



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC (CIVIL APPEAL) CASE NO. 14 OF 2017

FORMERLY MERU ELC (CIVIL APPEAL) NO 01 OF 2011

JACOB NJERU KARUKU.....APPELLANT/APPLICANT

VERSUS

NJAGI NJUGUNA.....RESPONDENT

RULING

1. This application was brought to court by way of a Notice of Motion dated **27th day of October, 2020**.

2. The application seeks the following orders:

1.THAT this application be certified urgent and be heard ex-parte in the first instance.

2.THAT the firm of M/S MURANGO MWENDA & COMPANY ADVOCATES be allowed to take over the conduct of this matter from the firm of I. C. MUGO & COMPANY ADVOCATES and come on record for the appellant/applicant.

3.THAT the dismissal order issued on the 5/4/2017 be set aside.

4.THAT this appeal be reinstated for hearing on merit.

3. The application has the following grounds:

a) That the appellant/applicant has instructed the firm of M/S MURANGO MWENDA & COMPANY ADVOCATES to take over the conduct of this matter from the firm of I. C. MUGO & COMPANY ADVOCATES.

b) That the Appeal herein was dismissed on 5/4/2017 for want of prosecution on the ground that the appellant/applicant did not attend court to show cause why the same shouldn't be dismissed.

c) That a Notice to Show Cause was issued and the appellant/applicant and his advocates on record were never served with a notice to show cause why the suit should not be dismissed for want of prosecution.

d) That the failure to attend court on the day fixed for notice to show was not attributable to the appellant/applicant but rather was due to failure to effect service of the said Notice to Show Cause on the appellant and his advocates on record and the appellant/applicant should not be denied an opportunity to canvass his Appeal on merit.

e) That the appellant/applicant has been and is desirous of proceeding with his Appeal expeditiously and unaware that the appeal had been dismissed, he has been making efforts to know the position of the matter in order to take appropriate steps to have it heard and determined on merit.

f) That the appellant/applicant has a strong and meritorious appeal with high chances of success and if the order of dismissal is not set aside and the appeal reinstated he will suffer irreparable damage and loss.

g) That the subject matter of the suit is land which is an emotive factor and it is only right, proper, just and fair that the appellant/applicant is given an opportunity to be heard on merit.

h) That the Respondent will not be prejudiced if the appeal is reinstated for hearing and determination on merit and it is in the

interest of justice that the application be allowed.

i) That this application has been made without undue delay and the appellant/applicant is ready and willing to abide by the terms and conditions the court may give.

j) That it is in the interest of justice that the application be allowed and the prayers sought be granted.

4. The application is supported by the affidavit of JACOB NJERU KARUKU the applicant, sworn on **27th October, 2020** which states:

SUPPORTING AFFIDAVIT

I, **JACOB NJERU KARUKU**, an adult male of P.O. Box 71-60102, Ishiara in the Republic of Kenya do hereby make oath and solemnly swear as follows:-

1. THAT I am the appellant/applicant herein hence competent to swear this affidavit.
2. THAT I instructed the firm of I. C. MUGO & CO. ADVOCATES to file this appeal against the decision of the Eastern Provincial Appeals Committee in the Provincial Appeals Committee No. 124 of 2009 dated 5/11/2010.
3. THAT the said firm filed the Memorandum of Appeal dated 3/1/2011 in the High Court of Kenya at Meru as MERU Civil Appeal No. 1 of 2011.
4. THAT I made a follow up of the appeal at Meru and I was informed that the appeal was transferred to Chuka after the Environment and Land Court at Chuka was constituted.
5. THAT I subsequently made a follow up of the matter at Chuka but my efforts turned fruitless and the registry staff informed me they had not received any such appeal from Meru and that I should follow up with my advocates on record.
6. THAT I made a follow up with my advocates on record who all along informed me that he had not taken any directions from the court on hearing of the appeal and was waiting for a notice from the court.
7. THAT I thereafter instructed the firm of M/S MURANGO MWENDA & CO. ADVOCATES to act for me in the matter and follow up on the position of the appeal.
8. THAT the firm of M/S MURANGO MWENDA & CO. ADVOCATES wrote to the High Court of Kenya at Meru court asking to be allowed to peruse the file and make copies of the pleading to enable them proceed with the matter appropriately. ***(Annexed and marked JNK I is a copy of the letter dated 15/6/2020 sent to Meru via email and the email forwarding the same)***
9. THAT the High Court of Kenya at Meru informed my advocates that the matter was transferred to Chuka on 3/7/2017 for hearing and determination.
10. THAT my advocates subsequently wrote to the High Court of Kenya at Chuka inquiring of the matter. ***(Annexed and marked JNK II is a copy of the letter dated 21/7/2020 sent to Chuka via email)***
11. THAT my advocates were informed that the Chuka ELC Appeals Register had no appeal with similar parties. ***(Annexed and marked JNK III is a copy of the email dated 22/7/2020 from Chuka Law Courts)***
12. THAT my advocates later discovered that the appeal was filed as a Civil Appeal and not an ELC Appeal and wrote to the court clarifying the issue and asking of the position thereof. ***(Annexed and marked JNK IV is a copy of the letter dated 27/7/2020 sent to Chuka)***
13. THAT on 13/10/2020 I was served with an application dated 5/10/2020 filed by the respondent herein in Chuka CM L.D.T Case No. 15 of 2009 seeking to evict me from the suit land. ***(Annexed and marked JNK V is a copy of the said application)***
14. THAT in the said application, the respondent attached and marked NN3, a copy of the ruling of this court showing that the appeal herein was dismissed on 5/4/2017 for want of prosecution.
15. THAT it is upon being served with the said application that I learnt that upon transfer from Meru, MERU Civil Appeal No. 1 of 2011 was assigned number Chuka ELC (C.A) CASE NO 14 OF 2017.
16. THAT I perused the said ruling and learnt that a Notice to Show Cause had been issued asking parties to attend court and show cause why the suit should not be dismissed for want of prosecution; I did not attend court and the appeal was subsequently dismissed.
17. THAT neither I nor my advocates on record were served with the Notice to Show Cause why the appeal should not be dismissed.
18. THAT the failure to attend court on the day fixed for notice to show was not attributable to me but rather was due to failure to effect service of the said Notice to Show Cause on myself and my advocates on record and I should not be denied an opportunity to canvass my Appeal on merit.

