



**Miheso v Kibetu & 10 others (Petition E007 of 2021)
[2022] KEELC 3832 (KLR) (9 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3832 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
PETITION E007 OF 2021
FM NJOROGE, J
JUNE 9, 2022**

BETWEEN

GEORGE ABWAYO MIHESO PETITIONER

AND

BENSON MBENI KIBETU 1ST RESPONDENT

ELIZABETH KALIUNTU 2ND RESPONDENT

JAMES KARIMI 3RD RESPONDENT

ARTEX REALTORS LTD 4TH RESPONDENT

KEDONG RANCH LTD 5TH RESPONDENT

LAND REGISTRAR, NAIVASHA 6TH RESPONDENT

LAND SURVEYOR, NAIVASHA 7TH RESPONDENT

GEORGE KINOTI, THE DIRECTOR CRIMINAL 8TH RESPONDENT

**DCIO, NAIVASHA, THE INSPECTOR GENERAL OF POLICE 9TH
RESPONDENT**

THE DIRECTOR, PUBLIC PROSECUTION 10TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 11TH RESPONDENT

RULING

1. The petitioner moved the court through notice of motion dated February 3, 2022 seeking the following orders: -
 - a. Spent;



- b. That this honourable court does set aside its orders of January 19, 2022 and re-instate the petition dated March 25, 2021;
 - c. That the petitioner's submissions dated January 24, 2022 and filed on January 28, 2022 be deemed as filed as per the orders of January 19, 2022;
 - d. That the costs of this application be in the cause.
2. The application was premised on the grounds on the face of it and the supporting affidavit sworn by Okumu Ong'ang'o on February 3, 2002.
 3. The grounds of the application were that as a result of inadvertence on the part of the petitioner's advocate's he filed his submission on January 28, 2022, two days after the required time and consequently the court dismissed the petition on February 3, 2022.
 4. The other ground was that the petition was dismissed despite the filed petitioner's submissions and affidavit of service already on the court record and lastly that the instant application has been lodged expeditiously and in good faith.

The Response

5. The 6th -11th respondents were not opposed to the application.
6. The 2nd, 3rd, 4th and 5th respondent opposed the application vide their replying affidavits dated February 22, 2022 and May 12, 2022 respectively.
7. They stated that the application is an abuse of the court process and that the petitioner has been indolent as he did not file his submissions within the timelines provided by the court.

Submissions

8. The petitioner filed his submissions dated March 1, 2022 on March 2, 2022, the 2nd and 3rd respondents filed their submissions dated April 7, 2022 on April 20, 2022 while the 5th respondent filed its submissions dated April 19, 2022 on May 10, 2022.

Determination

9. After carefully considering the application, the affidavit in its support, the responses, the submissions for and against the application and case law cited, two issues arise for determination. They are as follows:
 - a. Whether the applicant merits the setting aside of the order made on January 19, 2022; and
 - b. Whether the petition dated March 25, 2021 should be reinstated.
10. The unfettered discretion of the court in setting aside applications has to be exercised judiciously, as was stated in case of *Shah v Mbogo* (1979) EA 116 quoted with approval in the case of [*John Mukuba Mburu v Charles Mwenga Mburu*](#) [2019] eKLR, where that court held thus:

“.....this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.”



11. Regarding the merits of the instant application, the petitioner argued that he filed his written submissions on February 28, 2022 two days after the deadline before the matter came up for mention on February 3, 2022 when it was dismissed for want of prosecution. It was the petitioner's argument that none of the statutory conditions for dismissal had been met and that any delay by the petitioner is not inordinate.
12. In *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.”
13. Analyzing the reasons advanced by the petitioner, it is clear that the court gave its orders on January 19, 2022 for the petitioner to file and serve its submissions within seven (7) days, however the petitioner delayed by two (2) days as the same was filed on January 28, 2022. It is this court's view that two (2) days is not inordinate delay and this court exercises its discretion and sets aside its orders of January 19, 2022.
14. It is also this court's view that dismissal is a draconian order which drives away the litigant from the seat of justice and in the instant application where good reasons have been given in support of the application, justice would be served in reinstating the petition. Further, save a little delay that will be caused by the hitch occasioned by the applicant's failure to comply with the court order to file submissions, no other prejudice will be suffered by the respondents if an order reinstating the petition is issued.
15. Accordingly, I set aside the dismissal order and I reinstate the petition with dated March 25, 2021. The 2nd and 3rd respondents' are at liberty to file their written submissions to the petition. The petition shall be mentioned on June 23, 2022 for further directions.

DATED, SIGNED AND ISSUED AT NAKURU VIA ELECTRONIC MAIL ON THIS 9TH DAY OF JUNE, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

