Mbeche (Suing on her Behalf and as a Representative of the Estate of Araka Rachier Mbeche) v Kihumba (Civil Appeal 24 of 2018) [2025] KECA 2204 (KLR) (10 December 2025) (Decision)

Neutral citation: [2025] KECA 2204 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 24 OF 2018

MA WARSAME, JM MATIVO & PM GACHOKA, JJA

DECEMBER 10, 2025

BETWEEN

ROSE ARAKA MBECHE (SUING ON HER BEHALF AND AS A REPRESENTATIVE OF THE ESTATE OF ARAKA RACHIER MBECHE) ..... APPELLANT

AND

DAVID MATHAI KIHUMBA ..... RESPONDENT

(Being an application from the judgment of this Court (Musinga (P), Okwengu & Asike, JJA) dated 7th October 2022 in Nairobi Civil Appeal No. 55 of 2018)

DECISION

1. The background to the application dated 25th September 2025, the subject of this ruling is that on 16th September 2025, this Court dismissed the applicant's application dated 18th November 2022 under Rule 58 (1) of the Court of Appeal Rules for non-appearance and for failing to file written submissions as per the Court's directions. For the sake of brevity, the said order reads as follows:

> "When the notice of motion was called out for hearing, none of the parties were present. The Court also noted that none of the parties have filed submissions and accordingly the application dated 18th November 2022 is hereby dismissed under Rule 58 (1) of the Court of Appeal Rules, 2022."

2. In the said application the applicant was seeking an order for certification under Article 163 (4) (b) of the Constitution as read with sections 15 (1) & 15 B Supreme Court Act. When the application was called for hearing on 16th September 2024, both parties were absent despite having been duly served with a hearing notice. Therefore, the Court dismissed the application as aforesaid.

3. Vide application dated 16th September 2025 the applicant moved this Court under section 3A & 3B of the Appellate Jurisdiction Act Cap 9 Laws of Kenya and Rules 58 (2) & (3) of the Court of Appeal Rules, 2022 and applied for restoration of the dismissed application. The explanation for the failure to attend Court is set out in the affidavit of Wilfred Lusi, learned counsel for the applicant, sworn on 16th September 2024, as follows:

   (a) the inadvertent non-appearance on behalf of the applicant was caused by technical difficulties that hindered counsel's ability to join the virtual Court session;

   (b) the applicant has always remained keen to urge her application on merit since it raises substantive legal questions posed to the Supreme Court;

   (c) the instant application had been brought without any delay;

   (d) the applicant would be greatly prejudiced since she waited for two years to prosecute the subject application;

   (e) on the other hand no prejudice would be suffered by the respondent since he never filed a response to the dismissed motion;

   (e) the applicant sought directions on the application vide letter dated 10th January 2024 and served the court's directions upon the respondent on 12th January 2024. Therefore, the applicant was not indolent.

4. The respondent opposed the application vide his replying affidavit sworn on 7th October 2024. The substance of the objection is:

   (a) the dismissed application stood unprosecuted and with no activity since its filing on 18th November 2022;

   (b) the dismissed application had abated under the operation of law as provided by Rule 53 of this Court's rules which stipulates that if no application is made under sub-rule (2) within twelve months by the applicant or the respondent, the application shall abate;

   (c) the applicant has admitted to moving the court vide letter dated 10th January 2024 two years after filing the dismissed application;

   (d) the filing of submissions on 15th September 2024 was an afterthought and an attempt to show that the applicant had not been indolent in prosecuting the application dated 18th September 2022;

   (e) the dismissed application does not touch on public importance but is merely a land dispute that has already been determined and the respondent found to be a bona fide purchaser for value over the suit property No. Nakuru Municipality 15/169.

5. When the matter came up for hearing, learned counsel, Mr. Lusi was present for the applicant. There was no appearance for the respondent.

6. We have carefully considered this application. Rule 58 of the Court of Appeal Rule, 2022 primarily governs the reinstatement of applications that have been dismissed for non-attendance. The key requirements are demonstrating a sufficient cause for the failure to attend court and making the application within a specified timeframe. The said Rule reads:

   " 58. Procedure on non- appearance

1. If, on any day fixed for the hearing of an application, the applicant does not appear or comply with directions, the application may be dismissed, unless the Court sees fit to adjourn the hearing:

   Provided that the Court may order that an application may be heard by way of written submissions and where parties have filed written submissions, the court shall consider the submissions.

2. If the applicant appears or complies and the respondent fails to appear or comply, the application shall proceed in the absence of the respondent, unless the Court sees fit to adjourn the hearing.

