



**Ogola & another v Aketch (Environment and Land Appeal E004 of 2021)
[2023] KEELC 21648 (KLR) (14 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21648 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E004 OF 2021
GMA ONGONDO, J
NOVEMBER 14, 2023**

BETWEEN

WILKISTA AWINO OGOLA 1ST APPELLANT

EMILY ADOYO 2ND APPELLANT

AND

SEBASTIAN NENGOH AKETCH RESPONDENT

RULING

1. This ruling is in respect of the appellants/applicants' Notice of Motion application dated 10th March 2023 and filed herein on 16th March 2023 under Section 3A of the *Civil Procedure Act*, Chapter 21 Laws of Kenya 2010, and Order 12 Rules 7 (2) of the *Civil Procedure Rules*, 2010 (the application) seeking the orders infra:
 - a. That the order of this honourable court made on 7th February 2023 dismissing this appeal for failure to file the applicants' record of appeal be reviewed, varied and/or set aside.
 - b. That the appeal filed herein on 30th September 2022 be reinstated.
 - c. That the honourable court be pleased to issue orders that the matter be heard and dispensed with on a sooner date.
 - d. That the costs of this application be provided for.
2. The appellants are represented by H. Obach and Partners Advocates. The respondent is represented by Quinter Adoyo & Company Advocates.
3. The application is grounded on a supporting affidavit sworn on even date by Humphrey Obach, the applicants' counsel. In brief, counsel deponed that the delay in filing the record of appeal was occasioned by miscommunication between the appellants and counsel pertaining to instructions to



proceed with the appeal. That the record was ready for filing on 6th February 2023 but counsel noticed an error which was only corrected on 7th February 2023 due to power outage. That the firm's clerk was informed that the appeal had been dismissed on that same day, before he could file the record of appeal which was now ready. Thus, counsel urged the court to allow the application as prayed.

4. The respondent opposed the application by way of a replying affidavit sworn on 19th May 2023 by one the respondent's counsel. Counsel deposed, inter alia, that the appellants lodged the appeal on 30th September 2021 but the same was admitted on 4th August 2022. That during that period, the appellants failed to file a record of appeal. That the appellants failed to attend court on numerous occasions when the matter came up for mention. That also, the appellants disregarded the directions issued by the court on 24th October 2022, which required them to file the record of appeal herein. That equity aids the vigilant and not the indolent and the instant application is an abuse of the court process. Therefore, counsel urged the court to dismiss the application with costs to the respondent.
5. On 29th May 2023, the court ordered and directed that the Application be heard by way of written submissions in the spirit of Article 159 (2) (b) of the Constitution of Kenya, 2010.
6. Accordingly, the appellants' counsel filed submissions dated 13th June 2023 and identified twin issues for determination thus: whether the appellants have demonstrated reasonable grounds for the reinstatement of their suit and whether the appellants will suffer prejudice if the suit is not reinstated. Counsel cited Articles 48, 50 and 159 of the Constitution of Kenya 2010, as well as Sections 3, 4 and 13 of the Environment and Land Court Act, 2015 (2011) and Sections 1A, 1B and 3A of the Civil Procedure Act, Chapter 21 Laws of Kenya. He emphasized on the need for this court to render substantive justice and frown upon procedural technicalities. That the respondent will not be prejudiced if the appeal is reinstated for inter partes hearing. To fortify the submissions, counsel relied on various authorities including the case of Ngugi v Thogo (2021) KECA 88 (KLR) on administration of substantive justice.
7. On the part of the respondent, their counsel filed submissions dated 12th June 2023 on 13th June 2023 and identified issues for determination to wit; whether the appellants/applicants are deserving of the orders sought and who bears the costs of this application? Counsel submitted, inter alia, that the instant application is frivolous, vexatious and an abuse of the court process. That the applicants' counsel never expressed any challenges he was facing to the court but rather chose not to attend court. Thus, counsel urged the court to dismiss the present application with costs to the respondent.
8. I have duly considered the application, the response thereto and the parties' respective submissions. So, is the application merited?
9. From perusing the proceedings of this court in respect to the instant appeal, I note the following:
 - a. The appellants lodged the appeal on 30th September 2021 by way of a memorandum of appeal dated 24th September 2021.
 - b. The appeal was admitted on 12th May 2022 and set for mention for directions on 18th July 2022 and then on 24th October 2022.
 - c. On 24th October 2022, the appellants were not present in court but the court directed the appellants to file a record of appeal. The matter was fixed for mention to confirm compliance on 7th February 2023.
 - d. Despite the respondent's counsel serving the appellants' counsel with a mention notice as evidenced by an affidavit of service sworn by the respondent's counsel on 11th November



2022, the appellants' counsel did not attend court on 7th February 2023 nor comply with the directions of the court issued on 24th October 2022.

