela W. Njiru, on 30th October, 2023.
4. At the hearing thereof, it was the concurrence by counsels for the respective parties that the Motion be determined based on the affidavit evidence tendered.
5. The court has thus considered the rival affidavit material on record.



6. In his supporting affidavit to the Motion, advocate Munyalo Muli states that the Applicant instituted the present appeal on 16th December, 2021 seeking to challenge the judgment delivered by the trial court on 29th November, 2021. The advocate states that subsequently, his law firm requested for the certified copies of the typed proceedings and impugned judgment to be made available to them, by way of a letter dated 29th November, 2021 following which the said firm made further follow-ups on the availability of the requisite documents. That it was not until 18th April, 2023 that the firm's representative received a response email from the lower, confirming that the requisite documents were ready and available for collection and which were collected by the Applicant's advocates on 24th April, 2023.
7. It is the averment by the advocate that unfortunately, the appeal was dismissed on 26th May, 2023 before the Applicant had an opportunity to file his record of appeal. It is equally his averment that prior to the dismissal order, no notice to show cause had been served upon the Applicant's advocates. The advocate further avers that the delay in setting the appeal down for hearing was therefore occasioned by the time taken in obtaining the requisite documents and that the Applicant remains keen on prosecuting the appeal. The advocate equally avers that the further delay in ascertaining the status of the appeal was occasioned by the inadvertence on the part of his law firm and the same should not be visited upon the client. In conclusion, the advocate avers that the Respondent does not stand to be prejudiced if the orders sought in the Motion are granted. The court is therefore urged to exercise its discretion in favour of the Applicant, accordingly.
8. In reply, counsel for the Respondent, Pamela W. Njiru, deposes that upon lodging the appeal on 16th December, 2021 the Applicant went into a slumber and took no further action in the appeal, thereby resulting in issuance of a notice to show cause on 6th April, 2023. Counsel deposes that contrary to the averments being made in the supporting affidavit, the notice to show cause was served upon the respective parties. Counsel further avers that in any event, the onus was on the Applicant to personally follow up on the progress of his appeal and that notwithstanding the absence of the lower court proceedings, the Applicant ought to have taken steps in seeking a date for directions on the appeal, in the absence thereof, but did not.
9. Counsel therefore states that the delay in prosecuting the present appeal is not only inordinate but is also inexcusable in the circumstances. In the premises, counsel urges that the instant Motion be dismissed with costs.
10. The grant or refusal to set aside or vary an order, judgment or any consequential decree or order, is discretionary, wide, and unfettered. However, the discretion must be exercised judicially and justly. The rationale for the discretion to set aside as conferred on the court was spelt out in the case of *Shah v Mbogo and another* [1967] E.A 116:

“The discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”
11. The Motion was brought under Order 51, Rule 1 (on the general procedure for filing applications) of the CPR; Sections 1A, 1B (on the overriding objective of the Act) and 3A (on the inherent powers of the court) of the CPA; and Articles 50(1) (on the right to a fair hearing) and 159(2) (on the exercise of substantive justice without undue regard to procedural technicalities) of *the Constitution* of Kenya, 2010.



12. Section 3A of the CPA as earlier referenced, reserves the inherent power of the court “to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court.” The Court of Appeal in *Rose Njoki King’au & Another v Shaba Trustees Limited & Another* [2018] eKLR stated thus:

“Also cited was Section 3A of the *Civil Procedure Act* which enshrines the inherent power of the Court to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the Court. In *Equity Bank Ltd versus West Link Mbo Limited* [2013], eKLR, Musinga, JA stated inter alia, that, by “inherent power” it means that

“Courts of law exist to administer justice and in so doing, they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without its being derived from *the Constitution* or statute. Such power enables the judiciary to deliver on their constitutional mandate.....inherent power is therefore the natural or essential power conferred upon the court irrespective of any conferment of discretion.”

