



**M’Ndaka v Jambo & another (Civil Appeal E042 of 2023)
[2025] KEHC 9636 (KLR) (30 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9636 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CIVIL APPEAL E042 OF 2023
LN MUTENDE, J
JUNE 30, 2025**

BETWEEN

LUCY THIGAA M’NDAKA APPELLANT

AND

HAMMERTON MWAGANDI JAMBO 1ST RESPONDENT

FESTUS MUNYOKI MUSYOKI 2ND RESPONDENT

RULING

1. On the 25th September, 2023, the Appellant through the firm of Gekong’a & Company who was aggrieved by the decision of the trial court filed a Memorandum of Appeal against the judgment and decree on grounds that the learned Magistrate misdirected himself in law and fact in the assessment of damages awardable to the Appellant by awarding damages that were inordinately low in the circumstances and also failing to award the Appellant loss of earning.
2. On 28th February, 2024, there being no appearance the appeal was struck out for failure to file a Record of Appeal with no orders as to costs.
3. Through an application dated 8th March, 2025, the Applicant seeks an order of the court setting aside orders of 25th February, 2024 striking out the appeal so that the appeal can be reinstated, in order for the Appellant to have the opportunity of filing the Record of Appeal.
4. The application is premised on grounds that the Applicant is bound to suffer irreparable loss unless the order is set aside so that she is not condemned unheard contrary to the rules of natural justice. That the Respondent will not suffer any prejudice if the appeal is reinstated and heard on merit.
5. The Respondents in opposing the application urge that the Applicant never served them with the Memorandum of Appeal in respect of the suit and they only learnt of the appeal when they were served with the instant application. And, upon perusal of the Case Tracking System (CTS) they noted the



matter having been mentioned thrice and on the date that the appeal was struck out. That they were not notified of the dates. That the appeal is an afterthought as the Appellant received settlement cheques that were never returned.

6. I have considered the application, affidavits in support and opposition together with the annexures thereto; rival arguments and authorities cited. The application is brought pursuant to Order 12 Rule 7 of the [Civil Procedure Rules](#) which provide thus;

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.

7. This court has the discretion to grant or not orders sought based on circumstances of each case which must be exercised wisely and prudently. It behooves the Applicant to demonstrate existence of sufficient reasons for reinstatement of the appeal.
8. In the matter, the Memorandum of Appeal was filed on 25th September, 2023. Two (2) months later the matter was placed before the Judge and a mention date was given where a notice was to be issued for parties to attend. When the matter was mentioned on 18th January, 2024, there was no appearance. Subsequently, a notice was issued to parties to attend court on 28th February, 2025, when the Record of Appeal was to be filed. There was no appearance hence the appeal was struck out
9. It is urged by the Respondent that indeed the Memorandum of Appeal was never served upon them. They only learnt of existence of the appeal when the instant application was served upon them. In the intervening period cheques were issued in settlement of the decretal sum which is acknowledged.
10. The Applicant having filed the appeal on 25th September, 2023, she was expected to cause the matter to be listed for directions before a judge within 30 days (see Order 42 Rule 11 of the [Civil Procedure Rules](#)). However, this was not done. Ninety days later the court took the initiative of notifying her to appear in court but there was no appearance hence the matter was struck out.
11. Two hundred forty days later, counsel for the Applicant received the initial cheque being part payment of the decretal sum. Subsequently, he received other cheques on 9th May, 2024, 23rd May, 2024, 27th June, 2024, 14th June, 2024, 15th July, 2022 and 29th July, 2024, respectively, prior to filing the initial application on 8th August, 2024.
12. This was an indication of having been satisfied with the decision of the court. Such an Applicant should expect little sympathy from the court. No plausible explanation has been given for such conduct. The Applicant remained peaceful as long as the fruits of the judgment were available. But when the screen at the end of the faucet became clogged, the action that should have been propelled into action was remembered.
13. An explanation that the Applicant was logged into the session but there was power outage should have been followed with the matter being brought up for directions at the instance of the Applicant which was not the case.
14. As stated in [Ivita v Kyumbu](#) [1975] KEHC 4 (KLR) justice to both the Plaintiff and Defendant must be considered. The Applicant should satisfy the court of the prejudice to be suffered.
15. This court has not been satisfied by the explanation rendered by the Applicant as to why the suit should be reinstated. In the premises, I find the application devoid of merit. Accordingly, it is dismissed with no orders as to costs.
16. It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF JUNE, 2025.

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L.N. MUTENDE

JUDGE

