



REPUBLIC OF KENYA



KENYA LAW

THE NATIONAL COUNCIL FOR LAW REPORTING

Where Legal Information is Public Knowledge

**Amadiva v Getrude's Children's Hospital & 2 others (Civil Appeal
177 of 2019) [2025] KEHC 11850 (KLR) (Civ) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11850 (KLR)

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

CIVIL

CIVIL APPEAL 177 OF 2019

LP KASSAN, J

JULY 31, 2025

BETWEEN

ATSIAYA MIREMBE AMADIVA APPLICANT

AND

GETRUDE'S CHILDREN'S HOSPITAL 1ST RESPONDENT

PROF. WILLIAM MACHARIA 2ND RESPONDENT

DR. STEPHEN O. MUHUDHIA 3RD RESPONDENT

RULING

1. For determination is the motion dated 29.11.2023 by Atsiaya Mirembe Amadiva (hereinafter the Applicant) seeking *inter alia*;
 - a. That this honorable Court be pleased to set aside its orders of 07.10.2022 dismissing the Applicant's appeal for want of prosecution and do reinstate the same for hearing on merit as the Applicant has filed its record of appeal.
 - b. That the costs of this application be in the cause
2. The motion is expressed to be brought among others, pursuant to Section 3A & 63(e) of the *Civil Procedure Act* (CPA) and Order 12 Rule 2 & 7 of the *Civil Procedure Rules (CPR)* on grounds amplified in the supporting affidavit sworn by Ben Musundi dated 29.11.2023, who cites being counsel for the Applicant. The gist of his affidavit is the instant appeal was prematurely dismissed and or terminated on 07.10.2022 for want of prosecution. That the Applicant has since filed his record of appeal and is ready to have the appeal heard on merit whereas it took a long while before the lower Court proceedings were typed and availed towards preparation of the record of appeal. He further states that he did not receive any notice from the Court prior to dismissal of the appeal whereas it trite that notices usually



issue prior to dismissal of matter for want of prosecution. In conclusion he deposes that it is only fair and just that the dismissal order be set aside meanwhile no prejudice will be visited on Respondents if the motion is allowed.

3. Gertrude Children’s Hospital (hereafter the 1st Respondent) opposes the motion by way of a replying affidavit dated 24.01.2025 deposed by Aaron James Kinyanjui, counsel for the 1st Respondent. He begins by assailing the motion as being frivolous, vexatious and an abuse of the Court process. He deposes that this Court *suo moto* dismissed the appeal for want of prosecution and as such the Court is *functus officio* on the matter. He adds that the record will further confirm that the Applicant took no steps towards prosecution of the appeal since its filing in 2019. That the parties were duly served with the notice to show cause why the appeal should not be dismissed whereafter upon the Court being duly satisfied with service proceeded to dismiss the appeal. He further deposes that delay in obtaining proceedings cannot be attributed to failure to prosecute the appeal whereas no material has been evinced demonstrating efforts to obtain proceedings from the lower Court. He further takes issue with the Applicant’s assertion that a record of appeal has since been filed as the original record and Case Tracking System (CTS) reveals otherwise. He surmised by deposing that the Applicant has not offered any sufficient or plausible explanation to warrant the orders sought therefore the instant motion ought to be dismissed with costs.
4. Prof. William Macharia and Dr. Stephen O. Muhidhia (hereafter the 2nd & 3rd Respondent) oppose the motion by way of a replying affidavit dated 05/03/2025 deposed by Moses Barasa, a Legal Officer of Madison Insurance and insurer of the 2nd and 3rd Respondent. He deposes that the motion lacks merits for the sole reason that the appeal was dismissed due to the Applicant’s failure to respond to the notice to show cause. That the Applicant’s indolence is illustrated by the fact that the lower Court matter leading to the instant appeal was equally dismissed for want of prosecution. He maintains that delay in prosecuting the appeal has been inordinate and unexplained therefore the Applicant is guilty of laches. He concludes by deposing that the Court ought to be guided by Order 42 Rule 35(2) of the [CPR](#) in dismissing the instant motion with costs.
5. In rejoinder by way of a further affidavit dated 01.04.2025, the Applicant, reiterates that his counsel on record was never served with a notice to show cause why the appeal should not be dismissed. He further adds that the difficulty in prosecution of the appeal was further compounded by the Covid-19 Pandemic whereas upon counsel perusing the file realized that the appeal had been dismissed. He equally confirms that the record of appeal has yet to be filed however the same is ready for filing as the Court registry insisted that it would only receive the record of appeal upon reinstatement of the appeal. The lower Court proceedings were only received on 26.11.2023 however by then the appeal already stood dismissed through no fault of his own and or counsel on record. He assails the 2nd and 3rd Respondent’s argument concerning Order 42 Rule 35(2) of the [CPR](#) and asserts that this Court has jurisdiction, powers and discretion pursuant to Order 12 Rule 7 of the [CPR](#) to grant the motion as sought. In conclusion, he restates that no prejudice will be occasioned on the Respondents if the motion is allowed.
6. The motion was disposed of by way of written submissions, of which the Court has duly considered.
7. Having reviewed the affidavit material and adjunct submissions canvassed in respect of the motion, ex facie the Applicant’s motion invokes *inter alia* the provisions of Section 3A of the [CPA](#). Section 3A of the [CPA](#) which specifically 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 above provision was succinctly discussed by the Court of Appeal in [Rose Njoki King’au & Another v Shaba Trustees Limited & Another](#) [2018] eKLR and this requires no restatement. Notably, alongside the



