



REPUBLIC OF KENYA



**KENYA LAW**  
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**Changawa v Okumu (Environment and Land Appeal E002 of 2021)  
[2022] KEELC 14662 (KLR) (8 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14662 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL E002 OF 2021  
CA OCHIENG, J  
NOVEMBER 8, 2022**

**BETWEEN**

**JAMES KATANA CHANGAWA ..... APPELLANT**

**AND**

**ISAAC MURUMBA OKUMU ..... RESPONDENT**

*(Being an Appeal from the Ruling of the Chief Magistrate's Court in Civil Case No. 122 of 2018 delivered on 10th December, 2020 by Hon. B. Bartoo - (SRM))*

**JUDGMENT**

**Introduction**

1. By a memorandum of appeal dated the January 11, 2021 the appellant appealed against the ruling of the Hon. Jerop Brenda Bartoo (Ms.) Senior Resident Magistrate made on the 10<sup>th</sup> day of December, 2020 in CMCC. No. 122 of 2018 between James G. Katana versus Isaac Murumba Okumu. The genesis of this appeal is the ruling by Hon. Jerop Brenda Bartoo (Ms.) Senior Resident Magistrate where she declined to set aside orders issued on 30<sup>th</sup> January, 2020 dismissing the lower court suit for want of prosecution.
2. The appellant being dissatisfied with the whole of the said Ruling filed a memorandum of appeal dated the January 11, 2021 which contains the following grounds:
  1. The learned trial Magistrate erred in law and in fact in not taking into account that the reason given by the Advocate's clerk on the reason for the delay in arriving in court on time.
  2. The learned trial Magistrate erred in law and fact when she refused to take into account that this being a land matter it must be handled with the seriousness it needs as if it is not then it may lead to chaos.



3. The learned Magistrate erred in law and fact when she refused to take into account articles 159(d) and (e) of *the Constitution* of Kenya.
4. The learned magistrate erred in law and fact when she disregarded the evidence of the appellant and his witness.

Reasons wherefore the appellant prays:

1. That the appeal herein be allowed.
  2. That the ruling and order of the Chief Magistrate's Court at Machakos in CMCC. No. 122 of 2018 made on the 10<sup>th</sup> day of December 2020 be set aside and the suit be reinstated.
  3. That the appellants' cost in this appeal be paid by the respondent.
3. The appeal was canvassed by way of written submissions.

### **Appellant's Submissions**

4. The appellant in his submissions contends that the trial magistrate failed to judiciously exercise her discretion in refusing to set aside the ruling and orders made on the January 30, 2020. He argues that mistake of an advocate should not be visited upon an innocent client. Further, that the power to set aside ex parte orders are discretionary and the Court must use its discretion to come to a conclusion while also ensuring that justice has been done. He further submits that the discretion of the court on whether or not to set aside a Judgment is meant to ensure that litigants do not suffer injustice or hardships as a result of among other things, an excusable error. He reiterates that the door of justice should not be closed because a mistake has been committed by a counsel who ought to know better. Further, that the court is always obliged by the Rules of Natural justice to ensure that litigants are not driven away from the seat of justice. He reaffirms that he had given sufficient reasons, for non-attendance of court, that was caused by heavy traffic on Mombasa Road and this was further supported by the affidavits sworn by Emmanuel Odhiambo Onduso and himself. He states that every party to a suit has a right to fair hearing under article 50(1) of *the Constitution* of Kenya. Further, that he has a right to a fair administrative action, that is expeditious, efficient, lawful, reasonable and procedurally fair.
5. To buttress his averments, he relied on the following decisions: *Patel Vs E.A Cargo Handling Services Ltd* (1974) EA 75; Nairobi Civil Appeal No. 20 of 2016 *Patriotic Guards Ltd Vs James Kipchirchir*; Supreme Court of India, Civil Appellate Jurisdiction in Civil Appeal No. 9047 of 2014 - *K. Praksb v B.R. Sampath Kumar*; *MK v W M & another* [2015] eKLR; *Mbaki & others & Vs Macharia & Another* (2005) eKLR; Nairobi Civil Suit No. 51 of 2017, the Honourable Justice Maureen A. Odero cited the case of *Belinda Muras & 6 Others -Vs- Amos Wainaina* [1978] KLR; *Phillip Chemwolo & Another -Vs- Augustine Kubede* [1982-88] KLR 103 at 1040; *Shah -Vs- Mbogo & Another* [1967] 6.A U7; *Martha Wangari Karua -Vs- IEBC* Nyeri Civil Appeal No. 1 of 2017 and *Lucy Bosire v Kebancha Division Land Dispute Tribunal & 2 others* [2013] eKLR.

