



**Mokua & 2 others v Mokua & another (Civil Appeal
175 of 2011) [2022] KEELC 3462 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3462 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
CIVIL APPEAL 175 OF 2011**

JM ONYANGO, J

JULY 28, 2022

BETWEEN

JEREMIAH OMBWORI MOKUA 1ST APPLICANT

GIDEON MIYOGO MOKUA 2ND APPLICANT

IBRAHIM SAMMY MOKUA 3RD APPLICANT

AND

JAPHET BARONGO MOKUA 1ST RESPONDENT

ALFRED OBIERO MOKUA 2ND RESPONDENT

RULING

1. This ruling is in respect of the Notice of Motion dated 3rd December 2021, seeking that the order of dismissal of the appeal dated 17th July 2017, be set aside and the appeal be reinstated for hearing. The application is based on the grounds stated on the face thereof and the Supporting Affidavit of Gideon Miyogo Mokua, the 2nd Appellant/Applicant sworn on the 3rd December, 2021.
2. In his Supporting Affidavit, the 2nd Appellant deposes that the suit was dismissed for want of prosecution on the 17th July, 2017. He explains that they had instructed the firm of S.N Nyachae & Company Advocates to represent them, but the said advocates failed to inform them of the progress of the appeal upto the time it was dismissed. He states that their failure to attend court was due to the fact that they were not aware of the date when the matter came up in court despite the fact that they had kept in touch with their advocates. He contends that the appeal is arguable and has overwhelming chances of success.
3. The application is contested by the Respondents through the Replying Affidavit of Japheth Barongo Mokua sworn on the 27th day of January 2022. He depones that the Appellants went to sleep after filing their appeal as they have not demonstrated any step they took to prepare the appeal for hearing.



He states that the application has been made after undue delay as the dismissal was made in 2017, yet the application for reinstatement was filed in December, 2021.

4. He states that apart from the receipts indicating that they had paid their advocates fees they have not attached any document to show what attempts they made to have the matter fixed for hearing nor have they attached any letter to their advocate requesting for an update on the status of their case. He further depones that the Respondents would be greatly prejudiced if the appeal is reinstated as they have been unable to occupy their parcel of land for over ten years due to the pending litigation. He depones that the Applicants were present in court when the matter was dismissed and they are therefore not being truthful when they state that they were not aware of the dismissal.
5. In response to the Replying Affidavit, the 2nd Appellant filed a Further Affidavit sworn on the 18th February, 2022 to which he annexed copies of receipts for payment of advocates fees, with a copy of an Mpesa message showing that the last payment was made in January 2021. He depones that the Respondents have ploughed a portion of the suit property and they have threatened to occupy the suit property using force. He states that this matter has previously given rise to a criminal case whereby the Respondents attacked the Appellants and they were convicted of assault in Keroka PMCR Case No. 1047 of 2012.
6. It is therefore his contention that this being a land matter, the same is emotive and the parties ought to be given an opportunity to be heard. He reiterates that they were not made aware of the status of their case until it was dismissed. He denies that they were present in court when the matter was dismissed. He maintains that the appeal has high chances of success.
7. The application was disposed of by way of written submissions and both parties filed their submissions, which I have considered.

Applicants' Submissions

8. In their submissions, the Applicants have reiterated that they kept in touch with their advocates, but they were misled that their case was on course and they only learnt that it had been dismissed in July 2021. They submitted that the appeal was an emotive land matter involving brothers and they should not be denied the opportunity to canvass the appeal on merit. They relied on the case of [*Joseph Kinyua v G.O Ombachi*](#) (2019) eKLR where the court faced with a similar application held as follows:

“dismissal is a draconian order which drives the litigant from the seat of justice. Therefore, in spite of the gaps I have noted, I still think that justice would be served in reinstating the appeal but with strict conditions. No prejudice will be suffered by the Respondents in reinstating the appeal. ...”

