



**Murithi & another v Marete (Environment and Land Appeal
E108 of 2021) [2023] KEELC 20589 (KLR) (11 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20589 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E108 OF 2021
CK NZILI, J
OCTOBER 11, 2023**

BETWEEN

DAVID MUTHURI MURITHI 1ST APPELLANT

PETER MUTUMA 2ND APPELLANT

AND

BRIDGET NKIROTE MARETE RESPONDENT

*(Being an appeal from the ruling made in Gitbongo ELC No. 90 of
2018 on 23.8.2021 by Senior principle magistrate Hon. S. Ndegwa)*

JUDGMENT

1. By a memorandum of appeal dated 14.10.2021, the appellants, under leave granted on 1.10.2021, fault the ruling delivered on 23.8.2021 by the trial court, finding the application for review unmerited, failing to exercise discretion in their favor and grant them an opportunity to be heard on merits, and lastly for failing to consider the prevailing circumstances.
2. As a first appeal, the court is mandated under Section 72 of the *Civil Procedure Act* to rehearse, rehear, or reappraise itself of the lower court record and come up with independent findings as to law and facts. See *Selle & another v Associated Motor Boat Co. Ltd and others* [1968] eKLR v *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2001] eKLR and *Gitobu Imanyara v AG* [2018] eKLR.
3. The appellants, by a plaint dated 21.12.2018 as the plaintiffs, had sued the respondent as the defendant before the trial court, claiming to be the nephew of the late Imanyara Kiara alias M'Imanyara M'Ikiara, the registered owner of LR No. Abothuguchi/Kithirune 320, 891, and 691, (hereinafter the suit lands). They had claimed the suit land formed part of the ancestral land held in trust by the deceased for and on behalf of his brothers, namely Jasper Marete Ikiara and Philip M'Murithi.



4. Further, the appellants had averred that the customary trust had been acknowledged by the deceased to the extent that he had executed the transfer forms in favor of the beneficiaries, which, unfortunately, were never registered. Additionally, the appellants averred that in breach of the trust, the respondent petitioned for a grant of letters of administration without disclosing the trust. They urged the court to declare that the land was held in trust and that the respondent should be directed to execute and transfer the parcels of land to them. The plaint was accompanied by witness statements, a list of documents dated 21.12.2018, and an application for land control board consent, letters of consent, transfer forms, payment receipts, search certificates, and judgment in Meru Succession Case No. 426 of 2008. Similarly, a case summary and a list of issues dated 12.4.2019 were filed.
5. The respondent opposed the suit by a statement of defense dated 17.1.2019, denying that the registration of the two parcels of land in the name of the deceased was subject to customary trust as pleaded or at all. He also denied the existence of any documents to that effect, and if any existed, they must have been forged. The respondent termed the suit bad in law as per Order 4 of the [Civil Procedure Rules](#) and time-barred under the [Limitation of Actions Act](#). Additionally, the respondent averred that the claim was res-judicata, untenable, incompetent, bad in law, and improperly before the court, primarily because of Meru HC Succession Case No. 426 of 2008. The defense was accompanied by a list of witnesses' statements and a list of documents namely; the judgment in the cited succession case. A notice of preliminary objection dated 22.10.2019 that the suit was res-judicata, contrary to Section 7 of the [Civil Procedure Act](#) given the succession case and therefore an abuse of the court process which should be dismissed as per Section 3A of the [Civil Procedure Act](#), was also filed by the respondent.
6. In support of the preliminary objection, the respondent relied on written submissions dated 22.10.2019, placing reliance on *DSV Silo v the Owners of Sennar* (1985) ALL ER 104 as cited with approval in *Bernard Mugo Ndegwa v James Nderitu Gitbae & 2 others* (2010) eKLR, *Henderson v Henderson* (1843) 6R ER 313, *Ali Waziri Abubakari v District Land Registrar* Kakamega No.291 of 214 and *Mwangi Stephen Murithi v Daniel Toroitich Arap Moi & another* Nakuru ELC No. 11 of 2017.
7. The case was lifted for pre-trial conference on 24.8.2019 and later for hearing on 12.7.2019 and 27.9.2019 when directions were made that the preliminary objection be heard on 18.10.2019. The trial court issued a mention notice for 6.3.2020 and eventually a notice to show cause for 14.6.2021, why the suit should not be dismissed. The notice was served upon the appellants' lawyers on record on 26.5.2021, and a return of service by Catherine Mworira, sworn on 8.6.2021, was filed.
8. The parties blamed the delay on Covid 2019 and expressed their willingness to have the matter heard. By a ruling dated 14.6.2021, the court held that court operations were upscaled with effect from July 2020 and that since the case was last in court on 21.1.2020, the explanation was not plausible. The court dismissed the suit for want of prosecution with costs to the respondent.
9. Through an application dated 30.6.2021, the appellants sought reinstatement of the suit for hearing under Order 17 Rule 2 (1) of the [Civil Procedure Rules](#). In a ruling dated 23.8.2021, the trial court held that the appellants had not satisfied the requirements for review of the dismissal order. It nevertheless granted leave dated 13.10.2021 to the appellants to appeal against the ruling, following an application dated 26.8.2021, whose verdict was delivered on 1.10.2021.
10. In this appeal, parties, following directions, agreed to canvass the appeal through written submissions. The appellants, by written submissions dated 12.5.2023, took the view that they were present during the notice to show cause and had indicated a willingness to pursue the case, given the impact of covid-19.