19. THAT I have been and I am desirous of proceeding with this Appeal expeditiously and unaware that the appeal had been dismissed, I have been making efforts to know the position of the matter in order to take appropriate steps to have it heard and determined on merit.

20. THAT I have a strong and meritorious appeal with high chances of success and if the order of dismissal is not set aside and the appeal reinstated I will suffer irreparable damage and loss.

21. THAT the subject matter of the appeal is land which is an emotive factor and it is only right, proper, just and fair that I am given an opportunity to be heard on merit.

22. THAT I have not been indolent and did not deliberately fail to prosecute my appeal against the respondent and I pray that the dismissal order be set aside and an order for reinstatement of the Appeal be issued by the court.

23. THAT the Respondent will not be prejudiced if the appeal is reinstated for hearing and determination on merit and it is in the interest of justice that the application be allowed.

24. THAT it is in the interest of justice that the application be allowed and the prayers sought be granted.

25. THAT I swear this affidavit in support of my application for setting aside of the dismissal order dated 5/4/2017 and reinstatement of the appeal.

26. THAT what is deponed herein is true to the best of my personal knowledge information and belief.

5. The application was canvassed by way of written submissions.

6. I opine that in matters canvassed by way of written submissions and especially where the submissions are not bulky it is more convenient and all inclusive to reproduce the submissions in full so that all assertions are taken into account.

7. The Applicant's submissions are reproduced in full herebelow without any alterations whatsoever:

APPELLANT'S/APPLICANT'S SUBMISSIONS ON THE MOTION DATED 27/10/2020

BACKGROUND

The appellant/applicant filed this appeal challenging the decision of the Eastern Provincial Appeals Committee in the Provincial Appeals Committee No. 124 of 2009 dated 5/11/2010. The appeal was filed via the Memorandum of Appeal dated 3/1/2011 in the High Court of Kenya at Meru as MERU Civil Appeal No. 1 of 2011 which was later transferred to this court. The appeal was thereafter dismissed on 5/4/2017 for want of prosecution.

The appellant/applicant aggrieved by the said decision filed this application via the notice of motion dated 27/10/2020 mainly seeking setting aside of the dismissal order of 5/4/2017 and reinstatement of the appeal for hearing and determination on merit. The application is based on the grounds set out in the notice of motion and the supporting affidavit sworn by the appellant/applicant.

The respondent filed a replying affidavit dated 24/11/2020 opposing the said application mainly on grounds that the appellant/applicant was indolent in prosecuting their appeal; that justice delayed is justice denied; and that the respondent will be prejudiced if the application is allowed and the appeal reinstated for hearing on merit.

On 15/12/2020 when the application was coming up for hearing, parties took directions that the same be canvassed by way of written submissions and it is by these directions that we herewith wish to tender submissions for and on behalf of the appellant/applicant.

ANALYSIS AND LEGAL PRINCIPLES APPLICABLE

The application is brought under Article 159 (2) (d) of the Constitution of Kenya 2010, Section A, 1B and 3 and 3A of the Civil Procedure Act and Order. Your Lordship, the appellant/applicant herein seeks two main orders: setting aside of the dismissal order of 5/4/2017 and reinstatement of the appeal for hearing and determination on merit. The court has inherent powers to make such orders as may be necessary for the ends of justice. It is a decision that is within the discretion of the court where sufficient cause is shown for default.

