



REPUBLIC OF KENYA



**Birundu & another v Republic (Anti-Corruption and Economic Crimes Appeal E006 of 2022)
[2025] KEHC 11239 (KLR) (Anti-Corruption and Economic Crimes) (30 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11239 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES APPEAL E006 OF 2022**

LM NJUGUNA, J

JULY 30, 2025

BETWEEN

CHARLES ONYAMBU BIRUNDU 1ST APPELLANT

KENNEDY BEGI ONKOBA 2ND APPELLANT

AND

THE REPUBLIC RESPONDENT

RULING

1. The applicant herein has moved this court by way of the Notice of Motion dated the 30th May, 2025 brought under Order 10 Rule 11, and Order 9 Rule 9 of the Civil Procedure Rules, Articles 50 and 159(d) of *the Constitution*, and all other enabling provisions of the law. The applicant is seeking the following Orders;
 1. Spent.
 2. That leave be granted to the firm of NGARAMBA NJOROGE & CO. ADVOCATES to enter appearance for the Appellants.
 3. That this Honourable Court be pleased to set aside the Order made dismissing HCACECA E006 OF 2022 for want of prosecution on 9th November 2022.
 4. That the said appeal be reinstated and admitted for hearing on merit.
 5. That costs of this application be provided for.
2. The application is based on the grounds set out on the body of the same, and it is supported by the annexed affidavit sworn by the 2nd applicant, on the 30th May, 2025.



3. It is the applicants' case that they were among accused persons in the Chief Magistrate Anti-Corruption Case No. 20 of 2018 in which they were convicted, and following the said conviction and sentence, they filed an appeal before this court being criminal appeal No. E006 of 2022.
4. The said appeal was on the 9th November, 2022, dismissed for want of prosecution by Justice E. Maina. They aver that they were not aware that the appeal was dismissed until the month of November, 2024 when the 2nd applicant attempted to retrieve fine payments.
5. They have contended that failure to attend court on the date that the appeal was dismissed was not occasioned by any fault on their part and that the appeal has high chances of success as evidenced by the fact that the co-accused in the same trial were successful in their appeals in HCACECA E007 of 2022 and HCACECA E008 of 2022. They have urged the court to set aside the dismissal order in the interest of justice.
6. The respondent filed Grounds of opposition dated the 8th July 2025 indicating that, it would oppose the application on the following grounds;
 1. The applicants' application is an abuse of the court process and as such, it should be disallowed.
 2. The applicants' have not been desirous of prosecuting the appeal considering the time that has lapsed since the appeal was dismissed for want of prosecution.
7. The application was disposed of by way of written submissions.

Applicants' Submissions

8. The applicants submitted that the dismissal of the appeal was due to their former advocate's inaction in failing to attend court or take steps to prosecute the appeal. That they were not aware of the dismissal until much later in November, 2024 nearly two years after the fact, and they were not served with any notice of intention to dismiss the appeal or hearing notice and that a litigant should not be punished for the mistakes of counsel and relied on the case of *Sije & 2 others vs. Kiplagat (2025) KEHC 8336 (KLR)* in which the court reinstated the appeal and stated that the mistake of a counsel should not bar a litigant from the seat of justice.
9. On whether the applicants have shown sufficient cause to warrant reinstatement, the applicants submitted on the two-prong tests as espoused in the case of *Ivita vs. Kyumba*. Reference was also made to the case of *Kokwo vs. Akokor ELC appeal case No. E 016 of 2022 (2023) KEEL 20783 (KLR)*; on prolonged and inexcusable delay and whether justice can still be served notwithstanding the delay. In that regard, they submitted that they acted without delay upon learning of the dismissal. That they placed full reliance on their advocates and their expertise to guide them in the ongoing appeal, and they were informed that the appeal was finalized and judgment was delivered in their favour.
10. It was their further submission that should the court find the delay as inordinate, it still has discretion to allow the application and reinstate the appeal in order to do substantive justice in accordance with Article 159 of *the Constitution*.
11. On whether the appeal has high chances of success, the court was referred to Criminal appeals E007 of 2022 and E008 of 2022 which are related to the applicants' appeal herein and which the court gave favourable decisions in.
12. On the prejudice to be suffered by the respondent, if any, the applicants contend that there is no demonstrable prejudice that the respondent will suffer if the appeal is reinstated, but to the contrary,



the applicants stand to bear the consequences of a criminal conviction without the benefit of an appellate hearing and the criminal records will affect them the rest of their lives.

