



**Republic v Senior Land Registrar of Titles, Mombasa; Langat (Exparte) (Judicial Review Miscellaneous Application 1 of 2022) [2023] KEHC 3303 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 3303 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**  
**JUDICIAL REVIEW MISCELLANEOUS APPLICATION 1 OF 2022**  
**LL NAIKUNI, J**  
**MARCH 28, 2023**  
**(FORMERLY JR. MISC. APPLICATION 83 OF 2010)**  
**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW**  
**ORDERS OF PROHIBITION AND**  
**CERTIORARI**  
**AND**  
**IN THE MATTER OF: REVOCATION OF TITLE DEEDS BY THE**  
**SENIOR REGISTRAR OF TITLES,**  
**MOMBASA**  
**BETWEEN**  
**REPUBLIC ..... APPLICANT**  
**AND**  
**THE SENIOR LAND REGISTRAR OF TITLES, MOMBASA ..... RESPONDENT**  
**AND**  
**PAUL KIPKETER LANGAT ..... EXPARTE**  
**RULING**

**I. Introduction**

1. The *ex parte* applicant herein, Peter Kipketer Langat moved this honorable court by filing the notice of motion application dated October 13, 2020 but filed in court on September 15, 2021 thereof. It was brought under a certificate of urgency pursuant to the provisions of order 12 rule 7, order 51 rule 1 of



the Civil Procedure Rules, 2010, article 159 (2) of the Constitution of Kenya, 2010, sections 1A, 1B & 3A of the Civil Procedure Act, cap 21 of the Laws of Kenya.

## II. The Ex - Parte Applicant's case

2. The ex -parte applicant herein sought for the following orders:-
  - a. Spent.
  - b. The honorable court be pleased to set aside the order made on September 25, 2017 dismissing the applicant's application dated August 18, 2010 for want of prosecution.
  - c. The application dated August 18, 2010 be reinstated for hearing on merits.
  - d. Costs of this application be provided for.
  
3. The application by the ex – parte applicant herein was premised on the grounds, testimonial facts and averments under the 11 paragraphed supporting affidavit of Andrew Wandabwa, the applicant's advocate on record herein. He averred that:
  - a. He was the advocate of High Court having the conduct of these proceedings on behalf of the ex – parte applicant herein and hence competent and duly authorized to swear the said affidavit thereof in support of the present application seeking to reinstate the application dated August 18, 2010.
  - b. On the February 11, 2011, this suit came up ideally for purposes of the delivery of judgement on the ex - parte applicant's application dated August 18, 2010 by honorable Justice Ibrahim (As he then was). However, the honorable judge *vide* a short direction/ruling indicated that when preparing the judgement, he noted that the respondent had not participated despite having been served with court process and further, that the matter raised constitutional issues which had far reaching ramifications.
  - c. Accordingly, he deferred the delivery of the said judgement in abeyance and directed that the respondent be served again through the civil section of the offices of the Attorney General so that they could appear in court.<sup>6</sup>
  - d. Thereafter, on September 25, 2017, the suit came up before the honorable court for hearing of a notice to show cause dated August 15, 2017. Unfortunately, not being aware of this development, there was no attendance on the part of the advocate for the ex – parte applicant. As such, the court proceeded to dismiss the suit for want of prosecution.
  - e. The deponent informed court that their colleague, Ms Kithi Advocate who was based at Mombasa had been handling the matter on law firm's behalf and regularly kept updating them on the progress of the suit. However, there reached a point when there was a communication breakdown between the advocate's office and that of Ms Kithi Advocate.
  - f. They followed up on the matter and upon perusal of the court file, noted that the same had long been dismissed for want of prosecution.
  - g. The deponent emphatically stated that the notice to show cause had never at any point been served upon them and/or the ex parte applicant and they had no record of the same. He annexed a copy of the said notice to show cause and marked it as "AW – 1".



- h. Upon perusal of the said notice to show cause, it occurred to the deponent that it was sent by way of registered mail but got lost in the way because the address of service did not indicate the postal code. As such, it may have ended up in any of the post offices within Nairobi.
- i. The non - attendance by the deponent was therefore not intentional. Thus, it was in the interest of justice that the suit be reinstated and the pending judgment being delivered.
- j. The dismissal for want of prosecution was ill informed, reason being that the applicant had already been heard and matter was pending judgment.