above provision, the Applicant has equally invoked the provisions of Order 12 Rule 2 & 7 of the [CPR](#) whereas the 1st Respondent has relyingly addressed and submitted on the premise that the instant appeal was dismissed pursuant to Order 17 Rule 2(5) of the [CPR](#). Order 12 of the [CPR](#) concerns “hearing and consequence of non-attendance” whereas Order 17 of the [CPR](#) concerns “prosecution of suit”. A *prima facie* perusal of the record, it can be observed that the instant appeal was dismissed 07.10.2022 for want of prosecution pursuant to Order 42 Rule 35(2) of the [CPR](#). Consequently, Order 12 & 17 of the [CPR](#) have no bearing on the instant motion.

8. As to whether the Court is *functus officio* on the matter on accord of Order 42 Rule 35(2) of the [CPR](#), this Court summarily concurs with the rendition of Meoli, J. in [Tsimonjela v Infinity Autos Limited & another](#) [2024] KEHC 14825 (KLR) wherein while equally addressing the plea of *functus officio* in respect of an application for reinstatement of an appeal dismissed for want of prosecution, succinctly observed that where a Notice to Show cause towards dismissal of an appeal is heard ex parte in the absence of the Appellant and or a response thereto, a plea of *functus officio* cannot arise and or sustain. The Court therein made a distinction from its earlier decision in [Wafula & Another v Kamau](#) (Civil Appeal 393 of 2017) [2023] KEHC (KLR) wherein while correspondingly addressing a plea of *functus officio* in respect of an application for reinstatement of an appeal dismissed for want of prosecution, the Appellant was heard on the notice to show cause inter partes whereafter by a short ruling the Court observed that no good reason had been shown and proceeded to dismiss the appeal. As a result, the plea of *functus officio* was applicable, in the circumstance, as the only avenue to challenge this court’s determination rendered pursuant to Order 42 Rule 35(2) of the [CPR](#) is by way of an appeal, as a matter of right. Consequently, the plea as advanced by the 1st Respondent herein fails.
9. Moving on to the grain of the motion, in seeking to set aside this Court’s orders of 07.10.2022, the Applicant appropriately invokes Section 3A of the [CPA](#). The discretion to set aside proceedings and or orders by a Court is unfettered but a successful applicant is obligated to adduce material upon which the Court should exercise its discretion, or in other words, the factual basis for the exercise of the Court’s discretion in their favor. The discretion must also be exercised judicially and justly. In the case of [Shah v Mbogo & Another](#) [1967] EA 116 the rationale for the discretion was spelt out as follows: -

“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.”
10. The principles enunciated in [Shah v Mbogo \(supra\)](#) were amplified further by Platt JA in [Bouchard International \(Services\) Ltd vs. M’Mwereria](#) [1987] KLR 193. Although the Courts in the above cases were contemplating applications to set aside *ex parte* judgments, the principles pronounced therein apply with equal force in this matter, considering that the orders issued by this court on 07.10.2022 had the effect of conclusively determining the appeal by way of a dismissal order.
11. With the above in reserve, the record reveals that the appeal was filed in March of 2019. No record of appeal was filed whereas the appeal remained dormant for three (3) years until it was dismissed by Ongudi, J on 07.10.2022. Thereafter, there was no action until 30.11.2023 when the Applicant moved the court seeking to set aside the latter orders. The Applicant’s explanation through counsel and thereafter himself, on delay in prosecuting the appeal revolves around failure on the part of the Court to serve the Notice To Show Cause (NTSC), delay in receiving typed proceedings from the lower Court and the Covid-19 Pandemic.
12. On the question of service, the Court has taken the liberty of perusing the record, it can be gathered therefrom that on 03.08.2022, the Court issued NTSC for 07.10.2022 pursuant to Order 42 Rule