The appellant/applicant averred that he instructed the firm of I. C. MUGO & CO. ADVOCATES to file this appeal against the decision of the Eastern Provincial Appeals Committee in the Provincial Appeals Committee No. 124 of 2009 dated 5/11/2010. The said firm filed the Memorandum of Appeal dated 3/1/2011 in the High Court of Kenya at Meru as MERU Civil Appeal No. 1 of 2011. In an attempt to prosecute his appeal, the appellant/applicant made a follow up of the appeal at Meru and he was informed that the appeal was transferred to Chuka after the Environment and Land Court at Chuka was constituted. He subsequently made a follow up of the matter at Chuka but his efforts turned fruitless and the registry staff informed him they had not received any such appeal from Meru and that he should follow up with his advocates on record. Heeding to this advice, the appellant/applicant made a follow up with his advocates on record who all along informed him that he had not taken any directions from the court on hearing of the appeal and was waiting for a notice from the court.

The appellant/applicant thereafter instructed the firm of M/S MURANGO MWENDA & CO. ADVOCATES to act for him in the matter and follow up on the position of the appeal. The appellant/applicant has annexed and marked JKN I, JKN II, JKN III and JKN IV copies of correspondence between his advocates and the courts in Meru and Chuka through which he sought to know the position of his appeal.

Upon transfer of the matter from Meru to Chuka, the appellant/applicant was not aware of the new case number and unaware that the matter had been assigned a new number, he has been using the old number Civil Appeal number 1 of 2011 to follow up the matter. It should be noted your Lordship, even an attempt to follow up the matter with the names of the parties turned out fruitless. The appellant/applicant has annexed and marked JKN II a copy of the email dated 22/7/2020 from Chuka Law Courts informing him that the Chuka ELC Appeals Register had no appeal with similar parties.

The appellant/applicant explained that he learned of the new case number when he was served with an application dated 5/10/2020 filed by the respondent herein in Chuka CM L.D.T Case No. 15 of 2009 seeking to evict him from the suit land. The respondent attached and marked a copy of the ruling of this court showing that the appeal herein was dismissed on 5/4/2017 for want of prosecution. It is upon being served with the said application that the appellant/applicant learnt that upon transfer from Meru, MERU Civil Appeal No. 1 of 2011 was assigned number Chuka ELC (C.A) CASE NO 14 OF 2017. The appellant/applicant perused the said ruling and learnt that a Notice to Show Cause had been issued asking parties to attend court and show cause why the suit should not be dismissed for want of prosecution; he did not attend court and the appeal was subsequently dismissed. The appellant/applicant contends that neither he nor his advocates on record were served with the said notice to show cause therefore they did not attend court and subsequently the appeal was dismissed for want of prosecution.

It is our submission that the failure to attend court on the day fixed for notice to show was an inadvertent mistake not attributable to the appellant/applicant but rather was due to failure to effect service of the said Notice to Show Cause on the appellant/applicant and his advocates on record and the appellant/applicant should not be denied an opportunity to canvass his Appeal on merit. The decision of the court to dismiss the appeal occasioned a miscarriage of justice to the appellant/applicant for a mistake that was totally beyond his control.

The respondent at paragraph 7 of his replying affidavit dated 24/11/2020 averred that the notice to show cause was properly issued and served on all the parties. However, nothing has been placed before the court show that indeed the notice to show cause was served on all the parties. The record of the court is clear that there is no evidence of service of the said notice to show cause on the appellant/applicant and his advocates on record. The respondent averred that in paragraph 10 of his Replying Affidavit that the appellant/applicant was served with a copy of the ruling and a demand to vacate the land on 26/9/2018. In support of this averment, the respondent has annexed and marked NN2, a copy of a letter dated 26/9/2018 from the firm of Njeru Ithiga & Co. Advocates which purportedly forwarded the ruling of the court. It should be noted that the said letter is addressed to the Senior Chief, Kamwimbi Location informing him that the appeal was dismissed on 5/4/2017 and that he should not allow the appellant/applicant to bury his mother, TABITHA KARUKU on the suit land. The appellant/applicant in his further affidavit dated 23/12/2020 explained that he has never been served with any demand notice or ruling of the court indicating that the appeal herein was dismissed, either by the Respondent or by the said Senior Chief and that he indeed buried his mother on the suit land without interference from anyone. We submit that the respondent applicant has not proved that the said ruling of the court was served on the appellant/applicant or his then advocates on record or that they were aware of the dismissal of the appeal herein.