### III. The Respondent's Case

- 4. On October 21, 2021, the respondent herein, "the Senior Land Registrar of Titles, Mombasa", filed a grounds of opposition dated October 18, 2021 on the following six (6) grounds *inter alia*:-
  - a. That the application was mischievous and legally untenable as *ex parte* applicant had not demonstrated any steps he took in fixing the matter for hearing prior to the dismissal. Hence he was guilty of laches.
  - b. That the application had merely been brought as an afterthought and it offended the provision of order 17 rule 2 (1) of the Civil Procedure Rules, 2010.
  - c. That the court satisfied itself that the suit was inactive thus served the requisite notice under the provision of order 17 rule 2 of the Civil Procedure Rules, 2010.
  - d. That after dismissal it took the ex - parte applicant nearly three (3) years to move court in the current application.
  - e. That the inordinate delay by the applicant had not been satisfactorily explained.
  - f. That equity aided the vigilant and not the indolent.
  - g. It is in the interest of justice that this application be dismissed with costs to the respondents.

### IV. Submissions

- 5. On October 18, 2022 while all the parties were present in court, they were directed to have the notice of motion application dated October 13, 2022 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and a ruling date was reserved on notice by court accordingly.

#### A. The Written Submissions by the Ex - Parte Applicant

- 6. On the November 1, 2021, the learned counsel for the ex - parte applicant through the law firm of Messrs Wandabwa Advocates filed their written submissions dated October 29, 2021. Mr Wandabwa Advocate commenced the submission by providing the court with a full chronological background of the matter from the very onset. He stated the application before the honorable court dated October 13, 2021 seeks the above stated orders. He stated that the applicant relied fully on the grounds on the face of the application and the affidavit in support of the application. Pursuant upon being served he noted that the respondent filed grounds in opposition to the application in which it posited already stated.
- 7. Further, on the factual background, the counsel averred that:-
  - a. The applicant approached this honourable court *vide* an application filed under certificate of urgency dated July 29, 2010 seeking judicial review orders of certiorari and prohibition.



- b. On the July 30, 2010, Justice J. B Ojwang (as he then was), in presence of counsel for the applicant was pleased to grant leave to the applicant to institute judicial review proceedings and directed that the substantive application be served on the respondent and a hearing date was fixed.
  - c. As a result, the substantive application dated August 18, 2010 came up for hearing on the September 1, 2010. The respondent despite having been served with the application and the hearing date, did not show up. Accordingly, the hearing was deferred to the September 9, 2010.
  - d. Again, on the aforesaid date, the counsel for the respondent was absent. The matter was adjourned on account of non-attendance of the counsel for the respondent. The court proceeded to fix another hearing date.
  - e. On the next hearing date, the respondent was absent despite being served with the hearing date. In view of this, the counsel for the applicant implored on this honourable court to allow the application as prayed on account of the perennial absenteeism by the respondent.
  - f. The court obliged and fixed the matter for the delivery of judgment.
  - g. On the day scheduled for judgment, justice Ibrahim (as he then was) indicated that he acknowledged that the respondent had been duly served with court process but failed to enter an appearance. He went further and indicated that as he prepared the judgment, he formed the view that his decision would have huge ramifications which would set a precedent.
  - h. Accordingly, he invoked the provisions of section 1A and 1B of the *Civil Procedure Act*, cap 21 and directed that the respondent be served again since their participation was very crucial.
  - i. On the September 25, 2017, the matter was dismissed for want of prosecution.
8. It was the submission by the learned counsel that the law on dismissal of suit for want of prosecution had fallen under judicial scrutiny on a number of occasions. He referred court to the decision of: “*Naftali Opondo Onyango v National Bank of Kenya* [2005] eKLR”, where the court reiterated the burden of proof that a defendant seeking a dismissal for want of prosecution ought to meet. Quoting Salmon, LJ. in case of “*Allan v Sir Alfred Mc Alphine and Sons Limited* (1968)1 ALL ER 543, F. Azangalala, J stated that:

The defendant must show:

- a. That there has been inordinate delay... What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case but it should not be too difficult to recognize inordinate delay when it occurs.
- b. That this inordinate delay is inexcusable. As a rule, until a credible excuse is made out the natural inference would be that it is inexcusable.
- c. That the defendants are likely to be seriously prejudiced by the delay. This may prejudice at the trial of issues between themselves and the plaintiff or between each other or between themselves and third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay the greater the likelihood of prejudice at trial.



