



REPUBLIC OF KENYA



KENYA LAW
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**Kulevih v Kemboi (Civil Appeal E041 of 2023)
[2025] KEHC 12358 (KLR) (3 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12358 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E041 OF 2023
RN NYAKUNDI, J
SEPTEMBER 3, 2025**

BETWEEN

KADE KULEVIH APPELLANT

AND

HASSAN KIPTOO KEMBOI RESPONDENT

RULING

1. Before me for determination is a Notice of Motion dated 1st August 2025 seeking the following orders:
 - a. That the Honorable Court be pleased to extend stay of execution order pending hearing and determination of the appeal pending hearing and determination of the application herein and the HCCA/E041 of 2023.
 - b. That the Honorable Court be pleased to review, set aside and vary its ruling/order issued on 25th June 2025.
 - c. That the Honorable Court be pleased to reinstate HCCA/E041 of 2021 and it be scheduled for hearing inter parties.
 - d. That the cost of this application be in the cause.Which application is anchored on the following grounds and supported by affidavit of Harry Stephen Arunda:
 - a. That the appellant nor his advocate had not received a Notice to show Cause from the Deputy Registrar or any person whatsoever.
 - b. That the appeal was scheduled on 25th June 2025 for first mention for admission of the appeal and not inter partes hearing.



- c. That on 25th June 2025 when the appeal came up for first mention the appellant's advocate could not access the office for because of the June 25th Gen-z protests having its office located the International Life House in CBD-Nairobi which was the epicenter of the protests thus caused inconvenience.
 - d. That the appeal is viable and arguable with a probability of success and the appellant is bound to suffer irreparable damage should the application be declined.
 - e. That dismissal of the appeal suo moto vide ruling dated 25th June 2025 when it was scheduled for mention stifles the appellant's right fair hearing and
 - f. That the respondent will not be prejudiced whatsoever should the appeal be heard, and that the applicant is bound to suffer irreparable damage if the application is not heard.
 - g. That it is fair and just to reinstate the appeal and grant leave for inter-partes hearing.
 - h. That the appellant was notified of the ruling on the 25th June 2025 through an SMS thus the application herein is brought without undue delay.
2. Although this application has not been responded to the record is very clear that the record of appeal dated 22nd May 2024 had been received by the Registry by further action from this Court. It is also clear from the record that on 25th day of June 2025 this Court pronounced itself as follows:

“This matter has been pending without action for over one (1) year. Notice to show cause has been issued to the parties herein to activate this matter and parties having failed to take action to further prosecute this matter, this matter is hereby dismissed under Order 17 Rule 2 of the Civil Procedure Code as read with Section 1(A), 1(B) and 3(A) of the Civil Procedure Act. Matter marked as closed and the same shall not be activated without special leave of the court.”

3. This order seems to have necessitated the Certificate of Urgency and Notice of Motion dated 1st August 2025.

Decision

4. The Court has a wide discretion under Order 9B, Rule 10 to set aside judgment and there are no limits and restrictions on the discretion of a Judge save for the fact that if the judgment is varied, it must be done on terms that are just. Jurisdiction to vary being of a judicial discretion must be exercised judicially and this is dependent on circumstances of each particular case. Tests for setting aside judgments are:
 - (1) Defence on the merits;
 - (2) Prejudice; and
 - (3) Explanation for the delay (See *Shanzu Investment Ltd v. The Commissioner of Lands*, Civil Appeal Number 100 of 1993).
5. In law, the discretion that a Court of law has in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle. In the instant case, the learned trial Magistrate did not exercise her discretion properly when she failed to address herself as to whether the appellant's



unchallenged allegation that its Counsel did not inform it of the hearing date for the hearing that took place ex parte and hence it would appear was true and not if true, the effect of the same on the ex parte judgment was entered as a result of the non-appearance of the appellant and on the entire suit. The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned Magistrate did here. In doing so, she drove the appellant out of the seat of justice empty handed when it had what might have well amounted to an excusable mistake visited upon the appellant by its advocate. (See *Shah v Mbogo and Another* [1967] EA; *Mbogo and Another v Shah* [1968] EA 93) & Odunga's Digest on Civil Case Law and Procedure pg. 7099 paragraph (d).

6. In the present case, this Court has reviewed the entire record subsequent to the dismissal of the appeal for want of prosecution on 25th day of June 2025 whereas the record of appeal had already been filed on 22nd May 2024. The facts taken together justify this Court to exercise discretion to set aside the dismissal order to pave way for the appeal to be heard on the merits. Accordingly, it is ordered that the enlargement of time be granted to the parties to comply with the following orders pursuant to Section 1A, 1B and 3A of the *Civil Procedure Act* as read with Order 12 Rule 7, Order 42 Rule 21 and Order 45 Rule 1 of the Civil Procedure Rules. Thus:
- a. That the appeal be and is hereby admitted for hearing.
 - b. The appeal be canvassed by way of written submissions as earlier ordered by this court on 4th August 2025.
 - c. That the appellant do file submissions and have the same served upon the respondent in readiness for highlighting on 17th September 2025.
 - d. That there be enlargement of time to extend time of execution pending the hearing and determination of the appeal
 - e. The costs of this application and directions abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 3RD DAY OF SEPTEMBER 2025.

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R. NYAKUNDI
JUDGE