The respondent further averred at paragraphs 8, 13, 14 and 17 of the said replying affidavit that the appellant/applicant has been indolent in prosecuting his appeal and cannot allege that he was not aware that his appeal had been dismissed.

We differ with the respondent's averment and submit that it is very clear that the appellant/applicant was not aware of the position of his appeal and that is why unaware of its dismissal, he has been following up the matter via the correspondences annexed and marked JKN I, JKN II, JKN III and JKN IV to his supporting affidavit. The allegation by the respondent that the application herein is an afterthought and a reaction to his application dated 5/10/2020 filed in LDT seeking to have the appellant/applicant evicted cannot hold water. The correspondences marked JKN I, JKN II, JKN III and JKN IV are dated 15/6/2020, 21/7/2020, 22/7/2020 and 27/7/2020 respectively. The appellant/applicant was following up on the appeal before the respondent filed his application for eviction.

Even if there was any delay in prosecuting the appeal, the same cannot be blamed in the appellant/applicant. The appellant/applicant duly gave instructions to his advocates on record and relied on the said advocates' skill in judicial practice to conduct the appeal in accordance with the process of the court. The appellant/applicant followed up the matter both in court and with his advocates but was informed by his then advocates on record that he was awaiting directions from the court. It was the appellant's/applicant's expectation that the advocate would ably conduct the matter procedurally and without undue delay. As such, we submit that this mistake should not be visited on the appellant/applicant as an innocent litigant by denying him an opportunity to canvass his appeal on merit. In submitting so we rely on the authority in *Abdalla Ali Bajaber v Mangale Dzombo Ngoka & Another (2012) eKLR* where the court held:

“...I find that the Defendants' counsel has conducted the Defendants' case since the filing of the Memorandum of Appearance on 15th July 2011 to the argument before the court without due regard to the rules of procedure which required him on behalf of the Defendants to file a verifying affidavit in support of the Counter-claim, a list of witnesses, the witness statements and copies of document to be relied on together with the Defence and Counter-claim which was required to be filed 14 days after the Memorandum of Appearance. In default of all this, counsel should have sought by formal application the leave of court to enlarge the time prescribed for the doing of the said acts. He did not do so. Counsel was on record as acting for the Defendants, the latter relied on his apparent skill in judicial practice to conduct their case in accordance with the process of the court. Having failed to do so, counsel must be taken, on the principle of mistake by counsel, to be solely responsible for the errors and defaults in the presentation of the Defendants' case. However, in accordance with accepted practice of the courts the mistake of counsel should not be visited upon innocent parties whom they represent. I have not seen or heard anything in the argument or in the pleadings and affidavits before the court to suggest that the Defendants were in any way responsible for the defaults of their counsel and I therefore excuse them from blame...”

Your Lordship, it is the duty of the court to guard against undue hardships or irreparable loss being caused to litigants due to their advocates' mistakes as the appellant/applicant had no role to play in the actions leading to their advocates' action. The appellant/applicant had performed his duty as a litigant and constantly checked with his advocates for the progress of his case. The appellant's/applicant's efforts to have the matter determined are further depicted by the fact that upon unsuccessfully following up the matter with his previous advocates, the appellant/applicant instructed a new firm to take over the matter and follow up the same. We implore this court to find that the appellant/applicant should not suffer prejudice due to the mistake of their advocate.

Your Lordship, the end result of dismissing the appeal is that the appellant/applicant was prevented from being heard on his appeal against

the tribunal's decision. Substantive justice echoed by the overriding objective was not done. Dismissing the appeal is tantamount to contravention of the appellant's/applicant's constitutional right to a fair hearing anchored in Article 50 (1) of the Constitution of Kenya 2010. It is fundamental to our justice system and must always be observed and upheld by the courts. It is a right that cannot be taken away under any circumstances irrespective of the nature of the matter under consideration, more so, on issues of procedural technicalities. It is a basic right which cannot be taken away or sacrificed at the altar of procedural technicalities regardless, of the hopelessness of one's case. That is why your Lordship, the courts have, the world over, embraced the "*audi alteram partem*" principle, that, "No person should be condemned unheard". In *Harrison Wanjohi Wambugu v Felista Wairimu Chege & Another (Supra)*, the learned judges of appeal faulted the learned judge for failing to reinstate an appeal for hearing and determination on merit and in so doing cited with approval its decision in *Richard Nchapi Leiyagu v IEBC & 2 Others Civil Appeal No. 18 of 2013* that:

"The right to a hearing has always been a well protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the Courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality..."

We are of the considered view that the learned judge ought to have reinstated the appellant's appeal to give the parties herein an opportunity to be heard on the same and for the appeal to be determined on merit..."