Respondent's Submissions

13. The respondent has submitted that the applicants have not demonstrated satisfactory and plausible explanation for failure to prosecute the appeal and to take prompt action after the dismissal of the appeal. That the applicants alluded to the fact that they discovered the dismissal of the appeal in November, 2024 yet they waited until 30th May, 2025 to file the current application. That there was laxity on the part of the applicants and their advocates in prosecuting the appeal and no reason has been given why neither the applicants nor their advocate attended court when the appeal was dismissed.
14. It was further submitted that the applicants have sought the reinstatement of the appeal after discovering that their co-accused appeals Nos E007 of 2022 and E008 of 2022 were successful. That they cannot revive a matter by merely citing an acquittal of co-accused as each appeal is determined on its own merits based on the conduct of each accused person and the evidence presented against them, and hence the acquittal of the co-accused does not entitle the acquittal of the applicants herein.
15. In addition, it was submitted that the co-accused prosecuted their appeals diligently and earned a decision on merit and therefore, the applicants cannot benefit from proceedings they chose to abandon. That the application is therefore a total abuse of the court process and does not uphold the precincts of interest of justice. That reinstating the appeal at this stage undermines judicial finality and clogs the justice system, and that there has to be finality of litigation and efficient use of the judicial resources.

Analysis And Determination

16. The court has considered the application and the supporting affidavit, the response by the respondent and the submissions by the parties herein.
17. The applicants have moved this court with an application to set aside the order issued on the 9th November, 2022 dismissing the applicant's appeal for want of prosecution. The applicants filed ACEC Appeal No. E006 of 2022, on the 5th July 2022. The matter came up in court on the 9th November, 2022 and on the said date, neither the applicants nor their advocate attended court despite having been served with the hearing notices for that day. The court after having been satisfied that they had been served made an order dismissing the appeal.
18. From that date, the applicants did take any step in the appeal until the 30th May, 2025 when they filed the present application to reinstate the appeal. They contend that their former advocate failed to attend court or prosecute the appeal with due diligence and they were all along not aware of the dismissal order until November, 2024 and have asked the court not to visit the mistake of their advocate upon them. They have averred that their appeal has merits as the appeals by their co-accused were successful.
19. The guiding principles in dealing with an application for reinstatement of an appeal that has been dismissed for want of prosecution were espoused by the court in the case of *Ivita vs. Kyumbu* which are;
 - a. The length of the delay
 - b. Whether the delay is excusable
 - c. The prejudice to be suffered by the respondent.
20. As earlier stated in this ruling, the appeal herein was dismissed on the 9th November, 2022 and the application herein was filed on the 30th May, 2025 which is a period of two years and seven (7) months



which is a long period of time. The counsel for the applicants has not sworn an affidavit to explain why he failed to attend court on that day, yet, he had been notified of the hearing date via his know email address.

21. The applicants herein aver that they only got to learn of the dismissal order in the month of November, 2024 and that they are still desirous of prosecuting the appeal. Going by that assertion, the court notes that it took the applicants seven (7) months to move the court with an application for reinstatement. Though the applicants have blamed their advocate for the delay in prosecuting the appeal since it was filed until it was dismissed, they are very silent and have failed to explain the delay between the time they discovered of the dismissal and the filing of the application herein.
22. As stated by the respondents, the application herein was an afterthought and the applicants only sought to reinstate their appeal after discovering that their co-accused's appeals were successful. The court concurs with that submission by the respondent. It is unconscionable for the applicants to argue that their appeal has a high chance of success simply because their co-accused were successful in their appeals. It is trite law that the success of an appeal is determined by the law and the evidence and each case is decided on its own merits and hence, the acquittal of the co-accused does not automatically entitle the acquittal of the applicants herein.
23. I find that the applicants have not demonstrated sufficient cause to justify reinstatement of the appeal. The delay both in prosecuting the appeal and in filing the present application are inordinate and not satisfactorily explained. Reinstating the appeal at this stage undermines judicial finality and clogs the justice system, and there has to be finality of litigation and efficient use of judicial time and resources available.
24. The application has no merits and it is hereby dismissed
25. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 30TH JULY 2025.

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L.M. NJUGUNA

JUDGE

In the presence of:-

Miss Nafula holding brief for Mr. Ngaramba for the applicant

No appearance for the Respondent

Court Assistant – Wilson

