



Tallam v Rotich (Suing as the Administrator of the Estate of David Rotich – Deceased) & 2 others (Environment and Land Appeal E044 of 2022) [2025] KEELC 373 (KLR) (4 February 2025) (Judgment)

Neutral citation: [2025] KEELC 373 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL E044 OF 2022
JM ONYANGO, J
FEBRUARY 4, 2025**

BETWEEN

AGRIFAS TALLAM APPELLANT

AND

JOAN JEPKOSGEI ROTICH (SUING AS THE ADMINISTRATOR OF THE ESTATE OF DAVID ROTICH – DECEASED) 1ST RESPONDENT

BETTY JEPKORIR 2ND RESPONDENT

THE LAND REGISTRAR UASIN GISHU COUNTY 3RD RESPONDENT

JUDGMENT

1. This appeal arises from the orders of Honourable D. Mikoyan, Chief Magistrate made on 9th November 2022 in Eldoret CMELC Case No. 82 of 2019 dismissing the Appellant’s suit for want of prosecution.
2. The genesis of this appeal lies in the suit filed by the Appellant against the Respondents on 3rd October 2019 being Eldoret CM ELC Case No. 82 of 2019 in which he sought the cancellation of the title to land parcel number Uasin Gishu/Kimumu Settlement Scheme/1485 registered in the name of David Rotich (now deceased). He further sought that the said title be registered in his name and that the Respondents be restrained from interfering with the suit property.
3. The matter was scheduled for hearings on 9.11.2022 but since the Appellant’s advocate was engaged in several hearings at Kitale Law Courts, he got another advocate to hold his brief and request that the matter be heard at 2.30 p.m. The trial magistrate however declined the request and dismissed the case for want of prosecution despite the fact that the Appellant was present in court. It is this dismissal that triggered this appeal.



4. The Memorandum of Appeal is based on the grounds that the learned trial magistrate erred in
 - i. Dismissing the Appellant's suit for non-attendance without due regard to all the factors surrounding the said non-appearance.
 - ii. Dismissing the Appellant's suit for non-appearance without taking into consideration that the non-appearance by the Appellant's advocate in person was due to a bona fide reason.
 - iii. Dismissing the Appellant's suit for non-appearance without having regard to the fact that the Appellant was actually in court in person on the material day even though his counsel was absent.
 - iv. Dismissing the Appellant's suit for non-appearance without having regard to the Appellant's Constitutionally guaranteed right to be heard before being condemned.
5. He prayed that the appeal be allowed and all the proceedings and orders made on 9.11.2022 in Eldoret CM ELC Case No. 82 of 2022 be set aside.
6. The appeal was canvassed by way of written submissions and the Appellant filed his submissions dated 29th November 2024 while the 1st Respondent filed his submissions dated 2nd December 2024.
7. In his submissions learned counsel for the Appellant submitted that under order 17 rule 2 of the Civil Procedure Rules, the Court may issue a notice to show cause why a suit should not be dismissed for want of prosecution where no application has been made or step taken by either party for one year and if no cause is shown to its satisfaction, the court may dismiss the suit. He relied on the case of *Invesco Assurance Company Ltd v Oyange Barrack* (2018) eKLR where the Court was of the view that article 159 of *the Constitution* and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year on application by a party as justice delayed without explanation is justice denied and delay defeats equity.
8. He further submitted that the court has a discretion to set aside an order for dismissal although the discretion has to be exercised judiciously as stated in the case of *Shah v Mbogo* (1979) E.A 116. It was his submission that the court ought to consider if there has been inordinate and unexplained delay and whether the other party is likely to be prejudiced as a result of the delay. Additionally, that dismissal of a suit is a draconian measure which should only be restricted to the most hopeless cases. He placed reliance on the case of *Ecobank Ghana Limited v Triton Petroleum Co. Limited & 5 Others* (2018) eKLR and *D.T Dobie & Company Kenya Ltd v Joseph Mbaria Muchina & Another* (1980) eKLR.
9. Counsel contended that the dismissal of the Appellant's suit was unfair and manifestly unjust as there was no unreasonable delay in prosecuting the suit and the failure to prosecute the suit on the material day was inadvertent, innocent and backed by a reasonable explanation.
10. On his part, learned counsel for the Respondent submitted on two main issues; whether the appeal is competent and whether the Appellant has satisfied the grounds for setting aside the order of dismissal. Regarding the competence of the appeal, counsel took issue with the absence of the formally extracted order. He referred to order 42 Rule 13(4) of the Civil Procedure Rules which sets out the documents that must be contained in the Record of Appeal. He relied on the case of *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others* (2014) eKLR where the Supreme Court held that