The duty and concern of the court should be to deliver justice and not discipline parties/litigants who through inadvertence, genuine mistake or error fail to comply with certain procedural technicalities. Your Lordship, failure to attend court to show cause why the appeal should not be dismissed was an inadvertent mistake occasioned by lack of service. In *Harrison Wanjohi Wambugu v Felista Wairimu Chege & Another (2013) eKLR*, the Court of Appeal cited with approval, the words of Madan J.A. in *Belinda Murai & Others V Amos Wainaina (1978) LLR 2782 (CALL)* where he stated;

"A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel the court may feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to have known better. The court may not condone it but it ought to certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometime overrule..."

Your Lordship, the words of wisdom hereabove capture the true soul and spirit of the law. The words go further to address in wholesome the issue this Honourable court has to confront in this application. We find the same very relevant to our case. It is may be true your Lordship, to say that the appellant/applicant did not prosecute their appeal timeously nor attend court on the day fixed for notice to show cause. But such failure, which occurred due to circumstances beyond the appellant's/applicant's control, does it warrant the dismissal of the appellant's/applicant's appeal and locking out the appellant/applicant from being heard? Would justice have been served to the parties? Certainly not your Lordship.

The respondent alleged that justice delayed is justice denied and faulted the appellant/applicant for delaying justice. He averred that Article 159 of the Constitution provides for expeditious delivery of justice. We submit that the appellant/applicant has always been vigilant and desirous of prosecution the appeal. He followed up with the court, his previous advocates and that is why he even instructed a new firm to take over conduct of the matter. He was not aware of the new case number or that his appeal had been dismissed.

My Lord, Article 159 of the Constitution of Kenya 2010 requires justice to be done fairly, reasonably and in a manner that would ensure justice is delivered. Article 159 anchors the overriding objective which is codified in Sections 1A and 1B of the Civil Procedure Act Cap 21 and Sections 3A and 3B of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya. We urge this court to uphold the overriding objective principle. Even though the Overriding Objectives principles call for expeditious delivery of justice, the same is not tantamount to dismissal of matters without carefully considering whether the dismissal of the matter is just to all the parties. In applying the overriding objective principles, the court should be guided by the broader sense of justice and fairness.

In the case of *Martha Karua v Independent Electoral and Boundaries Commission & 3 Others (2018) eKLR*, the court of Appeal considered the application of Rule 4 of the Election Petition Rules which anchors the overriding objective principle as to facilitate the just, expeditious, proportionate and affordable resolution of petitions under the Constitution and the Act. The court observed;

"...In essence, the objective of the Petition Rules as set out under Rule 4 should be borne in mind to ensure the just, expeditious, proportionate and affordable resolution of an election petition. There should be a meticulous balance of those four objectives. It should not appear as though, an election court is simply concerned about expeditious disposal of the election petition by quickly striking it out, without carefully considering whether the decision to strike out, the petition is actually just to all the parties concerned, whether it is proportionate and whether the same could be avoided..."

Guided by the citation above, we are of the view that although justice should not be delayed, the same cannot be achieved by dismissal of suits without hearing and determination on merit. We therefore urge the court to find that justice was not served on all the parties and particularly the appellant/applicant by dismissal of the appeal. In the circumstances, the broader sense of justice and fairness calls for setting aside of the dismissal order and reinstatement of the appeal for hearing and determination on merit. The appellant/applicant should not face injustice because of the mistake that was occasioned by circumstances beyond his control.

Your Lordship, the concern and duty of the court at all times is to do justice to all the parties who appear before it. Article 159 of the Constitution of Kenya 2010 and Sections 1A and 1B of the Civil Procedure Act place heavy reliance on substantive justice as opposed to undue regard to procedural technicalities. The said sections of law impel the court to do substantive justice without due regard to procedural technicalities. Thus, a court of law has a duty to ensure that parties appearing before it have their disputes arbitrated upon fairly, reasonably,

and in a manner that ensures justice is delivered. It is by this duty that we urge the court not punish the appellant/applicant for failing to timeously prosecute the appeal and to attend court for hearing of the notice to show cause since the said mistakes were not deliberate.

In the case of *Abdirahman Abdi also known as Abdirahman Muhumed Abdi v Safi Petroleum Products Limited & 6 Others (2011) eKLR*, the learned judges of appeal held:

“...The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantial justice. It is however, not a principle the court may invoke without giving the parties an opportunity of being heard on the matter...In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of sections 3A and 3B of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya, and later, Article 159(2)(d) of the Constitution of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2)(d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure...The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion...”

