Abayo v Onong'o (Civil Appeal E107 of 2024) [2025] KEHC 9334 (KLR) (27 June 2025) (Ruling)

Neutral citation: [2025] KEHC 9334 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E107 OF 2024

A MABEYA, J

JUNE 27, 2025

BETWEEN

JONATHAN ABAYO ABAYO ..... APPELLANT

AND

KENNEDY ODIWUOR ONONG'O ..... RESPONDENT

RULING

1. This ruling determines the application dated 22/4/2024. The same was brought under sections 1A, 1B, 3A & 95 of the *Civil Procedure Act* Cap 21 Laws of Kenya, Order 45 Rules 1, Order 42 Rule 6, 21, Order 50 Rule 6 & Order 51 Rules 1,2 & 3 of the Civil Procedure Rules 2010.

2. The applicant sought to set aside the orders made on 1/4/2025 that dismissed his appeal and prayed that it be re-instated and be heard on merit. He further sought a stay of execution of the judgment delivered on 20/4/2025 in the Kisumu Chief Magistrates Court Civil Case No. 153 of 2020.

3. The application was based on the grounds set out on the body of the Motion and in the supporting affidavit of Joan Turgutt, advocate for the applicant. It was contended that this appeal was dismissed for non-attendance on the 1/4/2025, a date on which she was attending to her sick mother at the Eldoret Hospital and that the advocate who she had instructed to hold her brief, inadvertently failed to attend Court due to miscommunication.

4. That the applicant stands to suffer substantial loss if the orders sought are not granted whereas the respondent shall suffer no prejudice in the event the application is allowed as he has always been keen to prosecute his case in which the only thing pending was oral submissions.

5. The application was opposed by the respondent vide his Grounds of opposition dated 9/5/2025. He contended that the application lacked merit and was an abuse of the court process and ought to be dismissed with costs.

6. In the oral submissions, Ms. Turgutt argued that her non-attendance was a genuine mistake of Counsel which ought not be visited on her client as was held in the case of Phillip Chemwolo & Another v Augustine Obede (1982) KLR.

7. On her part, Ms. Namunji submitted that no evidence had been presented to show that Ms. Turgutt was attending to her mother in hospital or that Ms. Bii, who had instructions from Ms. Turgutt to hold her brief was attending to another matter. That Ms. Bii had not sworn any affidavit to support Ms. Turgutt's assertions.

8. The Court has carefully considered the parties' respective contestations. This is an application for setting aside an ex-parte order. The principles applicable are well known. These are; the reasons for failure to attend Court, that the application must be made timeously and the prejudice to be suffered by the opposite party.

9. The order to set aside an order made ex-parte is discretionary. This discretion is not restricted but must be exercised judiciously. The Court has to consider the three principles I have set out above.

10. In the present case, the date for the hearing was taken by consent of the parties. The reason advanced for non-attendance was that, Ms. Turgutt, Learned Counsel for the applicant was nursing her sick parent in an Eldoret Hospital. That the Counsel whom she had instructed to hold her brief, a Ms Bii failed to attend for some miscommunication.

11. It was contended by the respondent that no evidence was produced to prove the averments of Ms. Turgutt. While I agree that some evidence should have been produced, I am alive to the fact that the issue raised by Ms. Turgutt was one of health. Health issues are so personal and private to disclose to the whole world unless it is absolutely necessary especially when it concerns a third party who is not a participant in a proceeding. Further, it is inconceivable that a Counsel can wish his/her parent ill-heath to save a client's case.

12. To my mind, although no medical evidence was produced to authenticate the assertions of Ms. Turgutt, I have no reason to disbelieve her. I see no motivation on her part for her to wish her dear mother ill-heath just to save her client's appeal. Additionally, the failure to have Ms. Bii swear an affidavit to corroborate the assertions of Ms. Turgutt's does not make them less cogent. I believe the averments of Ms. Turgutt and hold that good reason was advanced for the failure by the applicant to attend Court on the material day.

13. Further, I believe that a bona fide mistake of Counsel should not be visited on a client. Such a mistake is a sufficient excuse within the meaning of Order 12 Rule 3(1) of the Civil Procedure Rules. In Belinda Murai & Others vs Amos Wainaina [1978] KLR, Madan JA held: -

> " A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because of a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate."(Emphasis added)

14. Further to the foregoing, I am of the considered view that the overriding objective of Articles 50 & 159 (2) of Constitution 2010, sections 1A & 1B of the *Civil Procedure Act* is to achieve substantive justice to the litigants.

15. The second issue to consider is the prejudice to be suffered by the respondent if the application were to be allowed. While rejecting the application would condemn the applicant forever and deny him a chance of being heard on his appeal, allowing the application would only inconvenience the respondent by delay only. Any prejudice to be suffered by the respondent can be compensated by an award of costs.

16. Finally, it is the issue as to whether the application was made timeously. The order sought to be set aside was made on 1/4/2025. The present application was lodged in Court on 22/4/2025, a period of 20 days only. To this Court's mind, a delay of 20 days was not inordinate. The application was brought timeously.

17. The upshot of the above is that I find the application dated 22/4/2025 to be meritorious and I allow the same as prayed. The costs of Kshs.5,000/- be paid by the Applicant.

    It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF JUNE, 2025.

A. MABEYA, FCI Arb

JUDGE