



REPUBLIC OF KENYA



KENYA LAW
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**Laichena v M'laichena & 5 others (Environment and Land Appeal
E044 of 2021) [2023] KEELC 16352 (KLR) (22 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16352 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E044 OF 2021
CK NZILI, J
MARCH 22, 2023**

BETWEEN

JULIUS THURANIRA LAICHENA APPELLANT

AND

MWONTUNE M'LAICHENA 1ST RESPONDENT

JOHN THINGAU M'LAICHENA 2ND RESPONDENT

M'MARIMA M'THEWA 3RD RESPONDENT

JOSEPH MUTHAA M'MUTHURI 4TH RESPONDENT

JOSHUA MWETI M'MUTHURI 5TH RESPONDENT

JOEL KILELA RUKUNGA 6TH RESPONDENT

RULING

1. This court is asked through an application dated 8.11.2022 to set aside the judgment dated 7.10.2022; order for stay of execution of the decree herein; reinstate the appeal and lastly; extend the time for the applicant to file a record of appeal out of time.
2. The application is supported by grounds on its face and an affidavit of Julius Thurania Laichena dated 8.11.2022. The applicant averred that he was let down by their erstwhile lawyers on record; the application to cease acting was not served upon him; the affidavit of service was a lie; his appeal had arguable points; he stands to lose his inheritance and mistakes of former counsels on record should not be visited upon him. In the supporting affidavit, the applicant narrated the history of this appeal which he had initially filed in person and out of time, withdrew it and applied for leave to file out of time. He insisted that his lawyers on record then betrayed him.



3. The application is opposed through a replying affidavit sworn on 12.1.2023 by Duncan G. Muthuri, the respondent's counsel on record on the basis that no judgment exists that was delivered on 7.10.2022. That the appeal was struck out on 28.10.2021 after the applicant had persistently failed to comply with the court's directions. That the application was filed after a year of the striking out of the appeal, hence justice and equity should not aid an indolent litigant. That the applicant was a beneficiary of the court's benevolence to file an appeal out of time but has instead abused the generosity. That other than blaming the former lawyers, the applicant has not explained why it took him more than a year to come back to court. That no security for costs has been offered and, in any event no positive order was made save for cost worthy staying. That litigation must come to an end and judicial time should not be wasted. Further, it was averred that most of the respondents are aged over 80 years and should not be tossed back and forth from one court to another.
4. Despite leave and directions to put in written submissions to the application, none were filed by 14.2.2023, save for a notice of appointment dated 30.1.2023 by P. EM Majau & Co Advocates coming on record for the applicant.
5. The applicant filed this appeal on 17.3.2021 pursuant to leave granted on 3.3.2021 to lodge the appeal out of time in Meru ELC Misc. Application No. E009 of 2020. The court called for the lower court file by a letter dated 23.3.2021. Eventually, the appeal was admitted for hearing on 3.5.2021. The court directed that the record of appeal be filed in 60 days' time and a pretrial conference was fixed for 27.9.2021, which was served upon the respective parties.
6. On 27.9.2021 counsel for the applicant told the court that he had not complied with the orders and was therefore granted 14 more days to file the record of appeal. Directions were also given for the appeal to be canvassed by way of written submissions as requested by the applicant's counsel. A mention date was fixed for 28.10.2021 to confirm compliance and to fix a judgment date.
7. Further, on 28.10.2021, counsel for the applicant told the court that the applicant had failed to instruct him to file the record of appeal together with written submissions. The respondents opposed this request as being an abuse of the court process and sought for the dismissal of the appeal for non-compliance. Counsel for the applicant sought for one last chance to comply. Subsequently, the court struck out the appeal for non-compliance.
8. Order 42 rule 21 of the *Civil Procedure Rules* grants the court the power to readmit a dismissed appeal where it is proved that a party was prevented by some sufficient cause from appearing when the appeal was called on for hearing, on such terms as to costs or as the court thinks fit. Similarly, the court has power to extend time to comply with timelines if and when there are good reasons. In exercising all these powers, the court has to act judiciously and not capriciously bearing in mind its hallowed duty to act justly, fairly and under the guidance of sections 1A, 1B, 3A of the *Civil Procedure Act* as read together with article 159 of *the Constitution* on substantive justice.
9. The jurisprudential path to follow in exercising such discretion has been clarified in a number of cases among them *Richard Ncharpi Leiyagu vs IEBC & others* (2013) eKLR, *Ngugi vs Thogo* (Civil Application 312 of 2018) (2021) KECA 88/KLR 22 October (2021) (Ruling), *Macharia & 7 others vs Mugo & another* (Civil Application) 73 of 2014) (2022) KECA 1210 (KLR) 4th November (2022) (Ruling), *Bernard Muthee & another vs Anita Kamba Mwiti* (2022) eKLR.
10. In *Ivita vs Kyumbu* E.A 441, 449, the test was set as to whether the delay was prolonged, inexcusable and if justice could still be done despite the delay and the prejudice to be suffered by the respondents.
11. The court had given the applicant more than adequate time to comply with the filing of the record of appeal. The lower court file was available by May 2021. As of 28.10.2021 the applicant



had not collected the record and complied with the court orders. There is apparent evidence that the relationship with his erstwhile advocates on record had broken down by June 2021 which unfortunately was not communicated to the court by 28.10.2021. After that, it took the applicant almost a year to come to this court for the reinstatement of the appeal and to seek leave to file a record of appeal almost a year and a half after the time to file the record had expired.

12. By any stretch of the imagination, this delay is inordinate and has not been explained. The appeal belongs to the applicant and not his lawyers then on record. The said lawyers did their part and attended court all the time without the presence of the applicant. The applicant has not told this court the last time he visited his lawyers on record at their offices or made virtual communication to seek for updates on his case. It can not be true that the mistake was on the part of the lawyers for over 3years.
13. The respondents have raised the prejudice which would be occasioned to them should the appeal be reinstated. In *Cecilia Wanja Waweru vs Jackson Wainaina Muiruri and another* (2014) eKLR, the court considered whether failure by the appellant to prosecute the appeal and or the delay in seeking for reinstatement constituted an inexcusable mistake meant to deliberately delay the cause of justice. The court cited with approval *Richard Leiyagu* (supra), on the right to be heard as the cornerstone of the rule of law and the consideration of the doctrine of proportionality.
14. In this application the respondent's only issue is prejudice caused by the delay. None of the respondents have raised the issue of the substratum of the appeal as having been interfered with. It has not been said that the status of the subject parcels of land has changed such that justice cannot still be done in spite of the inordinate delay.
15. To my mind, the great injustice would be to drive the applicant out of the seat of justice than it would be to the respondents who can still be re-compensated with costs. Since the applicant has disobeyed previous court directives there must be stringent directives if the court were to reinstate the appeal and extend time to file the record of appeal.
16. I, therefore, set aside the orders made on 28.10.2021 and reinstate the appeal for hearing on the following terms: -
 - a. The appellant shall deposit in court Kshs.150,000/= as security for costs within 14 days from the date hereof.
 - b. The record of appeal to be filed and served within 14 days from the date hereof.
 - c. The appellant to file and serves written submissions within 14 days from the date hereof.
 - d. In default of any of the above orders the appeal shall stand dismissed with costs.
 - e. Mention on 26.4.2023 to fix a judgment date.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 22ND DAY OF MARCH, 2023

In presence of:

C/A: John Paul

Miss Kimotho for respondent

HON. C.K. NZILI



ELC JUDGE