In *Joseph Kiangoi v Waruru Wachira & 2 Others (2010) eKLR*, the Court of Appeal echoed the substantive aspect of the overriding objective in the following words:

“In the circumstances, we think the unsuccessful attempt by the respondents to bring themselves within the proviso to rule 76(1) can be cured by our taking a broad view of justice as mandated by the overriding objective principle. The cure would come about because in the circumstances, justice is to be found in sustaining the appeal for it to be heard on merit instead of striking it out on a technicality. Indeed, in our view there cannot be a better case for the invocation of the overriding objective principle than this case. Court’s should in our view lean more towards sustaining appeals rather than striking them out as far as is practicable and fair...the substantive aspect of sustaining the appeal must in the interest of justice override the procedural rule requiring the striking out of the notice of appeal and the record...We have a feeling that if we were to allow the application and strike out the notice and the record, of appeal we would in the special circumstances of this case, act unjustly and we would fail to give effect to the overriding objective. We accordingly invoke the overriding objective and in the circumstances of this case, dispense with the need for the respondents to have applied as per the proviso to Rule 76(1) of this Court’s Rules.”

Your Lordship, the appellant/applicant filed this appeal in Meru and it was thereafter transferred to Chuka. He was not aware of the new case number and made fruitless efforts to ascertain the same until he was served with the respondent’s application for eviction. Without the case number, the appellant/applicant could not successfully move the court for hearing and determination of the appeal. Even an attempt to follow up the matter with names of the parties turned out fruitless. Upon learning of the new case number and that the appeal had been dismissed for want of prosecution, the appellant/applicant moved with haste and filed the application herein.

We rely on the case of *Christopher Orina Kenyariri t/a Kenyariri & Associates Advocates v Salama Beach Hotel Limited & 3 Others (2017) eKLR*, where the learned judges of appeal were of the view that:

It is these kinds of technical lapses, which do not occasion any irremediable prejudice, that Article 159 (d) of the Constitution and the overriding objective in section 1A & B of the Civil Procedure Act as well as in section 3A & B of the Appellate Jurisdiction Act seek to obviate. Since the promulgation of the Constitution and the adoption of the overriding objective, the trend in the courts of this country has been to strive to sustain rather than to strike out pleadings on technicalities, which do not occasion any prejudice.

The court went ahead and quoted with approval its decision in *Nicholas Salat v IEBC & 6 Others (2013) eKLR* that:

“Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.”

We are of the view that no harm or prejudice will be occasioned on the respondent as a result of reinstatement of the appeal for hearing and determination on merit. For his inconvenience, the respondent can be compensated by costs. There is no risk of failure of fair trial of the appeal. The court is still required to weigh the scale of justice and decide whether the same could be mitigated by payment of costs as opposed to wielding the draconian sword of dismissing the appeal. My Lord, in *Harrison Wanjohi Wambugu v Felista Wairimu Chege & Another (Supra)*, the court further cited with approval the decision in the case of *Philip Chemowolo & Another v Augustine Kubede (1982-88)KAR 103 at 1040* where Apaloo J.A. held:

“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of parties and not the purpose of imposing discipline.”

The above sentiments, Your Lordship, relate well to the case under consideration herein and we urge this Honourable Court to be guided by the same. The same is good law. It is clear from the above cited authorities that the law does not support dismissal of matters on ground of default and neither should the courts or the law deny litigants the right to a hearing because the party is in default or has committed a mistake or blunder along the way.

The proportionality of the sanction of dismissing the entire appeal for delay in prosecuting the same and failure to attend court for notice to show cause is prejudicial to the appellant/applicant considering that he had properly instructed his advocates in the matter, and has been making efforts to follow up the matter in vain. Courts should strive to sustain rather than dismiss suits on purely technical grounds. We urge your Lordship, to sustain this appeal by reinstating it for hearing and determination.

We submit that the appellant/applicant will be greatly prejudiced if this appeal is not reinstated for hearing and determination on merit since he stands to be rendered homeless. The respondent and his family have been in occupation and use of the suit land for years and have built our homes thereon. They eke a living from the suit land and he did not deliberately fail to prosecute the appeal.

It is our considered opinion and we so submit that setting aside the dismissal order and reinstating the appeal for hearing will guarantee justice and fairness to the parties on equal arms (footing). There is no evidence that there was intentional default on the part of the appellant/applicant. He dutifully followed up his case and anticipated that his advocates would follow up on the same as well.

Your Lordship, the respondent has not denied that the appellant/applicant has an arguable appeal with high chances of success. It is our considered view and opinion that the appeal herein raises solid and arguable grounds with high chances of success. The same merits a day in court.

CONCLUSION

Your Lordship, it is our humble view that the dismissal of the appellant's/applicant's appeal amounted to a grave miscarriage of justice and should be set aside. The appellant/applicant is an innocent litigant who properly instructed his former advocate and relied on their skill in judicial practice to conduct the appeal on their behalf. The appellant/applicant still followed up the matter both in court and with his advocates. Without a case number, the appellant's/applicant's hands were tied and he could not move. He should therefore not suffer injustice.