9. For instance, Chesoni J, as he then was, applied the principles in the case of ”*Ivita v Kyumbu* (1984) KLR 441 when he observed that:-

The test applied by the courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is whether justice can be done despite the delay. Thus, even if the delay is prolonged if the court is satisfied with the plaintiff’s excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter in the discretion of the court.

10. Based on these cited cases, and with regard to the instant case, the learned counsel set out the following issues for its determination:

- a. Whether the ex - parte applicant was served with the notice to show cause.
- b. Whether there was delay in prosecuting the suit and whether this delay was inordinate and inexcusable.
- c. Whether the respondent was likely to be prejudiced if the application was allowed.

11. Firstly, on the issue of the service of the notice to show cause. The learned counsel was of the view that neither the applicant nor the advocates were ever served with the notice to show cause. Therefore, the applicant was therefore never represented on the date when the notice to show cause came up for hearing and only learnt of the dismissal when the advocates on record managed to locate and peruse the court file. A look at the notice to show cause, it showed that it was sent by way of registered mail but got lost in the way because the address of service did not indicate the postal code. As such, the notice may have ended up in any of the post offices within Nairobi. The learned counsel also held as a fact that the advocates on record for the ex-parte were situated in Nairobi, therefore, if the notice was couriered or delivered by hand, the same would be marked as received by the law firm. But as such, it was clear from the court record that there was no evidence of receipt of the notice.

12. Accordingly, the learned counsel submitted that having not been served with the notice to show cause, the applicant was condemned unheard and this was in breach of his right to be heard. To buttress on this point he cited the case of:- “*Richard Nchapi Leiyagu v IEBC & 2 others*, civil appeal No 18 of 2013 (unreported), where the court stated as follows:-

“The right to be heard has always been a well - protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent power to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality”

13. Similarly, the learned counsel submitted that it was impossible to adduce evidence to prove a negative and the courts have had the following to say in the case of:- ”*Francis Maina Njogu v Nicolas Kiragu Ngacha* [2017] eKLR:-

“..... ..it would be impossible to expect him to produce evidence to prove the negative. In the Ugandan Case of *J.K.Patel v Spear Motors Ltd* SCCA No 4 of 1991 cited by Odunga J in *Republic v District Commissioner Machakos* J.R Misc application No 304 of 2013, the court held:



“The proving of a negative task is always difficult and often impossible, and would be a most exceptional burden to impose upon a litigant”

14. The learned counsel submitted that having been denied the opportunity to respond to the notice, the order for dismissal ought to be set aside and the suit reinstated.
15. Secondly, on the issue of inordinate delay, the learned counsel stated and as highlighted in paragraph 4 hereinabove, that the ex \_ parte applicant made diligent efforts to prosecute the suit. According to him, it was the respondent on the other hand who failed to enter appearance despite having been served severally with court process. In fact, from the records judgment was scheduled to be delivered in this matter but this could not proceed on account of the effect of the orders that were to be granted.
16. To the learned counsel, in fact the respondent entered appearance in this matter ten (10) years after the suit was instituted. To him, it went without saying that the respondent could not claim that it was the ex parte applicant who delayed in prosecuting a suit that they had not participated in despite being duly served. No prejudice would be suffered by the respondent if the matter was reinstated. Further, the court record would show that the applicant never reeked of a party who slept on their laurels as he diligently attended court and served his counterparty. The counsel argued that what amounted to inordinate delay was discussed by the court in the case of:- ”Mwangi S Kimenyi v Attorney General & another (2014) eKLR” where it was held that:-

“There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case, the explanation given for the delay; and so on and so forth” nevertheless, inordinate delay should not be difficult to ascertain once it occurs, the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable....”