3. Where an application has been dismissed or allowed under sub-rule (2), the party in whose absence the application was determined may apply to the Court to restore the application for hearing or to re- hear it, as the case may be, if that party can show that he or she was prevented by any sufficient cause from appearing when the application was called on for hearing.

4. An application made under sub rule (3) shall be made within thirty days of the decision of the Court, or in the case of a party who would have been served with notice of the hearing but was not so served, within thirty days after that party's first hearing of that decision."

5. The decision to reinstate or not to reinstate an application dismissed for non-attendance is an exercise of discretion (see Imbochi vs. Leopard Beach Resort & Spa [2024] KECA 726 (KLR)). The applicant must be deserving of the exercise of the discretion in his favour. Did the applicant present sufficient cause for the failure to attend Court on the appointed date?

6. What constitutes sufficient cause depends on the circumstances of each case. But in our perception, sufficient cause connotes an explanation of such quality or value as would justify setting aside the order of dismissal; a reason that is adequate in law, showing why the applicant's request to set aside the order of dismissal should be granted. (See Mahadi Investments Ltd vs. Kenya Railways Corporation & Another [2025] KECA 2024 (KLR) para 11).

7. The applicant urged and contended that it patiently waited for its day in Court, including waiting for a bench of the Court in Nakuru and availability of dates coupled with consistent follow up at the registry trying to secure a hearing date. Therefore, the non-appearance was inadvertently caused by technological challenges which could not be obviated in time to ensure the applicant's appearance. To buttress his submission, Mr. Lusi cited the Madan, J.A (as he then was) in Chege Muraya vs. Rehema Noor & Another [2017] eKLR where the court held that the door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which are politely referred to as erring in their interpretation of laws.

8. Responding to the question paused by the Court as to why the applicant did not file submission in accordance with the directions by the Deputy Registrar of the Court, Mr. Lusi maintained that the late filing of submission dated and filed on 15th September 2024 was because the application was not responded to and they did not want to pre-empt the respondent's response and to avoid the need to file further documents.

9. It is noteworthy that the directions on the dispensing with the application dated 18th November 2022 were issued on 11th January 2024. However, the applicant waited until the eve of the hearing of the motion to file its written submissions dated 15th September 2024 which was contrary to this Court's direction. It is also noteworthy that by the time the applicant's application came up for hearing on 16th September 2024, the applicant's submissions were not on record and the applicant was also absent. Therefore, the court considered the age of the application, and resolved to dismissed the application dated 18th November 2022 in accordance with Rule 58 (1) of the Court of Appeal Rules, 2022. It's noteworthy that under the practice directions governing online hearings, parties are required to log in by 8.30 am to test their audio and cameras. This is to enable parties to have adequate time to contact the registry in case of a challenge. The court started the hearings at 9.00 am and save for a blanket statement that the advocate experienced technical challenges, no explanation has been given as to what efforts the applicant or his advocate took before and after the court started the hearings.

10. From the foregoing, we find the applicant's conduct is laced with laches since nothing prevented the applicant from filing submissions the moment directions on compliance were issued on 11th January 2024.

11. This Court in Mae Properties Limited vs. Joseph Kibe & Another [2017] KECA 238 (KLR) stated;

> " We do so alive to the need for expedition in the pursuit of justice. We frown upon indolence and dilatoriness. We still hold the view we expressed in Martin Kabaya vs. David Mungania Kiambi Nyeri Civil Application no 12 of 2015; "The need for judicial proceedings to be concluded in a timely fashion is too plain for argument. It is a desideratum of a rational society. A justice that is too long in coming, encumbered by sloth or inattention on the part of those who seek it, is a pain and a bother. An expensive one at that. A justice that comes too late in the day is a tepid drop on perched lips that quenches no thirst. A justice delayed is a justice denied. Litigants, especially those summoned by plaints, petitions, applications or appeals are vexed when those who summoned them hence go to sleep yet the proceedings and processes they engendered remain alive but comatose, a burden to the mind and to the pocket. And they form part of the dead weight the Judiciary bears as backlog."

12. Having considered the applicant's conduct in prosecuting of the application dated 18th November 2022, we are not persuaded that the applicant has demonstrated sufficient cause for the failure to attend Court on the appointed date and the failure to file submissions in compliance with the Court's direction issued on 11th January 2024. Accordingly, we find that the applicant is underserving the exercise of this Court's discretion in her favour.

13. The upshot is that the applicant's notice of motion dated 25th September 2024 is hereby dismissed with no orders as to costs.

DATED AND DELIVERED AT NAKURU THIS 10TH DAY OF DECEMBER, 2025.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed.

DEPUTY REGISTRAR.