



**Wahiu v Nzioki (Environment and Land Appeal E014 of 2022)  
[2023] KEELC 19916 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19916 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL E014 OF 2022**

**JG KEMEI, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**BONIFACE WANG'OMBE WAHIU ..... APPELLANT**

**AND**

**WINNIFREDAH MUENI NZIOKI ..... RESPONDENT**

*(Being an appeal from the Judgment and Orders of Honourable J. A. Agonda,  
Principal Magistrate in Ruiru MCELC No. E062 of 2021 delivered on 27/1/2022)*

**RULING**

1. The Applicant and the Respondent were the Defendant and plaintiff respectively in the trial Court in MCELC No 62 of 2021. Aggrieved by the judgement of the Court delivered on the 27/1/2022 the Applicant herein filed a memorandum of appeal dated the 14/2/2022 on various grounds.
2. According to the record a Notice to Show Cause why the appeal should not be dismissed was given for the 3/11/2022 and come the said date the Applicant was absent consequent of which the appeal was dismissed. This triggered the application of 17/3/2023 in which the Applicant sought the orders inter alia;
  - a. Spent
  - b. Stay of execution and implementation of the orders issued in the judgement delivered on the 27/1/2022
  - c. The Court to set aside the orders of dismissal and reinstate the appeal
3. The application is based on the grounds annexed thereto and the Supporting Affidavit of the Applicant sworn on the 17/3/2023 in which he deposed inter alia that the delay in prosecuting the appeal was occasioned by the delay in changing his Advocates; time taken to file the Record of Appeal;



4. He urged the Court to reinstate the appeal for hearing on its merits. He was not served with the Notice to Show Cause and his new Advocates only found out about the dismissal in the process of filing their notice of change of Advocates.
5. Further that he is apprehensive that if the orders are not granted the Respondent who has already obtained eviction orders will execute rendering him and his family homeless and destitute given that he has settled on the suit land with his family since 1997. In addition, that on the 15/3/2023 the Respondent brought strangers onto the suit land to help him demolish his homestead. That his claim of adverse possession is now a subject of the intended appeal and that the Respondent will not be prejudiced if the orders are granted.
6. On the 17/7/2023 the Court granted leave to the Respondent to file a response to the said application. The Respondent failed to comply with the directions of the Court thus the application is not opposed.
7. That said both parties filed written submissions which I have read and considered.
8. On the question of setting aside the dismissal orders the Applicant advanced reasons which led to the delay of the prosecution of the appeal as set out above. In response the Respondent submitted that the Applicant was guilty of laches in the dilatory manner in which he failed to prosecute the appeal. The Applicant was blamed for neglecting to seek stay of execution orders of the judgement. He relied on the case of *Savings & Loans Limited v Susan Wanjiru Muritu* (Nairobi) (Milimani) (HCC No 397 of 2002) where the Court stated as follows;

“Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former Advocate’s failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her Advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such Advocate’s failure to attend court. It is the duty of the litigant to constantly check with her Advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff’s determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgement that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant.”

9. The Court was urged to dismiss the application on the ground that equity aids the vigilant and not the indolent.
10. Reinstatement of a suit is at the discretion of the Court which discretion must be exercised judiciously and not whimsically. See the case of *Shah v Mbogo* (1967) EA 166. Having considered the grounds adduced by the Applicant the Court is satisfied that the Applicant’s conduct and action is not intended to pervert or delay the cause of justice. The application was filed about 4 months which in the circumstances of the case the Court does not find inordinate. In the interest of justice this Court finds that the cause of justice shall be served better if the parties are heard on merit. I find that this is a good case to exercise discretion in favour of the Applicant.
11. On the issue of substantial loss, the Court has taken note of the eviction orders which have been admitted by the Respondent and in the circumstances the possibility of execution is probable given



that execution is a lawful process. I find that the Applicant has demonstrated substantial loss since he is in occupation of the property. This Court has in many other decisions held that the duty of the Court is to hold the judicial ring even so that the rights of the parties that is to say the right of appeal and the right of the Respondent to enjoy the fruit of his judgment are protected.

12. On whether the application has been filed timeously the Court has taken note that the application was filed on 28/2/2022 hence timely.
13. On security of costs the Court orders the Applicant to provide security in the sum of Kshs 100,000/- being security for the due performance of the decree of this Court.
14. Final orders;
  - a. The application is allowed.
  - b. The appeal be and is hereby reinstated purely in the interest of justice.
  - c. Stay of execution of the orders issued on the 27/1/2022 be and are hereby granted pending the hearing and determination of the appeal.
  - d. The Applicant to deposit the sum of Kshs 100,000/- in Court as security for the due performance of the decree within the next 30 days in default the orders shall lapse.
  - e. Costs of the application shall be in favour of the Respondent.
15. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 21<sup>ST</sup> DAY OF SEPTEMBER, 2023 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

Delivered online in the presence of;

Appellant – Absent but served (See Affidavit of Service dated 19/9/2023)

Kisini for Respondent

Court Assistant – Phyllis & Lilian