13. The Supreme Court went further in *Board of Governors, Moi High School Kabarak and Another v Malcolm Bell* [2013] eKLR, to add the following:

“Inherent powers are endowments to the court as will enable it to remain standing as a constitutional authority and to ensure its internal mechanisms are functional. It includes such powers as enable the Court to regulate its intended conduct, to safeguard itself against contemplation or descriptive intrusion from elsewhere and to ensure that its mode of disclosure or duty is consumable, fair and just.” (sic)

14. The record sets out the events leading to the instant Motion in the following manner. The Applicant filed his memorandum of appeal on 16th December, 2021. The record shows that no further progressive steps took place in the appeal thereafter, resulting in issuance of a notice to show cause on 6th April, 2023 requiring the parties to show cause as to why the appeal should not be dismissed for want of prosecution. At the hearing of the said notice to show cause on 28th July, 2023 it was noted that only the Respondent’s advocate was present in court. In the absence of any cause shown, the court proceeded to dismiss the appeal for want of prosecution under Order 42, Rule 35(2) of the CPR, by way of the dismissal order made on 26th May, 2023.

15. The dismissal order triggered the instant Motion which was brought close to four (4) months later.

16. Upon considering the explanation given on behalf of the Applicant that the delay in prosecuting the appeal was largely occasioned by the time taken in obtaining the certified copies of the requisite documents to enable the filing of the record of appeal, the court noted from the record that the Applicant through his advocates followed up on the aforementioned documents on only two (2) occasions: namely by way of a letter dated 29th November, 2021 addressed to the Executive Officer-Milimani Commercial Courts, followed an email sent on 19th January, 2023. Otherwise, neither the Applicant nor his advocates demonstrated any diligence in following up on the requisite documents during the intervening period.

17. Upon further considering the explanation given on behalf of the Applicant to the effect that his advocates’ inadvertence in prosecuting the appeal is equally to blame for the delay, and whose inadvertence should not be visited upon him, while the court acknowledges the existing legal principle



that the mistake of an advocate should not be visited upon the client as a matter of general principle, it is worth mentioning that this principle does not apply in a blanket sense.

18. It is trite law that a suit/appeal ultimately belongs to the litigant and not the advocate at the end of the day; and thus, it is the litigant's duty to pursue or otherwise take active steps in ensuring the timely prosecution of his or her claim. This position was laid out by the Court of Appeal in *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR when it held thus:

“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.”

19. Moreover, the Court of Appeal went on to render itself as follows in the case of *Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others* [2015] eKLR:

“While mere negligent mistake by counsel may be excusable, the situation is vastly different in cases where a litigant knowingly and wittingly condones such negligence or where the litigant himself exhibits a careless attitude (in *Mwangi v Kariuki* [1999] LLR 2632 (CAK)) Shah, JA. ruled that “mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant's careless attitude.” The import of this is that while the mistake of counsel is excusable, if it is accompanied by a litigant's carelessness and inactivity, then the refusal by court to exercise discretion in favour of such a party cannot be impugned.”

20. On the subject of service of the notice to show cause, upon perusal of the record, the court noted that the said notice was issued on 6th April, 2023. From a perusal of the affidavit of service sworn by Court Process Server Jackson Kanyoro on 5th May, 2023 the same indicates that service was effected upon the Respondent's advocates but makes no mention of service upon the Applicant's advocates. It therefore remains uncertain whether the Applicant's advocates were indeed served with the notice.
21. That notwithstanding, it cannot be overlooked that there has been a prolonged and inexplicable delay of about one (1) and a half years between the date of lodging the appeal and issuance of the dismissal order. There has been a further delay of close to four (4) months between the date on which the dismissal order was made and the date on which the Motion was filed. In the court's view, such delay speaks to a casual sense of indolence on the part of the Applicant and/or his advocates, irrespective of the position on service of the notice to show cause.
22. Service of court process to parties in a suit is a crucial step as its purpose is to inform the parties of hearing or mentions of their cases before the court.
23. As stated above, there is no evidence that the applicants advocates had knowledge of the Notice to show cause or date of its hearing. It is against the rules of natural justice to condemn a party unheard. Article 50 of the Kenya constitution grants all persons a right to be heard in a court of law in a fair and just hearing.
24. In the foregoing circumstances, the court is persuaded that the explanation given by and on behalf of the Applicant is sufficient enough to warrant an exercise of its discretion in his favour.
25. The upshot is that the applicant's appeal by a Memorandum of Appeal dated December 16, 2021 is hereby reinstated for hearing on merit. The Record of Appeal shall be filed within 30 days for mention for directions on March 12, 2025.



DATED, SIGNED AND DELIVERED NAIROBI THIS 30TH DAY OF JANUARY 2025.

.....

JANET MULWA.

JUDGE