17. He cited the case:- ”Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers v Talai Secondary School (2016) eKLR observed as follows:-

“Inordinate delay would be a matter to be determined on the peculiar facts or circumstances of each case, depending on the circumstances, a delay of even one day may be inordinate while a delay of 7 months may not be inordinate.”

18. The learned counsel submitted that from the court record, there was no delay in prosecuting the suit. Further, the dismissal of the suit came about after there was a breakdown in communication with the counsel following up on the matter on behalf of the firm on record for the applicant. This was for the reason that the law firm was situated in Nairobi and as such engaged another advocate to follow up on the matter on their behalf due to the logistical challenges that prevailed then. Accordingly, it was their humble submission that the explanation proffered for the delay in prosecuting the suit after the directions that were issued last was excusable and further we implore upon this honorable court that the mistake of counsel, if any, should not visited on an innocent litigant.
19. Thirdly, on the issue of prejudice, the learned counsel submitted that the respondent would suffer no prejudice which could not be ameliorated by way of costs. Further, in the case of: ”Mwangi S Kimenyi case, it was held that:-

“.....the defendant must show he suffered some additional prejudice which is substantial and results to 1) impending fair trial; 2) aggravated costs; or 3) specific hardships to the defendant. It must also be shown that the delay has worsened the defendant's position in the



suit. It will not, therefore, be sufficient to just make a general assertion that you will suffer prejudice without showing the particular prejudice as spelt out herein above.”

20. The learned counsel contended that the respondent would suffer no prejudice on account of their non-participation when the suit was active. All that was required of the respondent was filing of a response to the application dated August 18, 2010, thereafter, parties could canvass the application by way of written submissions. Thereafter, this honorable could render its ruling on the application.
21. In conclusion, the learned counsel submitted that this suit ought not to have been dismissed in the absence of representation of the applicant. Therefore it ought to be reinstated as any delay in prosecuting this suit was not unexplainable, intentional or inordinate as to cause prejudice to the respondent which prejudice could not be ameliorated by an award for damages. Further, the counsel held that applicant had an arguable case with high chances of success. It was in the interest of justice that the matter be reinstated so that it could be heard and determined on merit.

## **B. The Written Submissions for the Respondent**

22. On November 2, 2021, the learned state counsels for the respondent through the offices of the Attorney General filed their written submissions dated even date. Mr Mwandeje Advocate submitted that he would be relying on four (4) issues in his submissions for the determination by court. Firstly, whether the ex-parte applicant was entitled to setting aside orders made by this court on September 25, 2017 dismissing the applicant’s application dated on August 18, 2010 for want of prosecution. He submitted that in order to effectively determine the issue as to whether the suit should be reinstated by setting aside the dismissal order it would be of essence-to answer the following questions:-
  - a. Was there proper notice served upon the applicant before the suit was dismissed for want of prosecution
  - b. Was there delay in making this application and was it excusable
  - c. Will setting aside be prejudicial to the defendants.
23. Secondly, the learned counsel submitted on whether the plaintiff was served with a notice to show cause why the suit should not be dismissed. He argued that the mandatory provisions of the civil procedure rules requiring issuance of a notice to the parties prior to the dismissal of a suit was complied with and parties were both served with the requisite notice. Under the provision of order 17 rule 2 (1) of the Civil Procedure Rules, 2010 granted the court power to dismiss a suit in which no step had been taken for one year. The said order also required the court to give notice to the party concerned to show-cause why the suit should not be dismissed for want of prosecution, and if no cause was shown to the satisfaction of the court, the court may dismiss the suit. In emphasizing the importance of this section, the learned counsel for the respondent cited the case of ”*Fran Investments Limited G4S Security Services Limited* [2015] eKLR” .
24. Thirdly, the learned counsel submitted on the issue of whether the delay was inordinate and if there was justification for the delay, the learned counsel made reference on the case of “*James Yanga Yeswa v Bob Morgan Services Limited* [2019] eKLR the court cited the case of:- “*Birket James* [1978] AC the court set out the principles that ought to guide the court when considering an application for reinstatement of a suit dismissed for want of prosecution. The principles included whether there was inordinate delay on the plaintiff’s part and whether the delay is intentional and inexcusable and whether the delay is an abuse of the court process. An examination of the file showed that the suit was filed on August 18, 2010 and dismissed on September 25, 2017. This application was filed on October 13, 2020 which was three (3) years after dismissal of the suit. They submitted that the delay of three (3) years in making the



application to set aside was inordinate. He also cited the case of “*lvita v Kyumbu* [1984] KLR 441 the court held that when an inordinate delay was established it was inexcusable until a credible excuse was made. The applicant had not demonstrated why it took him three (3) years to file the said application to set aside the court orders.