11. For a competent appeal to lie before the court it must comply with the provisions of Rule 33(1) of the Supreme Court Rules, 2012 which provides that:

“An appeal to the Court shall be instituted by lodging in the registry within 30 days of the date of filing the notice of appeal:-

- a. A petition of appeal
- b. A record of appeal and;
- c. The prescribed fee

12. Rule 33(2), (3) and (4) further provide for the specific documents that must be contained in the Record of Appeal for it to be complete.

13. The court further held that the Record of Appeal is the complete bundle of documentation, including the pleadings, submissions and judgment from the lower court, without which the appellate court would not be able to determine the appeal before it.

14. Counsel further relied on the case of Elvis Anyimbo Sichenga v Orange Democratic Movement & 4 Others (2018) eKLR where the court held that the failure by the Appellant to attach a certified copy of the decree appealed from was fatal to the petition.

15. Counsel submitted that in the instant appeal, the Appellant had not filed a complete Record of Appeal as the proceedings and impugned order dated 9.11.22 were not included in the Record of Appeal.

16. On whether the Appellant had satisfied the grounds for setting aside the order of dismissal, counsel submitted that the matter had been set down for hearing on several occasions when it was adjourned at the behest of the Appellant. It was his contention that on 9.11.22 when the matter came up for hearing, the court rejected the request of Mr. Kipsamo who was holding brief for the Appellant’s counsel to have the matter heard at 2.30pm. The Appellant’s name was called out and since there was no response, the court proceeded to dismiss the suit for non-attendance. Counsel submitted that considering the length of time the case had taken in court, the Appellant’s laxity in prosecuting his case and his absence on the hearing date, the court ought not to exercise its discretion to set aside or vary the orders of the trial court. He referred to the case of Shah v Mbogo cited in John Mukuhu Mburu v Charles Mwenga Mburu (2019) e KLR where the court held that:

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

Analysis and determination

17. Having considered the grounds of appeal, the entire Record of Appeal and the submissions filed by both parties the issues for determination are

1. Whether the failure to include the order appealed from in the Record of Appeal renders the appeal incompetent
2. Whether the order dismissing the suit should be set aside.



18. The duty of a first appellate court was set out in the case of Abok James Odera t/a A. J. Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR, where the Court pronounced itself as follows: -

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority vs Kustron (Kenya) Limited 2000 2EA 212.”

I will now proceed to determine the two issues mentioned above.

1. Whether failure to include the order appealed from renders the appeal incompetent

19. It was submitted on behalf of the Respondent that the absence of the order appealed from renders the appeal incompetent. Order 42 Rule 13(4) of the Civil Procedure Rules provides as follows:

“Before allowing the appeal to go for hearing, the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on the party that is to say:

- a. The Memorandum of Appeal;
- b. The Pleadings;
- c. The notes of the trial magistrate made at the hearing;
- d. The Transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
- e. The affidavits, maps and other documents whatsoever, put in evidence before the magistrate
- f. The judgment, order or decree appealed from, and where appropriate the order (if any) giving leave to appeal:

Provided that-

- i. A translation into English shall be provided of any document or part of a document which is not in that language
- ii. The judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).”