A court of law should not allow the prescriptions of procedure and form to trump the primary objective of dispensing substantive justice. We implore the court to invoke the principles of the overriding objectives and apply them to breath life into this appeal, for purposes of ameliorating the harshness of the consequences of the appellant's/applicant's inadvertent failure to timeously prosecute his appeal and to attend court on the day fixed for notice to show cause.

We urge your Lordship to be guided by the above stated authorities which are good law for the litigants of this country and for proper administration of justice, and find favour in the appellant's/applicant's application herein and allow the same with costs in the appeal. We implore this Honourable Court to set aside the dismissal order, reinstate the appeal to be heard and determined on merit. We have attached the following for the court's consideration:

- 1. Abdalla Ali Bajaber v Mangale Dzombo Ngoka & Another (2012) eKLR***
- 2. Harrison Wanjohi Wambugu v Felista Wairimu Chege & Another (2013) eKLR***
- 3. Martha Karua v Independent Electoral and Boundaries Commission & 3 Others (2018) eKLR***
- 4. Abdirahman Abdi also known as Abdirahman Muhumed Abdi v Safi Petroleum Products Limited & 6 Others (2011) eKLR***
- 5. Joseph Kiangoi v Waruru Wachira & 2 Others (2010) eKLR***
- 6. Christopher Orina Kenyariri t/a Kenyariri & Associates Advocates v Salama Beach Hotel Limited & 3 Others (2017) eKLR***

DATED AT MERU THIS29TH DAY OFDECEMBER..... 2020

FOR: MURANGO MWENDA & CO.

ADVOCATES FOR THE APPELLANT/APPLICANT

8. The respondent's submissions are reproduced in full herebelow without any alterations whatsoever:

RESPONDENT'S WRITTEN SUBMISSIONS IN OPPOSING THE NOTICE OF MOTION APPLICATION DATED 27TH OCTOBER 2020.

May it please you my Lord,

The respondent will rely on his replying affidavit dated 24TH day of November 2020 and these submissions to oppose the prayers sought in the Applicant's Notice of motion.

The respondent formulates the following three issues for determination by this honorable court.

I. *Whether there was proper notice to show cause?*

II. *Whether there was delay and whether it is excusable?*

III. *Will setting aside be prejudicial to the respondent?*

i. Whether there was proper Notice to Show cause

My Lord the Applicant has averred that neither he nor his then advocates were served with a notice to show cause why the Appeal should not be dismissed.

Order 17 Rule 2 (1) of the Civil Procedure Rules grants this court power to dismiss a suit in which no step has been taken for one year. The Order also requires the court to give notice to the party concerned to show-cause why the suit should not be dismissed for want of prosecution, and if no cause is shown to the satisfaction of the court, the court may dismiss the suit as was done in this matter.

In Kestem Company Ltd v Ndala Shop Limited & 2 others [2018] eKLR Justice Ombayo held that Order 17 Rule 2 (1) of the Civil Procedure Rules does not require service of notice; it uses the word “give notice”. The court may give notice of dismissal through its official website or through the cause-list.

In this matter my Lord, the notice of dismissal of the suit was given through the judiciary website and cause-list prepared which to the court is adequate notice to the parties. The law did not envisage a situation where courts are burdened with the process of looking for indolent litigants to personally serve them with a notice to show cause.

The Learned Justice Jikonyo in **Fran Investments Limited v G4S Security Services Limited [2015] eKLR** held that “this order is permissive and allows quite significant room for exercise of discretion to sustain the suit. And I think, it is so especially when one fathoms the requirements of article 159 of the Constitution and the overriding objective which demands of courts to strive often, unless for very good cause, to serve substantive justice. This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such draconian act comparable only to the proverbial “sword of the Damocles”. But that reality should be checked against yet another equally important constitutional demand that cases should be disposed of expeditiously, which is founded upon the old age adage and now an express constitutional principle of justice under article 159 of the Constitution, that justice delayed is justice denied. Here I am reminded that justice is to all the parties and not only the plaintiff. This is the test I shall apply here.

ii. Whether there was delay and whether it is excusable?

The dismissed Appeal had been filed in court in 2011. The Applicant took no steps to prosecute his appeal until it was dismissed in 2017. A period of 7 years. Further, it has taken him another period of 4 years after the dismissal to make the application to set aside. A record period of 11 years without taking any step. THIS IS INORDINATE DELAY.

My Lord the Applicant has averred at paragraph 8 and 9 of his supporting affidavit that ever since the Appeal was filed in Meru in 2011, he has never been aware that the same was transferred to the Environment and Land Court at Chuka , and he was not aware that the same was dismissed. This clearly shows that the Applicant has never been desirous to have the matter heard and determined.

iii. Will setting aside be prejudicial to the respondent?