11. Further, the appellants submitted that before covid -19, the suit had been set down for hearing, that the delay was not inordinate, that the claim was based on land, and that the court should have considered all these factors by allowing the matter to be heard on merit. Instead, the appellants submitted that the trial court wrongly exercised its discretion and should have reviewed its earlier orders. Reliance was placed on [Rose Makokha Mteka v. Oserian Development Co. Ltd](#) (2022) eKLR.
12. The court has considered the lower court record, the grounds of appeal, and the written submissions. The issues calling for the court's determination are:-
 - a. If the appellants were entitled to the review orders.
 - b. If the trial court exercised its discretion correctly in dismissing the application dated 30.6.2021.
13. The application before the trial court had been made under Order 17 Rule 6 of the [Civil Procedure Rules](#). The respondent opposed the same through a replying affidavit sworn by Bridget Nkirote Marete on 15.7.2021, on the basis that the dismissal order was made in the appellants' presence, there was no satisfactory explanation, credible or sufficient cause for the inordinate delay to set down the matter for hearing and that the only option available was an appeal and not review. Further, the respondent averred that the appellants had lost interest in the case and that the reinstatement could not have served any purpose. In support of the application for reinstatement of the suit, the appellants had pleaded that they were occupying the suit land and that the dismissal of the case would prejudice them.
14. Order 17 Rule 2(2) & (4) of the [Civil Procedure Rules](#) grants the court power to dismiss a suit for want of prosecution for non-compliance with any order given. Under Order 17 Rule (6) thereof allows a party whose case has been dismissed room to make an application after the dismissal of the suit. The court is granted powers under Order 17 Rule 1 & (2) of [Civil Procedure Rules](#) to issue a notice to show cause why a case should not be dismissed, and if satisfactory cause is not shown, the court may proceed to dismiss the suit. The discretion of the court under Order 17 Rule (6) of the [Civil Procedures Rules](#) was discussed by the court in [Rose Makhoba Mteka](#) (*supra*). The court cited with approval [Argan Wekesa Okumu v Dima College Ltd & 2 others](#) [2015] eKLR, [Ivita v Kyumbu](#) [1984] KLR 441, [Nilesh Premchand Mulji Shah & another v M.D Popat & others](#) [2016], and [Naftali Opondo Onyango v National Bank of Kenya Ltd](#) [2005] eKLR, that he discretion has to be exercised judiciously keeping in mind that the court should strive to sustain a suit, where possible instead of prematurely terminating it. The court further set out some factors to consider, such as the length of the delay, explanation for the delay, prejudice to the opposite party, and whether justice could still be achieved despite the inordinate delay. The court also cited with approval [Mwangi S. Kaimenyi v Attorney General](#) [2009] that if the delay was prolonged and inexcusable such that grave injustice would be visited upon the other side or to both, the discretion to dismiss the action would be straight away though the court should look at the substantive justice based on if the delay was intentional or contumelious or went to the heart of a fair trial.
15. In the case of [Richard Leiyagu v Independent Electoral and Boundaries Commission](#) [2013] eKLR, the court held that the right to a fair hearing was the cornerstone of the rule of law, and in dismissing a suit, the court should strive to preserve the integrity of the court process from abuse likely to amount to injustice and that at the end of the day, there should be proportionality.
16. In [John Nabashon Mwangi v Kenya Finance Bank Ltd in Liquidation](#) (2015) eKLR, the court held that the fundamental principle of justice under Articles 50 & 159 of the [Constitution](#) included the right and the desire to serve substantive justice to all the parties and that to dismiss the suit for want of prosecution was a draconian act which drives a party away from the seat of justice in an arbitrary manner which should only happen sparingly. Further, the court held that a court of law should apply



- the same test by considering whether there were reasonable grounds to reinstate such a suit after considering the prejudice to be suffered by the defendants if the claim were reinstated against the prejudice the plaintiff would suffer if the case were not reinstated.
17. In *Cecilia Wanja Waweru v Jackson Wainaina Muiruri & another* [2014] eKLR, the court observed that in considering whether to reinstate the applicant's conduct from the time the appeal was filed up to the date the application for reinstatement was filed was material, including if there was indolence, reasonable explanation and deliberate effort to delay the matter.
 18. Turning to the instant appeal, the court had issued notices to show cause to the parties before the dismissal of the suit on 14.6.2021. The delay was more than one and a half years. The explanation was out of Covid - 2019. The trial court was not convinced of the cause since the upscaling of the court operations had occurred with effect from July 2020. Within 15 days, the appellants came up with the application dated 30.6.2021 and gave some more facts in the supporting affidavit. Some of the reasons were that they had attended court on 14.6.2021, efforts had been made to list the matter down for hearing, they were in occupation of the suit land, that there was going to be more injustice to them, unlike the respondent if the suit was not heard on merits, and lastly, that they were willing to prosecute the suit if reinstated on such terms as the court may impose.
 19. In the ruling appealed against, the trial court established the delay to be 1 ½ years. The trial court, however, found that no new grounds were made for review save to state that it was a land matter and that they were in occupation of the suit land. The trial court did not address whether justice could still be done to the parties despite the delay in the circumstances, as held in *Ivita v Kyumbu* (*supra*). The respondent did not state what prejudice he would face if the suit were reinstated.
 20. Justice should be justice to both the plaintiff and the defendant. The trial court should have addressed whether justice would still be done despite the delay and the two parties' positions. See *Pan Africa Paper Mills Ltd v Silvester Nyarango Obwocha* [2018] eKLR. In the circumstances obtaining, I find the trial court failed to exercise its discretion judiciously, considering all the possibilities. The upshot is that I allow the appeal and reinstate the suit for hearing on a priority basis. Costs of the appeal to the respondent in any event.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU
ON THIS 11TH DAY OF OCTOBER 2023**

In presence of

C.A Kananu

Appellant

Gitari for the appellant

Mrs. Maheli for the respondent

HON. CK NZILI

ELC JUDGE