20. As can be gleaned from the proviso to rule 13 (4) (f) above, the documents mentioned in paragraphs (a), (b) and (f) must be included in the Record of Appeal and they cannot be dispensed with. Among these documents are the judgment, order or decree appealed from.
21. In the instant appeal, the order appealed from is the order dated 9.11.22 by the Hon. D. Mikoyan, Chief Magistrate in Eldoret CM ELC Case No. 82 of 2019 dismissing the Plaintiff’s suit for non-appearance. I have carefully perused the Record of Appeal and I have not seen the said order or proceedings of the court dated 9.11.22.



22. The Supreme Court of Kenya in the case of *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others* (2014) eKLR held as follows at paragraph 41:

“Without a record of appeal the court cannot determine the appeal cause before it. Thus if the requisite bundle of documents is omitted, the appeal is incompetent and defective for failing the requirements of the law. A court cannot exercise its adjudicatory powers conferred by the law or Constitution where an appeal is incompetent. An incompetent appeal divests a court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues”.

23. Similarly, in the case of *Chege v Suleiman* (1988) eKLR the Court of Appeal stated as follows:

“But we concur positively in the submission of Mr. Lakha that this is not a procedural but jurisdictional point. Those holdings were founded on a proper interpretation of S.66 of the *Civil Procedure Act* which confers the right of appeal to this court from the decrees and orders of the High Court. And those holdings were predicated on the fact that since an appeal could only lie against a decree or order, no competent appeal could be brought unless those decrees or orders were formally extracted as the basis of the appeal”.

24. The same position was adopted by the court in the case of *Elvis Anyimbo Sichenga v Orange Democratic Movement & 4 Others* (2018) eKLR.

25. It is therefore clear from the provisions of Order 42 Rule 13 (4) and the above decided cases that failure to attach the decree or order appealed from renders the appeal incompetent.

2. Whether the order dismissing the suit should be set aside.

26. It is common ground that the Eldoret CMELC Case No. 82 of 2019 being the Appellant’s suit in the lower court came up for hearing on 9th November 2022 and it was dismissed for want of prosecution.

27. Order 17 Rule 2 of the Civil Procedure Rules provides for dismissal of suits as follows:

Notice to show cause why suit should not be dismissed:

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 dismissal as provided in sub-rule 1.
4. The court may dismiss the suit for non-compliance with the direction given under this order.

28. Dismissal of a suit under the above cited provision presupposes that the Plaintiff has failed to take action to set his or her case for hearing for a period of one year or more. However, in the case under consideration the case had been fixed for hearing and the dismissal was occasioned by the fact that the Appellant was absent when the case was called out.

29. The court has a discretion to set aside an order of dismissal of a suit for want of prosecution or non-attendance. However, that discretion must be exercised judiciously. See *Shah v Mbogo* (supra) In considering whether or not to set aside an order of dismissal the court must consider all the facts and circumstances prevailing at the time of the dismissal. In the case of *Rachael v Njango Mwangi* suing as the personal representative of the estate of *Mwangi Kabaiku v Hanna Wanjiku Wanjiru Kiniti &*



Another (2021) eKLR the court observed that for the Court to exercise its discretion in favour of the Applicant, he or she has to satisfy it that there is sufficient cause or reason to warrant it to be put into use in setting aside the order of dismissal and subsequently reinstate the suit.

30. The Appellant has explained that he has always been keen to prosecute his case and that the failure to attend court on the material date was inadvertent. However, the record does not bear him out as the case had previously been dismissed for want of prosecution. His explanation of what happened on .11.22 particularly regarding his absence from the court when the case was called out also does not add up.
31. It is thus the considered view of this court that no sufficient cause has been demonstrated to interfere with the exercise of the discretion of the trial court by setting aside the order of dismissal.
32. The upshot is that the appeal lacks merit and it is hereby dismissed with costs to the Respondent.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 4TH DAY OF FEBRUARY 2025

J. M ONYANGO

JUDGE

In the virtual presence of:

Mr Kurgat for the 1st Respondent

Mr Kiboi for the Appellant

Court Assistant: Hinga

