



Rotich v Cherono (The administrator of the Estate of Henry Cherono) (Environment and Land Appeal 19 of 2019) [2023] KEELC 18480 (KLR) (4 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18480 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL 19 OF 2019**

JM ONYANGO, J

JULY 4, 2023

BETWEEN

WILSON ROTICH APPELLANT

AND

LENA KIMOI CHERONO RESPONDENT

THE ADMINISTRATOR OF THE ESTATE OF HENRY CHERONO

RULING

1. The applicant filed an application dated 27th February, 2023 pursuant to section 3A and 80 of the [Civil Procedure Rules](#), Cap 21 of the Laws of Kenya, Order 40 Rule 1 and Order 45 Rule 1 of the [Civil Procedure Rules](#) seeking the following orders:
 - i. Spent
 - ii. That the Honourable Court be pleased to allow the Appellant to change his advocates from the firm of M.K Chebii & Company Advocates to the firm of M/S Kingori & Associates Advocates and the latter be deemed to be n record.
 - iii. That pending the hearing and determination of the application inter partes the Honourable Court be pleased to order that the status quo ante prevailing at the time of the dismissal of the appeal dated 14th June 2019 on 28th October 2022 for want of prosecution be restored and maintained.
 - iv. That pending the hearing and determination of this application, the stay of execution orders granted by the Honourable Court on 1st August 2019 be reinstated.
 - v. That the Order of the Court made on 28th October 2022 dismissing the Appeal dated 4th June 2019 together with all other consequential orders be reviewed, varied and/or set aside and the appeal be reinstated



- vi. That the stay of execution orders granted by the Honourable Court on 1st August 2019 be reinstated pending the hearing and determination of the appeal.
 - vii. That the Honourable Court directs that the appeal be set down for hearing on priority basis.
 - viii. That the costs of this application be in the cause.
2. In support of his application the Applicant swore an affidavit dated 27th February 2023 in which he deposed that he had instructed his former advocates M/S M.K Chebii to prosecute his appeal but they failed to do so and as a result his appeal was dismissed for want of prosecution on 28th October 2022. That he only learnt of the dismissal on 24th Febry 2023 when he was served with an eviction order. He deposes that he has an arguable appeal and if the same is not reinstated the same shall be rendered nugatory.
 3. In opposing the application the Respondent filed a Replying Affidavit sworn on 18th March, 2023 in which he depones that the Applicant went to sleep after obtaining an unconditional stay of execution. He points out that apart from blaming his former advocate for failing to prosecute his appeal, the Applicant has not stated what steps he took to ensure his appeal was prosecuted. He further deposes that execution was carried out on the 7th March, 2023 and the application for stay of execution has therefore been overtaken by events. He adds that the Applicant in a desperate attempt to maintain his grip on the suit premises, colluded with some persons who purport to be his tenants at the suit premises and filed a reference being Eldoret BPRT Cause No. E041 of 2023 in which he has dishonestly used the purported tenants to sue him and the Applicant alleging he (Respondent) has issued notices to the said tenants. For the foregoing reasons, the Respondent deposes that the Applicant does not deserve the orders sought.
 4. The application was canvassed by way of written submissions which I have considered.
 5. Having considered the application, Replying Affidavit and rival submissions, the main issues for determination are:
 - i. Whether the firm of Kingori & Associates Advocates are properly on record.
 - ii. Whether the order dismissing the appeal should be set aside so that the appeal can be reinstated for hearing.
 - iii. Whether a stay of execution should be granted.

Analysis and Determination

6. With regards to the issue of representation Order 9 Rule 9 of the [Civil Procedure Rules](#) requires that where there is a change of advocate after delivery of judgment the consent the change shall only be effected with leave of the court or if the incoming advocate that the outgoing one file a consent. In the instant case the issue was raised when the application first came up for hearing on 21.3.23 and counsel for the Respondent indicated that the Applicant could file a consent with the outgoing counsel. Since the said consent was filed, counsel for the respondent cannot turn around and object to the same unless he can demonstrate the prejudice that the Respondent shall suffer. The firm of Kingori & Associates Advocates are therefore deemed to be properly on record.
7. With regard to the second issue, the discretion of court to set aside an order for dismissal ought to be exercised judiciously. When a suit that is dismissed for a want of prosecution, it means that the parties therein failed to aid the court in meeting the overriding objective of the [Civil Procedure Rules](#), which is to facilitate the just expeditious and affordable adjudication of cases. The party seeking to reverse this



order must therefore explain to the satisfaction of the court why he failed to prosecute his case in order for the court to exercise its discretion in his favour. The test for consideration in granting an order to set aside an order dismissing a case for want of prosecution was emphasized in the case Boniface Kamau Njoroge v John Waweru Wanjobi [2021] eKLR where the court held as follows;

“The test for consideration for reinstatement of a suit that has been dismissed for want of prosecution is whether the delay is prolonged and inexcusable; whether justice can still be done despite the delay; and whether the Plaintiff or the Defendant will be prejudiced by reinstatement of the suit.” (Emphasis supplied).”

In *Savings and Loans Limited vs. Susan Wanjiru Muritu* Nairobi (Milimani) HCCC NO. 397 of 2002 Kimaru, J expressed himself as follows:

“Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate’s failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate’s failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff’s determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgement that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant.”

8. In the instant case, the Applicant has laid all the blame for failing to prosecute his appeal on his former advocate. The Memorandum of Appeal was filed on 8th June 2019. The record shows that the certified copies of the proceedings and judgment were ready on 1.12. 20. Thereafter no action was taken to file the Record of Appeal upto the time the appeal was dismissed more than 3 years later. The delay has not been explained at all. The Applicant has admitted that he only learned that his appeal had been dismissed when he was served with an eviction notice. He ought to have realized that the case belonged to him and he had the responsibility to follow up on his case with a view to ensuring that his appeal was prosecuted. He has not demonstrated what steps he took to follow up of the progress of his appeal. The Applicants’ attempt to blame his former advocate for failing to prosecute his appeal is cannot be countenanced by this court. In failing to follow up on his appeal, the applicant was clearly indolent.
9. In his Replying affidavit, the Respondent has deposed that the decree of the lower court has since been executed and the Applicant has been evicted from the suit premises. This means that that the Respondent would be prejudiced if the appeal is reinstated.
10. In the case of Cecilia Wanja Waweru v Jackson Wainaina Muiruri 2014 eKLR the Court of Appeal observed as follows:

“This court in Richard Nchangi Leiyagu v IEBC & 2 Others Civil Appeal No. 18 of 2013 while considering circumstances under which an ex-parte order may be set aside expressed itself as follows:



We agree with the noble principles which go further to establish that the court’s discretion to set aside an ex-parte judgment or order for that matter is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake but not to assist a person who deliberately seeks to obstruct or delay the course of justice”.

11. The applicant has not placed any material before this court that would persuade me to exercise my discretion in his favour.
12. The upshot is that the application lacks merit and it is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 4TH DAY OF JULY 2023.

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J.M ONYANGO
JUDGE

In the presence of;

1.
2.

Court Assistant: H. Akidor