### **Respondent's Submissions**

6. The Respondent contends that the appellant has moved the court purportedly seeking justice yet he has perpetrated injustice upon him as well as greatly abused the court process. He proceeded to highlight the proceedings in the lower court on 30<sup>th</sup> January, 2020. He argues that the Appellant and his advocate's hands are tainted with lies and the court should frown on this and not exercise its discretion



in their favour but dismiss this Appeal. He avers that the lower court suit was filed on October 13, 2015 but the Appellant never bothered to set it down for hearing until a Notice to show cause was issued. He argues that the delay in prosecuting the suit is so inordinate and no plausible explanation was ever espoused by the Appellant. He reiterates that delay defeats equity. Further, that the Appellant has been indolent and failed to obey court orders and directions issued vide a ruling dated the February 10, 2017, four (4) years prior to this dismissal, wherein the Judge had directed that the suit be prepared for hearing expeditiously and parties were to comply with order 11, within a period of six (6) months from the said date. Further, all along the Appellant and his Advocates have been using delay tactics, even after the suit was transferred to Machakos and a hearing date set for February 12, 2019 and July 4, 2019 respectively. He avers that even though this court has discretion to set aside the order of the trial court, however, based on evidence adduced, the Appellant has not met the threshold to enable this court to grant orders in his favour. Further, that the concern and driving force for the appellate court is to do justice not only to the appellant but to the respondent. He reiterates that in the administration of justice, the provisions of article 159 of *the Constitution* and the overriding principles of the *Civil Procedure Act* apply to all litigants. He insists that the appellant has not given a reason why it had taken 5 years to not only conclude the suit but set it down for hearing as soon as possible before it was dismissed. Further, this delay is a source of prejudice to him as it affects the fair administration of justice. To buttress his averments, he relied on the case of *John Onger Mariara & 2 Others Versus Paul Matundura* Civil Application 301 of 2003 [2004] eKLR.

### **Analysis and Determination**

7. Upon consideration of the memorandum of appeal, record of appeal and the rivalling submissions, the following are the issues for determination: Whether the ruling and orders issued on 10<sup>th</sup> December, 2020 should be set aside. Whether the appeal is merited.
8. The background against which the Appeal was brought was a suit filed by the appellant being CMCC. No. 122 of 2018 between James G. Katana vs Isaac Murumba Okumu. In the said suit, the Appellant herein who is an allottee of unsurveyed Plot No. 219 within Mavoko, claimed that in April 2015 the Respondent entered and forcefully evicted his casual labourers from the said land and proceeded to dig trenches as well as remove beacons. The appellant sought for orders of injunction vide an application dated October 13, 2015 which orders were allowed and the Court directed the parties to comply with Order 11 of the *Civil Procedure Rules* and prepare for hearing of the main suit. The appellant explains that on January 30, 2020 when the matter was scheduled for hearing, his Advocate failed to attend court culminating in the suit being dismissed for want of prosecution. Further, he filed an application dated the February 12, 2020 seeking to set aside the said orders as well as reinstatement of the suit but the trial Magistrate disallowed the said Application vide her ruling dated the December 10, 2020, which ruling is the subject of this appeal.
9. I note on the January 30, 2020 when the matter in the lower court was scheduled for hearing, the Appellant (Plaintiff) was actually present in court although his advocate was absent but the trial Magistrate still proceeded to dismiss the suit for want of prosecution. I have had a chance to peruse the court records and I wish to highlight proceedings of certain dates. I note that on 21<sup>st</sup> November, 2019 when the matter came up for hearing, both the plaintiff and defendant (appellant and respondent) were not ready to proceed. Further, on 26<sup>th</sup> September, 2019, when matter was fixed for mention, to schedule a hearing date, the Respondent was even absent from court. From the court record, it is evident the Respondent including Counsel had also been absent severally from court and this is contrary to the averments in the written submissions where he seeks to solely blame the appellant for delaying the lower court case.