35(2) of the [CPR](#) to the respective counsel acting the matter. The return of service by the Court process server, one Jackson Kanyoro, reveals postage of the said notice on 26.08.2022, to the firm of Messrs. Magare Musundi & Co. Advocates through P.O Box xxx-001000, Messrs. Singh Gitau Advocates through P.O Box xxx-00100 and Messrs. Muthoga Gaturu & Co. Advocates through P.O Box xxx-00100. The 1st Respondent (Annexure AJK-2) and the 2nd and 3rd Respondent (Annexure BM-1) vide their respective affidavit material confirm service of the said notices. The Applicant and or counsel has equally not disputed the address as captured in the NTSC does belong to the firm of Messrs. Magare Musundi & Co. Advocates.

13. In any event, issues concerning delay in prosecution of the appeal occasioned by failure to receive typed proceedings and the Covid 19 Pandemic do not address the main concern towards setting aside of this Court's order rendered on 07.10.2022. The latter issues merely works at a disadvantage of the Applicant in my view. It is a matter of public record that as early as 2020 the Judiciary Leadership transitioned Court processes and proceedings to electronic and virtual platforms at the onset of the Covid-19 Pandemic therefore had the Applicant intended to prosecute the appeal there were available avenues. Secondly, with respect to the change of typed proceedings, while this Court is alive to the said challenge, it is notable that the Applicant's affidavit material is deficient of any evidence demonstrative of attempts to obtain typed proceedings. As is, the explanations and purported challenges ring hollow. However, the totality of the latter does not explain the Applicant's failure to attend Court on 07.10.2022 nor why he did not deflect the NTSC. It was not helpful for the Applicant and or counsel to rivet their depositions around peripheral issues while offering vague explanation for their omission leading up to dismissal of the appeal. Even despite the appeal being dismissed in October 2022 it was not until November 2023 that the Applicant moved his Court vide the instant motion this on the backdrop of the fact that since filing the appeal in 2019 there was no activity leading up to its dismissal in 2022.

14. The period of delay in prosecuting the appeal prior to dismissal and subsequent filing of the motion appears inordinate, and no satisfactory explanation has been given. It is trite that the period of delay as well as explanation thereof are key considerations in an application of this nature. A party must not be seen to presume on the Court's discretion. Makhandia JA in [Patrick Wanyonyi Khaemba v Teachers Service Commission, Board of Management, Kapletingi Mixed Day Secondary School & Francis Tanui](#) [2019] KECA 112 (KLR), emphasized this when he observed that -;

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained, hence a plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour.”

15. Additionally, Court actions ultimately belong to the litigants and not the advocates. Thus, it is the litigant's duty to pursue or otherwise take active steps to ensure the timely prosecution of his or her claim. This position was fortified by the Court of Appeal in [Habo Agencies Limited v Wilfred Odbiambo Musingo](#) [2015] KECA 987 (KLR) when it held that-;

“.....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.”

16. As correctly observed in *Shah -vs- Mbogo (supra)*, this Court's discretion “.....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.”. At a time when Courts are deluged with heavy caseloads, it is not available to any party to prosecute their cases at leisure. It is now almost six (6) years



since the appeal was filed and more than twenty (20) years since the lower Court matter was filed. Parties and counsel are duty bound to co-operate with the Court in the furtherance of the overriding objective to facilitate the just, expeditious, proportionate, and affordable resolution of disputes in accordance with Section 1A and 1B of the CPA. While the constitutional right of the Applicant to be heard on the merits of his appeal is undisputable, it is not absolute and must be balanced against the Respondents' equal right to have the appeal to which they have been dragged determined expeditiously. The Respondents' apprehension of further prejudice if the motion were to be granted does not seem idle, in the circumstances of this case.

17. Considering all the foregoing, the Court is of the firm view that the justice of the matter lies in dismissing the Applicant's motion dated 29.11.2023 with no orders as to costs.

Order Accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 31ST DAY OF JULY 2025

LINUS P. KASSAN

JUDGE

In the presence of:-

Musundi for Applicant

Mureithi holding brief Mugambi for 1st, 2nd and 3rd Respondents

Carol – Court Assistant