My Lord the delay of 11 years has not been satisfactorily explained by the Applicant and that delay is a source of prejudice to the Respondent as it affects the fair administration of justice. Article 47 of the constitution of Kenya 2010 provides for the right to administrative action that is expeditious, lawful, reasonable and procedurally fair. Article 159 of the said constitution provides that justice shall not be delayed. Failure to set down the suit for hearing for 10 years was a clear infringement of Article 159 of the Constitution of Kenya, 2010 as the failure delayed justice in this matter.

There is a need for expeditious disposal of land matters in order to bring the disputes to an end and enable families/litigants move on. We implore upon this honorable court to deny the prayers sought by the Applicant.

DATED AT CHUKA THIS27TH DAY OF JANUARY2021

MUTHOMI GITARI & CO

ADVOCATES FOR THE RESPONDENT

9. I have carefully considered the pleadings, the submissions and the authorities proffered by the parties to buttress their diametrically divergent assertions. I opine that all the authorities proffered by the parties are good authorities in their facts and circumstances. However, no two cases are congruent to a degree of mathematical exactitude in their facts and circumstances.

10. There are two substantive prayers in this application;

a) That the dismissal order issued on 5.4.2017 be set aside.

b) That the appeal be reinstated for hearing.

11. This suit was dismissed in terms of the provisions of order 17 Rule 2 of the Civil Procedure Rules. Order 17 Rule 2 of the Civil Procedure Rules states as follows:

“2(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 for in sub-rule 1.

(4) The court may dismiss the suit for non-compliance with any direction given under this order.”

12. This court needs to find out the following:

a) Had no application been made or any step taken by either party for one year?

b) Was notice given to the parties to come to court to show cause why the suit should not be dismissed for want of prosecution?

c) Was any cause shown to the satisfaction of the court? that the suit should not be dismissed?

13. From the pleadings and the submissions made by the parties, it is pellucid that:

a) No application and no step had been taken by any of the parties before the suit was dismissed.

b) Notice was duly given to the parties to come to court to show cause why the suit should not be dismissed. Indeed, the applicant's previous advocate does not deny that he was served.

c) No cause whatsoever was shown by any of the parties, including the applicant, as to why the suit should not have been dismissed.

14. I note that unlike for dismissals of suits under Order 12 of the Civil Procedure Rules where the law at rule 7 provides that on application, the court may set aside or vary judgment or order on such terms as may be just, under Order 17, there is no express provision that says that the court may set aside a dismissal. That notwithstanding, I opine that the court may in proper circumstances invoke its inherent and unfettered discretion as provided for by sections 1A, 1B, 3 and 3A of the Civil Procedure Act and set aside a dismissal issued under order 17 of the Civil Procedure Rules. For the court to do so an applicant must show cause to the satisfaction of the court why this should be done.

15. I note that the applicant, among other provisions of the law, claims that this application has been brought to court under Article 159(2)(d) of the Constitution of Kenya. Article 159(2)(d) of the constitution states that: **“(d) Justice shall be administered without undue regard to procedural technicalities.”** At the outset I wish to state that dismissal of a suit under Order 17 of the Civil Procedure Rules is not a procedural technicality. It constitutes a process underpinned by statutory law. It is a legal imperative that it is exercised judiciously by courts of law.

16. The same Article 159 of the Constitution at 2(b) decrees as follows: **“Justice shall not be delayed.”** The sword of Justice cuts both ways. It takes into account the legal rights of all parties. What is good for the goose is good for the gander!

17. The Civil Appeal, which is the genesis of this application was filed in **2011**. This is roughly **ten years ago**. By the time this suit was dismissed on **5th April, 2017**, this suit had remained unprosecuted and undetermined for **seven years**. This application was filed on **27th October, 2020**, about **three and a half years** after the suit was dismissed. This is evidence of veritable, unmitigated and unexplained indolence on the part of the applicant.

18. I do not agree with the applicant that dismissal of his suit amounted to a grave injustice. I also do not agree that his previous advocate should be solely to be blamed. I agree with the respondent that failure to have the suit heard and determined for a period ranging **from seven to ten years** amounts to infringement of Article 159 2(b) of the constitution which is laconic that: **“Justice shall not be delayed.”**

19. In the circumstances, I find that the applicant has not shown to the satisfaction of this court why it should exercise its discretion to set aside its dismissal order issued on **5.4.2017** and to reinstate the suit for hearing.

20. The following orders are hereby issued:

a) This application is dismissed.

b) Costs are awarded to the respondent.

Delivered in open Court at Chuka this 2nd day of March, 2021 in the presence of:

CA: Ndegwa

Muthomi Gitari present for the Respondent

Murango Mwenda for the Applicant

HON. JUSTICE Dr. P. M. NJORGE,

ELC JUDGE.