25. Finally, the learned counsel submitted on whether setting aside the dismissal would prejudice the fair hearing of the case, the learned counsel submitted that the delay of seven (7) years had not been satisfactorily explained. Therefore setting aside the *ex parte* judgment would prejudice the respondent. He held that the provision of article 159 of the Constitution of Kenya, 2010 provided that justice shall not be delayed. Failure to set down the suit for hearing for three (3) years or even attempt to find out the happenings of the file was a clear infringement of article 159 of the Constitution of Kenya, 2010.

## V. Analysis and Determination

26. I have carefully read and considered the pleadings herein – the notice of motion application dated October 13, 2020 by the *ex parte* applicant, the responses by the respondents, the myriad of authorities made by the learned counsels herein, the relevant provisions of the Constitutions of Kenya, 2010 and the statutes.
27. In order to arrive at an informed, reasonable, fair and just decision, the honorable court has framed the following three (3) salient for its determination. These are:-
- a. Whether the notice of motion application dated October 13, 2020 merits the threshold for setting aside of the order made on September 25, 2017 and granting of other reliefs sought.
  - b. Whether the suit dated August 18, 2010 be reinstated for hearing on its own merits.
  - c. Who to bear the costs of the instant application?

### **ISSUE No. a) Whether the Notice of Motion application dated 13<sup>th</sup> October, 2020 merits the threshold for setting aside of the order made on 25<sup>th</sup> September, 2017 and granting of other reliefs sought.**

28. The main issue under this sub – title herein is on setting aside a judgement entered upon dismissal of the suit for want of prosecution and non attendance under order 12 (1) and 17 (1), (2) and ( 3 ) of the Civil Procedure Rules, 2010. For clarity sake, the court will deal with each of these provisions of the law separately. Firstly, the provision of order 12 rule 7 of the Civil Procedure Rules, 2010 provides that:
- ‘Where under this order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.’
29. A party wishing to set aside an order of dismissal of suit for want of prosecution as envisaged under order 12 rule 7 of the Civil Procedure Rules, 2010 has to satisfy the court that the dismissal was pursuant to the provisions in the order and not any other. The provision of order 12 generally deals with hearing and consequences of non - attendance. In a nutshell it is an issue of non – attendance of a party. As regards to a plaintiff or a defendant who filed a claim or counterclaim respectively and fails to attend court, the order provides for the steps the court should take at each stage of the claim or counterclaim. Needless to say then, where a suit or counterclaim is dismissed on the day it is fixed for hearing and the party does not attend court, order 12 rule 7 provides for the remedy available to such a party whose matter is dismissed.



30. A party may move court to set aside the order, but with sufficient cause or reason. In addition, perhaps, this may also happen under the provision of sections 3 and 3A of the *Civil Procedure Act*, cap 21 whereby a court can exercise discretion under order 12 rule 7 of the *Civil Procedure Rules*, 2010. If the rules committee intended that the discretion be exercised similarly, it could have stated so or combined the orders so as to have the same import. Certainly, while the court applies its discretion on matters on non attendance of parties is not in similar way as when considering dismissal for want of prosecution under order 17 of the *Civil Procedure Rules* as shall be demonstrated hereinunder. There is a wide difference between a case where a suit or claim is dismissed on account of the plaintiffs' failure to attend court when the matter is due for hearing, and where a suit or claim is dismissed for want of prosecution under order 17 rule (2) of the *Civil Procedure Rules*, 2010.
31. Secondly, as indicated, a suit may also be dismissed for want of prosecution under order 17 rule 2 (3) of the *Civil Procedure Rules*. It provides this:-
- 1). "In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed and if cause is not shown to its satisfaction, may dismiss the suit.
  - 2). .....
  - 3). any party to the suit may apply for its dismissal as provided in sub-rule 1".
32. In order for these legal principles to be applicable the following need to be demonstrated:-
- a. That no application has been made or step taken by either party for one (1) year from the time of filing the suit and
  - b. That the respondents have failed to comply with the directions of the court clearly.

