



**Mbogo v Mwaighacho (Environment and Land Appeal
11 of 2016) [2023] KEELC 18993 (KLR) (26 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18993 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 11 OF 2016
NA MATHEKA, J
JULY 26, 2023**

BETWEEN

THOMAS MWAWASI MBOGO PETITIONER

AND

LIVINGSTONE MWAIGHACHO RESPONDENT

RULING

1. The application is dated April 20, 2023 and is brought under order 42, rule 6, order 9 rule 9 and 10, order 51 rule 1 of the [Civil Procedure Rules](#), 2010, sections IA, 1B and 34 of the [Civil Procedure Act](#) cap 21 Laws of Kenya seeking the following orders;
 - a. That this Honourable Court be pleased to certify this application as urgent and service upon the Respondent be dispensed with in the first instance.
 - b. That in the interim, there be a temporary stay of execution pending hearing and determination of this application .
 - c. That there be a stay of execution pending the hearing and determination of the appellant 's Appeal.
 - d. That this Honourable Court be pleased to set aside the orders it issued on the 8th March. 2022 dismissing the appellant 's/applicant's Appeal and reinstate the said Appeal so that it to heard and determined on its merit.
 - e. That this Honourable Court be pleased to grant leave to the firm of Mjomba Mwawasi & Company Advocates to come on record on behalf of the appellant /applicant in this Suit.{
 - f. That costs of this application be in the cause.



2. It is based on the grounds that due to the failing health of the appellant /applicant, once the Subordinate Court passed a Judgment which he was dissatisfied with, he instructed the firm of F. M. Mwawasi & Company Advocates to file an Appeal on his favour. That all along during the pendency of the Appeal, the appellant /applicant followed through his Advocate about the progress of the Appeal. That at all times when the appellant /applicant sought to be updated about the progress of the Appeal, his Advocates on record then lied to the appellant that the Appeal was proceeding well and that it was on its tail end and he was expecting a final determination within a reasonable time. That on the strength of this advice from his then Advocates on record, the appellant waited patiently for the Appeal to be determined. That unbeknown to the appellant his Advocates on record were never attending Court and he came to learn about this fact sometime early March, 2023 after he sent one of his children to go to the Court Registry to find out the status of the Appeal when he was surprised when he was informed that the Appeal was dismissed on 8th March, 2022 for non-attendance and want of prosecution. That after discovering this fact, the appellant took remedial measures by instructing new Advocates with strict instructions to reinstate the Appeal so that the Appeal can be heard on its merits. That the circumstances leading to the dismissal of the Appeal is inadvertent and excusable on the part of the appellant as it was exclusively caused by his then Advocates on record. That the mistakes of his then Advocates ought not be visited upon the appellant . That the Appeal as filed is arguable and merited as it raises triable issues. That upon learning of these facts by the appellant /Applicant about the dismissal of the Appeal sometime early March, 2023, this application has been filed without reasonable delay. That if successful, the appellant undertakes to abide by any conditions given by this Honourable Court to ensure that this Appeal is heard and determined expeditiously. That the Respondent will not suffer any prejudice as he is yet to execute the Decree but has initiated the process of execution. That unless the Orders sought are granted, the appellant will suffer irreparable loss and the appeal may be rendered nugatory and a mere academic exercise. That it is only just and fair that the Orders sought be granted.
3. 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."
4. 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".



5. I have perused the court record and find that on the March 8, 2022 matter came up for mention and there was no appearance from the parties and the Court dismissed the suit for want of prosecution. This matter was last in court on the April 20, 2017 when an application was dismissed for non - appearance. This application was filed in court in May 2023. This is over one year after the dismissal. I find that the applicant is guilty of laches. The appellant stated that at all times when the he sought to be updated about the progress of the Appeal, his Advocates on record then lied to the appellant that the Appeal was proceeding well. I find that the reasons given for his absence inexcusable and this application was brought after prolonged delay. I find this application is unmerited and I dismiss it with no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF JULY 2023.

N.A. MATHEKA

JUDGE