9. They also cited the case of [*Lucy Bosire v Kebanicha Division Land Disputes Tribunal & 2 Others*](#) (2013) eKLR where justice Odunga held that:

“In this case the dispute revolves around land which is a very emotive subject in this country. Accordingly, such matters ought to be heard on merits as far as possible so that parties do not feel that they were driven out of the seat of justice without being afforded an opportunity of being heard. In this case the blame is placed at the doorstep of the applicant's erstwhile advocates. It is true that where the justice of the case mandates, the mistakes of advocates even if blunders should not be visited on their clients when the situation can be remedied by costs. It must be recognized that blunders will continue to be made from time to time and



it does not follow that because a mistake has been made, a party should suffer the penalty of not having his case determined on its merits”.

10. The Applicants urged the court to be guided by the principles of Article 159 (2) (d) of *the Constitution* which enjoins the court to administer substantive justice without undue regard to technicalities. They contended that the Respondents had not demonstrated what prejudice they would suffer if the appeal was reinstated for hearing on its merits.

Respondents’ Sumissions

11. On his part, learned counsel for the Respondents took issue with the provisions under which the application was filed and submitted that they were irrelevant as section 3A of the *Civil Procedure Act* deals with the inherent powers of the court, while Order 4 Rule 3 of the *Civil Procedure Rules* deals with what a Plaint in a land matter should contain. He submitted that since the Applicants had admitted that their appeal was dismissed for want of prosecution yet they were represented by counsel, they should take up the issue of professional negligence with their advocate. He submitted that the authorities cited by the Applicants are not relevant.

Analysis and Determination

12. The main issue for determination is whether the order of dismissal made on 28.3.2017 (not 17th July, 2017 as indicated in the Notice of Motion) should be set aside.
13. The Plaintiff’s suit was dismissed under the provisions of Order 17 rule 2 of the *Civil Procedure Rules*. The principles that guide the court in exercising its discretion to set aside orders of dismissal were set out in the case of *Mwangi S. Kimenyi v Attorney General* (2014) eKLR . These principles are:
 - 1) Whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;
 - 2) Whether the delay is intentional, contumelious and, therefore, inexcusable;
 - 3) Whether the delay is an abuse of the court process;
 - 4) Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;
 - 5) What prejudice will the dismissal occasion to the Plaintiff?"
 - 6) Whether the plaintiff has offered a reasonable explanation for the delay;
 - 7) Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the court"
14. In the instant case, I have perused the court file and even though I have seen a Notice to Show Cause why the suit should not be dismissed addressed to the firm of S.N Nyachae & Company Advocates and the Respondents, there is no evidence of service of the said notice as no Affidavit of Service was filed nor is there a copy of the Notice bearing the stamp of S.N Nyachae & Company Advocates. The record shows that on the date when the matter came up for dismissal, both parties were absent.
15. Before the court can exercise its discretion to reinstate a suit it must be satisfied that there is sufficient explanation by the Applicant as to why he failed to attend court. The court must also consider the length of the delay in bringing the application and the prejudice that would be occasioned if the suit was reinstated.



16. Although there has been a delay of more than three years in bringing this application, I am satisfied that the said delay has been sufficiently explained. This being a land matter, I am of the view that the interests of justice would be served if the case is heard on its merits. I am of the opinion that whatever prejudice the Respondent is likely to suffer if the matter is reinstated can be adequately compensated by way of costs.
17. In the final result, I find merit in the application and I grant it and make the following orders:
- a. The orders made on 17th July 2017 dismissing the Plaintiff's Appeal and all consequential orders are hereby set aside.
 - b. The Appeal is hereby reinstated for hearing.
 - c. The Appellant shall pay the costs of this application.
 - d. Given the age of the appeal, the same shall be set down for hearing on priority basis.

DATED, SIGNED AND DELIVERED AT KISII THIS 28TH DAY OF JULY, 2022.

J.M ONYANGO

JUDGE