Clearly, the powers granted to court hereby by law are discretionally by nature. Thus, they have to be exercised judicially, fairly and capriciously. In so doing, the test applied by court in the application for dismissal of suits for want of prosecution is whether the delay is prolonged and inexcusable and if it is, whether justice can be done despite the delay. In other words if the delay is satisfied with the plaintiff's excuse for the delay and the parties are still keen and interested in pursuing their matter going forward in the fullness of time, justice can still be done to the parties before court, and hence the action would not be to dismiss the suit but direct that it be heard at the earliest time possible and available.

This court on the legal ratio of the provision of order 17 (2) (3) of the *Civil Procedure Rules, 2010* relies on the decision as already referred to be the learned counsel for the respondent in the case of "*Fran Investment Limited G4s Security Services Limited* (2015) eKLR where court held :-

"This order is permissive and allows quite significant room for exercise of discretion to sustain the suit. And I think it is so especially when one fathoms the requirements of article 159 of the Constitution of Kenya and the overriding objective when demands of courts to strive often, unless for very good cause, to serve substantive justice. This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such draconian act comparable only to the proverbial "Sword of the Damocles". But in reality should be checked against yet another equally important constitutional demand that case should be disposed of expeditiously, which is founded upon the old adage and now an express constitutional principle of justice under article 159 (2) of the Constitution of Kenya that justice delayed is justice denied. Here I am reminded that justice is to all the parties not only to the plaintiff. This is the test I shall apply.



33. In my humble view, whereas the court is clothed with the discretion to set aside orders in both circumstances, the parameters used in making consideration to exercise that discretion should be different. In the latter circumstances, even when considering the facts of each case as it should be, the court should raise a higher bar to the applicant seeking to move it. By all means, it should be pointed out loudly, matters are not filed in court to lie idle and therefore clog the justice system. To be this is an easy recipe of what is now popularly termed in the judicial parlance as creating cases backlogs. All cases once filed, ought to be prosecuted speedily. Here the legal maxim, “justice delayed is justice denied” comes to play.
34. According to the court records, in the instant case, while the notice to show cause dated August 15, 2017 issued by court clearly shows it bearing an official stamp by the office of Attorney General an indication that the notice was served and received by the respondent but on the contrary, the said notice does not bear the official stamp or signature showing that it was served and received by the advocate for the ex - parte applicant nor the applicant himself. The applicant has vehemently contended that he was not served with the notice to show cause and neither were the advocates on record served with the notice. It follows therefore, that the applicant was not represented on the date when the notice to show cause came up for hearing. They only learnt of the dismissal when the advocates on record managed to locate and peruse the court file. Furthermore, a keen assessment of the notice to show cause, shows that it was sent by way of registered mail but got lost in the way because the address of service did not indicate the postal code. As such, the notice may have ended up in any of the post offices within Nairobi.
35. The above notwithstanding, while the honorable court was navigating through the matter and in order to reach out for a sound decision on this rather complex issue, it sought guidance from spirit and letter of certain provisions of the Constitution of Kenya, 2010 and statutes. The provisions of article 159 (1) and (2) of the Constitution of Kenya, 2010 provides court with the judicial authority while sections 1, 1A, 3 and 3A of the Civil Procedure Act, cap. 21 grants the court inherent powers to make such orders as may be necessary to meet the ends of justice and on the duty of the court to the just, efficient and timely disposal of disputes presented before it. Additionally, to the above, the provisions of sections 3 and 13 of the Environment and Land Court, No. 19 of 2011, sections 101 of the Land Registration Act, No 3 of 2012 and section 150 of the Land Act, No 6 of 2012 grants the court with a wide leverage on inherent jurisdiction by affirming the overriding objectives to make certain decisions based on “just, expeditious, proportionate and accessible resolution of disputes governed by it”. Equity and discretion are conjoined twins which require purity of hands asking for their help. They will never and do not aid the indolent.
36. This honorable court takes judicial notice to the fact that old and delayed matters still pending before this court are now being addressed so mechanically. These cases seem to have stagnated and stalled at the behest of the parties. In the recent past, cognisance will be taken that these category of cases are having notices to show cause under order 17 rule 2 (1) of the Civil Procedure Rules as a wake up call being issued and listed in the daily cause list and the judges service week activity all intended to clear them from unnecessarily clogging the judiciary system. The decision is working marvelously and borne positive robust results whatsoever.
37. Similarly, in order to balance the scales of justice and upon keen assessment on the conduct of the respondent here, one sees the justification to the English saying that goes, “What is good for the goose is good for the gendur”. The ex - parte applicant’s advocate avers that he lost contact with a colleague advocate, M/s Kithi who was holding brief on behalf of his firm. They lost touch with her. Further, he further argues that the application raises triable issues. It is instructive to note from the records –



