



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwita v Mwita & 5 others (Environment & Land Case  
162 of 2014) [2023] KEELC 18319 (KLR) (21 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18319 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 162 OF 2014**

**NA MATHEKA, J**

**JUNE 21, 2023**

**BETWEEN**

**MICHAEL MAISHA MWITA ..... PLAINTIFF**

**AND**

**THOMAS BWIRE MWITA ..... 1<sup>ST</sup> DEFENDANT**

**DORIS CISORE MWITA ..... 2<sup>ND</sup> DEFENDANT**

**JOHN BOKE MWITA ..... 3<sup>RD</sup> DEFENDANT**

**JANE MATOKORE MWITA ..... 4<sup>TH</sup> DEFENDANT**

**MOHAMED AHMED ABDALLA ..... 5<sup>TH</sup> DEFENDANT**

**DAULA MOHAMED OMAR ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

1. The Application is dated January 6, 2023 and is brought under Article 48 and 50 of the [Constitution](#) of Kenya 2010, Sections 3, 4 and 13 of the [Environment and Land Court Act](#), Sections 1A 1B and 3A of the [Civil Procedure Act](#) Order 12 Rule 6 Civil Procedure Rules seeking the following orders;
  1. This application be certified as urgent and be disposed of on priority basis.
  2. This Honourable court be pleased to reinstate Mombasa ELC Case No 162 of the same be placed before court for directions.
  3. Cost of this application be granted to the applicant.
2. The application is based on the annexed affidavit of Michael Maisha Mwita and the following grounds that on September 20, 2022 issued orders dismissing Mombasa ELC Case No 162 OF 2014 for non-attendance by the Plaintiff/Applicant. The Applicant's failure to attend the hearing on September 20,



2022 was as a result of no fault of the Applicant/Plaintiff. The Applicant on March 12, 2022 suffered a fracture of the lower spine after a fall from a height and he was subsequently hospitalized at the Coast General Teaching and Referral Hospital. The Applicant was discharged on May 7, 2022 from the Coast General Teaching and Referral Hospital. Despite the Applicant being discharged from the hospital, he was immobile and required constant support from wellwishers to go on with his daily activities. The injuries suffered greatly affected his mobility thereby making the Plaintiff/Applicant unable to attend the hearing slated for September 20, 2022. The orders dismissing Mombasa ELC Case No 162 of 2014 have had the effect of condemning the Plaintiff/Applicant unheard despite the fact that he has an arguable case which discloses a reasonable cause of action and that he stands to suffer a grave injustice if the same remains unheard. Reinstatement of Mombasa ELC Case No 162 of 2014 shall occasion no prejudice on the Defendants as they shall have an opportunity to prosecute and challenge any evidence adduced by the Plaintiff/Applicant. If Mombasa ELC Case No 162 of 2014 is not reinstated, the Applicant will be condemned unheard and that it would suffer grave injustice and prejudice as the Applicant's case has merits and deserves. This application for reinstatement is made in the interest of justice and should be certified as urgent and be heard on priority basis,

3. The Respondents state that the suit herein was filed on July 1, 2014 by way of a Plaint dated July 1, 2014 where the Plaintiff challenged the distribution of his father's estate and sale of Title No Mombasa/XV/207. That pleadings closed way back in 2015 whereafter the Plaintiff was required to set down the suit for hearing. That on September 9, 2016 this Honourable Court dismissed the Plaintiffs Application for Injunction against the 5<sup>th</sup> and 6<sup>th</sup> Defendants who proceeded to dispose of the suit property to 3<sup>rd</sup> Parties who are not parties to this suit. That on September 14, 2017, this Honourable Court issued a Notice to show cause why the suit should not be dismissed for want of prosecution. Annexed here to is a true copy of the Notice marked as "SS-I". That on June 6, 2022, parties appeared before Court where the matter was fixed for Mention on June 16, 2022 but the Plaintiff and his Advocate did not attend Court. That the Respondent duly served the Plaintiff's Advocates with the Hearing Notice dated June 16, 2022 clearly indicating that the suit was fixed for hearing on September 20, 2022. That the Plaintiff never protested against the hearing date on Hearing Notice dated June 16, 2022. That on September 20, 2022 the Defendant's Advocates attended Court for Hearing of the suit but the Plaintiff's Advocates were not present where after the suit was dismissed for non-attendance on the part of the Plaintiff and his Advocates.
4. That the Plaintiff never followed upon his suit before it was dismissed or even after until January 9, 2023 when he filed the present Application which clearly demonstrates that the Plaintiff is not interested in prosecuting the suit. That the purported medical report annexed to the Plaintiff's Application clearly states that the Plaintiff was admitted from March 12, 2022 up to May 7, 2022 and no or no-valid explanation has been given as to why the Plaintiff was not able to attend Court on September 20, 2022 long after he had been discharged from hospital. That in any event, the Plaintiff was represented by an Advocate and no explanation has been offered by the firm of Gachiri Kariuki & Co Advocates as to why they did not attend Court on behalf of the Plaintiff on September 20, 2022 when the matter came up of Hearing. That the Application for reinstatement has been made after an inordinate and inexcusable delay. That the 5<sup>th</sup> and 6<sup>th</sup> Defendants will be greatly prejudiced if the orders sought are granted considering that the suit has been in Court for over eight (8) Years without it proceeding for hearing. That the Application by the Plaintiff is made in bad faith and ought to be dismissed.
5. This court has considered the application and the submissions therein. In the case of Mwangi S Kimenyi vs Attorney General and Another, Civil Suit Misc No 720 of 2009, the court restated the test as follows;



1. When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the Defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.
2. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the Plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and 5) what prejudice will the dismissal cause to the Plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties."
6. In the case of *Ivita vs Kyumbu* (1984) KLR 441 the court held as follows:

The test is whether the delay is prolonged and inexcusable and, if it is, can Justice be done despite such delay".
7. I have perused the court record and find that on September 20, 2022, the matter was to proceed and there was no appearance from the Plaintiff and the Court dismissed the suit for want of prosecution. The Applicant stated that his failure to attend the hearing on September 20, 2022 was as a result of no fault of the Applicant/Plaintiff. The Applicant on March 12, 2022 suffered a fracture of the lower spine after a fall from a height and he was subsequently hospitalized at the Coast General Teaching and Referral Hospital. The Applicant was discharged on May 7, 2022 from the Coast General Teaching and Referral Hospital. The instant application was filed on January 8, 2023. I find that the reasons given for his absence excusable and this application was brought without undue delay bearing in mind the medical report. I find this application is merited and I grant the same. Parties are advised to comply with order 11 and take a hearing date in this matter. Costs of this application to be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 21<sup>ST</sup> DAY OF JUNE 2023.**

**N.A. MATHEKA**

**JUDGE**