10. On setting aside of a Judgment as well as reinstatement of a suit, and dismissal of a suit for want of prosecution, I will proceed to highlight the legal provisions governing the same. order 10 rule 11 of the [Civil Procedure Rules](#) stipulates that:-

Where Judgment has been entered under this order, the court may set aside or vary such Judgment and any consequential decree or order upon such terms as are just.”

While order 17 rule 2 of the [Civil Procedure Rules](#) provides that:-

- (1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit. (2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit. (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1. (4) The court may dismiss the suit for non-compliance with any direction given under this Order.”

11. From the lower court records and explanations in the Supporting affidavit, it is evident that this suit had been set down for hearing but did not proceed. Further, I note both the appellant and respondent sought adjournment hence delaying the lower court suit.
12. In the case of *Patel vs. E.A. Cargo Handling Services Ltd* [1974] EA75 at page 76 C and E the court held as follows: -

There are no limits or restrictions on the Judge’s discretion to set aside or vary an ex-parte judgement except that if he does vary the judgement, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the rules.”

13. Further, in the case of [Mwangi S. Kimenyi v Attorney General & another](#) [2014] eKLR it was held that: -

Consequently, upon the analysis of all legal considerations, it is clear the direction the court is taking on this matter. But before I close, I will re-state; the acceptable test is that; 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.”

14. See the decision in [Ivita -Vs- Kyumbu](#) [1984] KLR 441 at 451.



15. In the current scenario and from the court record, I note even though the suit has not been set down for hearing, the parties had been engaged in an interlocutory application and the suit had not been dormant for twelve (12) months. Further, the suit was transferred from one court to another which also led to delay. Looking at the materials presented in the record of appeal including the proceedings of the lower court, I find that the delay in prosecuting the lower court suit is not inexcusable nor inordinate as claimed by the defendant.
16. Based on the facts as presented while associating myself with the decisions cited above as well as the legal provisions which I have quoted, I find that there was no intention by the appellant (plaintiff) to delay the matter and further the respondent did not demonstrate the substantial risk to fair trial or prejudice that he would suffer if this matter was set down for hearing on its merit. I further note that, the plaintiff raises triable issues which parties should be allowed to ventilate upon. I opine that, the trial magistrate was unfair in dismissing a suit for want of prosecution, when the appellant (plaintiff) was actually present in court, although his advocate was absent. It is trite that mistake to counsel cannot be visited upon a client, and in the interest of justice, it would have been proper if the trial magistrate granted the appellant (plaintiff) a chance to proceed with his matter.
17. In the circumstance, I will proceed to set aside the order issued on December 10, 2020 and reinstate Machakos CMCC. No. 122 of 2018 James G. Katana vs Isaac Murumba Okumu.
18. It is against the foregoing that I find the appeal merited and will allow it.
19. I however direct each party to bear their own costs of the Appeal.
20. I further direct that Machakos CMCC. No. 122 of 2018 James G. Katana vs Isaac Murumba Okumu be fixed for hearing within ninety (90) days from the date hereof, failure of which the suit stands dismissed for want of prosecution.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 8<sup>TH</sup> DAY OF NOVEMBER, 2022**

**CHRISTINE OCHIENG**

**JUDGE**