an affidavit of service by a court process server dated and filed on July 30, 2010 whereby the pleadings in this matter were served upon the respondent.

38. Subsequently, and as noted from the records, there has been several hearing notices served on the respondents to appear in court but without any responses elicited. This matter has to be adjourned severally at the instance of the absence of the respondents. Indeed, on February 11, 2011 it caused this court, through my brother Justice Ibrahim (JAA) to have spared delivering of judgement against the respondent by invoking the inherent powers under the provision of sections 3 and 3A of the Civil Procedure Act, cap 21 whereby he stated verbatim:-

“While perusing the file in preparation of the judgement, the court found that this matter is not a simple one and any decision herein could lead to a precedent being made and may affect or influence other cases of similar nature pending. This matter touches on constitutional issues on which the gazette notice is also based. There is an issue of access to the beaches for the neighbouring plots which is also an important issue that could touch on the rights of other parties who have not been served in these proceedings. I also note that the matter involves the question of proposed government staff quarters for senior civil servants on the suit premises or part of thereof. As a result, the matter proceeding *ex parte* will not resolve the dispute or issues hereof. I therefore do hereby invoke the provision of sections 1A and 1B of the Civil Procedure Act, cap 21 and the spirit thereof to defer judgement. I do hereby direct that the Attorney General, civil section be served so that they can take instructions on the matter.....”

It was only on October 21, 2021 that the respondent took action by filing a notice of appointment dated October 18, 2021 and grounds of opposition. This is a period of close to over ten (10) years. It is therefore not only ironical, scarstic but also unfair for the respondent to be pressing for the dismissal of the suit and the application by the ex – parte applicant in the given circumstances.

33. In the case of:- “Ivita v Kyumbu [1984] KLR 441 the court laid down principles for issuance of an order of dismissal of suit for want of prosecution. It stated:-

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff’s excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time”.

33. While the provision of order 51 rule 10 of the Civil Procedure Rules, 2010 provides that:-

‘(1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.

(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.’



One would easily want to apportion blame onto the counsel for the ex – parte applicant for the prolonged delay of three (3) years without having taken any steps from the time they were allegedly served with the notice to show cause. Honestly, I see no blame at all on the part of the *ex parte* applicant or his advocate on record taking that they have explained not having been properly served and that they lost being in touch with the advocate they were relying on to hold their matter taking that they were not based in Mombasa. And if at all there was any such mistake whatsoever committed or caused by the said advocates, then the same must be very remote so to speak. In the case of “[Belinda Murai & others v Amos Wainaina](#) (1979) eKLR, Madan J as he then was, while dealing with an issue relating to a mistake made by a lawyer, stated thus:-

“The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not 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 mistake which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule.....”

Based on the facts before me and relying on the legal provisions cited above including associating myself with the quoted decisions by and large, I discern that the respondent has equally contributed into the delay in disposal of this suit and hence should not be seen to be playing the holier than thou saints here having come home lately Johnnie – after being away from the arena for over ten (10) years. On the other hand, I find that the *ex parte* applicant’s reasons are valid and if at all there were any mistakes by the counsel, which must have been with very thin veil, the same should not be visited upon the *ex – parte* applicant. In saying so, I also seek guidance from the legal ratio in the case of: “*Shah v Mbogo and another* [1967] EA 116). Where Harris J stated:-

“...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 course of justice”.

