



**Mwongela v Africa Brotherhood Church (Civil Appeal  
E070 of 2022) [2025] KEHC 9079 (KLR) (26 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9079 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E070 OF 2022**

**EN MAINA, J**

**JUNE 26, 2025**

**BETWEEN**

**TONY NYAMAI MWONGELA ..... APPELLANT**

**AND**

**AFRICA BROTHERHOOD CHURCH ..... RESPONDENT**

**RULING**

1. This appeal was dismissed for non-attendance on 25<sup>th</sup> September 2023 by the court acting “suo moto”.
2. By the Notice of Motion dated 14<sup>th</sup> November 2023 the Appellant sought re-admission of the appeal but that application was also dismissed whereupon the Appellant/Applicant filed the application dated 26<sup>th</sup> June 2024 seeking to reinstate the application dated 14<sup>th</sup> November 2023 under Order 51 rule (1) of the *Civil Procedure Rules* and has cited the following grounds:-
  - a. That the applicant filed an appeal on 31<sup>st</sup> May 2022 and on 12<sup>th</sup> July 2023, directions were taken that the appeal be canvassed by way of written submissions to be filed by the parties on or before 26<sup>th</sup> September 2023.
  - b. That on 26<sup>th</sup> September 2023 when the appeal came up for mention to confirm filing of submissions, parties had not filed their submissions and they sought an extension of time to be able to put in their submissions.
  - c. That the court directed that the appeal shall be mentioned before the Deputy Registrar on 25<sup>th</sup> October 2023 to confirm whether the parties have complied with the orders on submissions and to fix a date before the Judge.
  - d. That on the said 25<sup>th</sup> October 2023, a Notice was issued by the court that the Honourable Deputy Registrar would not be sitting from 23<sup>rd</sup> October to 27<sup>th</sup> October 2023 and that matters slated for the Deputy Registrar would be given fresh dates at the registry.



- e. That relying on the notice, the Applicant's Counsel did not attend court on the said date.
  - f. That further following the directions on the Notice, the Applicant's Counsel proceeded to the registry to fix a fresh date but only to be informed that the appeal was mentioned before the Honourable Judge on the 25<sup>th</sup> October 2023 and was dismissed for non-attendance.
  - g. That the Applicant then promptly filed the application dated 14<sup>th</sup> November 2023 for reinstatement of the appeal.
  - h. That the said application was fixed for hearing on 7<sup>th</sup> February 2024 and mention on 17<sup>th</sup> April 2024 when the Hon. Judge was not sitting.
  - i. That shortly thereto after and on 15<sup>th</sup> April 2024 a formal Notice was published that the matters before the judge would be mentioned on stated dates and a Notice was served upon Applicant's advocates that appeal was for mention for directions on 4<sup>th</sup> June 2024 before the Deputy Registrar.
  - j. That the Counsel appeared before the Deputy Registrar on 4<sup>th</sup> June 2024 only to be informed that the appeal was dismissed on 14<sup>th</sup> May 2024.
3. The application is however opposed. In the replying affidavit of Phillip Mbulu sworn on 12<sup>th</sup> August 2023 it is deposed that even the application dated 14<sup>th</sup> November 2023 was dismissed for non-attendance on 14<sup>th</sup> May 2024; that the Appellant/Applicant's advocate on record has taken carelessness and laziness to a higher level by failing to attend court a record two times; that the Appellant/Applicant has sufficiently justified and demonstrated why this court should believe the riddles and exaggerated stories contained in the applications dated 26<sup>th</sup> June 2023 and that the affidavit in support is sworn by the Advocate which is an omission of his legal responsibility. Further that Section 1A (3) of the [Civil Procedure Act](#) places a duty upon an advocate to assist the court in furthering the overriding objective of the just and expeditious disposal of cases; that an advocate failing to prosecute a matter a record two times is against the provisions of Section 1A(3) [Civil Procedure Rules](#) and this court should not aid such conduct by allowing this application. It is also argued that the Appellant/Applicant having been indolent is not deserving of the exercise of the discretion of this court in his favour and this application should be dismissed for being a waste of judicial time.
  4. The learned Counsel for the parties canvassed the application dated 26<sup>th</sup> June 2023 by way of written submissions and I have carefully considered the application, the affidavits, the rival submissions, the cases cited and the law. In my view the application is merited.
  5. The record shows that upon the application being filed the registry fixed for hearing on 7<sup>th</sup> February 2024 but come that date the application was not heard but was instead fixed for mention on 17<sup>th</sup> April 2024. However, the record is silent on what transpired in court on 17<sup>th</sup> April 2024 as it seems that the court did not sit. Then on 14<sup>th</sup> May 2024, the court without the attendance of the parties, Advocates held that the order of 29<sup>th</sup> September 2023 remained in force and the matter was dismissed and the court file closed.
  6. I have a painstakingly gone through the record but I have not found anything that notified the parties that their application would be heard on 14<sup>th</sup> May 2024. The record itself does not have a minute to indicate that the matter would come up in court either for hearing or for mention on 14<sup>th</sup> May 2024. The only notice on record is one dated 16<sup>th</sup> May 2024 notifying Counsel for the Appellant/Applicant that the matter would be mentioned for directions on 4<sup>th</sup> June 2024 and indeed the record shows that Counsel appeared before the Deputy Registrar on 4<sup>th</sup> June 2024. It is trite that the discretion



of this court which is wide and unfettered ought not to be exercised in favour of an indolent party. The discretion is intended to avoid injustice, or hardship as a result of inadvertence or excusable mistake. See the case of *CMC Holdings limited v Nzioki* [2004] IKLR 173.

7. Clearly, given the circumstances of this case, the Appellant/Applicant stands to suffer injustice and hardship due to a mistake of neither himself nor his Counsel. The Respondent is not on the other hand likely to suffer any prejudice if the application is reinstated as he shall have an opportunity to be heard in opposition of the same.
8. The upshot is that the Notice of Motion dated 26<sup>th</sup> June 2024 is allowed and the application dated 14<sup>th</sup> November 2024 is reinstated. The costs of this application shall be borne by the Appellant/Applicant.  
Orders accordingly.

**RULING SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 26<sup>TH</sup> DAY OF JUNE, 2025.**

**E. N. MAINA**

**JUDGE**

In the presence of:

Mr. Mbulu for the Respondent

Ms Omari for the Appellant

Geoffrey - Court Assistant