- e. The respondent's counsel then made an application on the same day for dismissal of the suit with costs in the interest of justice.
 - f. This court allowed the application via a ruling delivered on 7th February 2023.
10. In the ruling dated 7th February 2023, this court was guided by Article 159 (2)(b) of *the Constitution* of Kenya, 2010, Sections 3 and 19 of the *Environment and Land Court Act*, 2015 (2011) as well as Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Chapter 21 Laws of Kenya. Also, reliance was placed on the case of *Ogada v Mollin* (2009) KLR 620.
 11. The appellants' counsel contends that the delay in filing the record of appeal was occasioned by miscommunication between the appellants and counsel pertaining to instructions to proceed with the appeal. That the record was ready for filing on 6th February 2023 but counsel noticed an error which was only corrected on 7th February 2023 due to power outage. That the firm's clerk was informed that the appeal had been dismissed on that same day, before he could file the record of appeal which was now ready for filing.
 12. This court is cognizant of the provisions under Article 159 (2)(b) (*supra*) that:

“Justice shall not be delayed”
 13. Indeed, it is the duty of the court, litigants, as well as advocates, to ensure that matters are concluded expeditiously without inexcusable delay; see Section 3 of the *Environment and Land Court Act* and Sections 1A and 1B, of the *Civil Procedure Act* (all *supra*).
 14. Further, Section 3A of the *Civil Procedure Act* (*supra*) gives the court wide discretion over matters and issues that are before it, including the question as to whether it should or should not reinstate a suit dismissed on account of want of prosecution and non-attendance.
 15. In *Ivita v Kyumbu* (1984) KLR 441, the court laid down the factors taken into account for the purpose of reinstatement of suits. The court stated thus:

“...So the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay....

...The defendant must however satisfy the Court that he will be prejudiced by the delay or even that the Plaintiff will be prejudiced...”
 16. In the present case, the dismissal of the appeal resulted from an omission by the appellants to file their record of appeal within the timeframe that had been ordered by the court. Therefore, this court has to determine whether the delay was prolonged, whether it is inexcusable and finally what prejudice the respondent stands to suffer.
 17. It is my considered view that there was delay herein for a period exceeding one year from the date of filing the memorandum of appeal. Undoubtedly, this was a prolonged one.
 18. Further, I note that the appellants failed to attend court as disclosed in paragraph 10 hereinabove. Besides, counsel's assertion that there was miscommunication between the appellants and counsel pertaining to instructions to proceed with the appeal is not supported by way of evidence in form of correspondence or otherwise. It is not enough to make mere averments devoid of supporting evidence.



Therefore, it is my conserved view that the appellants have failed to adequately explain the delay. To this end, this court finds that the order for dismissal was indeed sound and justifiable.

19. This court is, however, alive to the fact that re-instatement of an appeal is a matter of discretion and is to be handled on a case to case basis. Section 95 of the *Civil Procedure Act* (*supra*) provides for enlargement of time thus:

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

See also Order 50 Rule 6 of the *Civil Procedure Rules* (*supra*).

20. Although the appellants have not expressly sought for extension of time, an order reinstating the appeal would be of the same effect as an order extending the time within which they were required to file the record of appeal.
21. The memorandum of appeal dated 24th September 2021 and filed herein on 30th September 2021 raises eight (8) grounds of appeal. The main ground is that the trial court lacked jurisdiction to entertain the suit as the same was filed out of time. This is indeed, an arguable appeal.
22. This court is conscious of the rights of the appellants under Articles 48, 50 (1) as read with Article 25 (c) of the *Constitution* of Kenya, 2010. So, it is not the intention of this court to deprive the appellants their rights as enshrined in the said Constitutional provisions. Furthermore, the respondent has not sufficiently demonstrated how he stands to suffer prejudice if the appeal is reinstated for inter partes hearing.
23. A fortiori, I find that although there has been a prolonged and unjustifiable delay in prosecution of the appeal, this court shall reinstate the appeal for hearing and determination on its merits in the spirit of administration of substantive justice.
24. Accordingly, the appellants’ application dated 10th March 2023 is hereby allowed in terms of prayer numbers 1, 2 and 3 and the appeal is hereby reinstated.
25. The Appellants are directed to file and serve their Record of Appeal within fourteen (14) days from the date of this order, failure to which the appeal will stand dismissed.
26. The costs of this application to be borne by the appellants.
27. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 14TH DAY OF NOVEMBER 2023.

G.M.A ONG’ONDO

JUDGE

Present

1. Ms. Akinyi instructed by Quinter Adoyo, learned counsel for the respondent
2. B. Ochieng instructed by H. Obach, learned counsel for the appellants
3. Luanga Terrence, Court Assistant