In the long analysis, the application dated October 13, 2020 by the *ex – parte* applicant should be allowed to succeed.

#### **ISSUE No. b). Whether the suit dated 18<sup>th</sup> August, 2010 be reinstated for hearing on its own merits.**

33. Under this sub heading, the court will be assessing the viability of reinstating the suit dated August 18, 2010 having been dismissed for want of prosecution under order 17 rules, 1, 2 and 3 of the [Civil Procedure Rules](#), 2010. The court believes it has already stated in elaborate terms on the relevant issues pertaining to the subject matter. Hence, there will be no need to belabor the point whatsoever. In the same vein, I totally disagree with the learned counsel for the respondent that the application is unmerited and incompetent as the clear legal provisions were not cited. Undoubtedly, I opine that the application dated August 18, 2010 raises triable issues which should be heard on merit. Further the *ex - parte* applicant has a right to access to justice and be fair hearing as enshrined under articles 25 ( c ) 47, 48 and 50 (1) and ( 2) of the [Constitution](#) of Kenya 2010 and provisions of [Fair Administrative Action Act](#), of 2012.
34. For these reasons, therefore, it is my considered strong view that the suit by the *ex - parte* applicant *vide* the substantive notice of motion application dated August 18, 2010 should be reinstated while the respondent can be compensated through some thrown away costs.



### ISSUE No. c). Who will bear the costs of the application

33. It is trite law that the issue of costs is at the discretion of the court. Costs mean the award that a party is granted at the conclusion of a legal action or process in any litigation. The proviso of the provision of section 27 (1) of the Civil procedure Act, cap 21 holds that costs follow the event. By events it means the outcome of result of the said legal action or process (See the Court of Appeal case of Rosemary Wambui Munene v Ibururu Dairy Co – operatives Societies Limited (2014) eKLR and “Cecilia Karuru Ngayo v Barclays Bank of Kenya Limited (2016) eKLR). Where court directed as follows:-

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event.....it is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

33. The results of the motion herein is that the application by the ex parte applicant has been found to be successful in the interest of justice. However, taking that the matter is still to proceed on for further hearing, it is just fair that each party bears their own costs. But in order to take care of the troubles that the respondents have had to incur while preparing for the defence and replies of this application, I order that they be paid some thrown away costs.

### VI. Conclusion & Disposition

33. In long analysis, having considered all the framed issues herein, the honorable court on preponderance of probability, weighs the scales of justice in favour of allowing the application by the ex – parte applicant. Specifically, the court proceeds to order as follows:-

- a. That the notice of motion application dated October 13, 2020 by the ex - parte applicant be and is found to be meritorious and hence allowed.
- b. That the orders of this court made on September 25, 2017 dismissing the applicant’s application be and is hereby set aside and/or vacated.
- c. That an order of this court that the ex - parte applicant’s application dated August 18, 2010 be and is hereby reinstated.
- d. That the *ex parte* applicant be and is hereby directed to set down this suit for hearing on its merits within one hundred and eighty (180) days from the date of the delivery of this ruling hereof commencing from October 5, 2023. There shall be a mention on May 30, 2023 for pre – trial session.
- e. That the respondent be and is hereby awarded throw away costs of Kenya shillings fifty thousand (Kshs 50, 000/-) to be paid by the ex - parte applicant within the next 30 days from the date hereof, failure of which the order reinstating the application shall stand vacated.
- f. That each party to bear their own costs.

34 It is so ordered accordingly

**RULING DELIEVERED MICROSOFT TEAMS MEANS SIGNED AND DATED AT MOMBASA THIS 28<sup>TH</sup> DAY OF MARCH 2023.**

**HON. JUSTICE L. L. NAIKUNI, (JUDGE)**



**ENVIRONMENT AND LAND COURT AT  
MOMBASA**

In the presence of:

- a. M/s. Yumna, the Court Assistant.
- b. No appearance for the Ex Parte Applicant
- c. No appearance for the Respondent

