



**Ngaiwa (Sued as the legal administrator of the estate of the late Jeconia Ochieng Usita) v Mukuana & 2 others ([Suing as the Legal Administrator of the Estate of Leonadus Mukuana Aduda] (Environment and Land Appeal E006 of 2021) [2022] KEELC 2388 (KLR) (2 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2388 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT AND LAND APPEAL E006 OF 2021**

**AY KOROSS, J**

**JUNE 2, 2022**

**BETWEEN**

**ALICE NGAIWA ..... APPELLANT  
SUED AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF THE LATE  
JECONIA OCHIENG USITA**

**AND**

**RUSILA NYAGARE MUKUANA ..... 1<sup>ST</sup> RESPONDENT  
LAND REGISTRAR SIAYA ..... 2<sup>ND</sup> RESPONDENT  
ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT  
[SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF LEONADUS  
MUKUANA ADUDA**

**RULING**

**Introduction**

1. The appellant's application to set aside an ex parte judgment was struck out by the trial court on 26/11/2020. Subsequently, the appellant filed a another application seeking a stay of execution; this was dismissed by the trial court for being an abuse of the court process on 12/08/2021.
2. Aggrieved, the appellant filed a memorandum of appeal dated 15/09/2021. On 25/10/2021, the court in the presence of the appellant's counsel issued a mention date of 25/10/2021 for purposes of taking a ruling date on the appellant's motion dated 28/09/2021; the appellant's counsel failed to attend court on this date. The court directed the registry to serve a ruling notice of 25/11/2021 on the parties. This court is uncertain if the notice was ever served but on the ruling date, counsel for the 1<sup>st</sup> respondent attended Court.



3. In its ruling, the court directed the appellant to file its record of appeal within 30 days and gave a mention date of 19/01/2022. On this date, the appellant sought for 14 more days to comply. The court obliged and issued a further mention date of 14/2/2022. On this date, appellant's counsel failed to attend court. Upon an application by the 1<sup>st</sup> respondent's counsel, the court dismissed the appeal for want of compliance with costs.
4. Aggrieved by the decision of the court, the appellant filed the instant motion dated 21/02/2022 that is the subject of this ruling.

### **The appellant's case**

5. Some of the the prayers are spent and the main prayers pending determination are as follows;
  - a) Spent.
  - b) That this honourable court be pleased to grant orders to reinstate this appeal.
  - c) That costs of this application be awarded to the appellant against the respondent.
6. The motion was supported by the affidavit of the appellant's counsel Samuel Michael Onyango on the main ground that the delay in filing the record of appeal fell on the court registry's doorstep; they had not proffered him with copies of typed proceedings despite him paying for them on 25/01/2022 and it had not responded to his letters dated 25/01/2022 and 08/02/2022.

### **The respondents' case**

7. The 1<sup>st</sup> respondent filed a replying affidavit dated 17/03/2022. In it, she averred that the appellant's motion was an abuse of the court process for failure of not filing his record of appeal within the requisite 60 days and complying with the court's directions.
8. It was the 1<sup>st</sup> respondent's position that the court was functus officio and the only recourse the appellant had was at the Court of Appeal. She urged the court to dismiss the motion with costs for being an abuse of court's process and waste of judicial time.
9. Despite service, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents failed to file responses.

### **The appellant's submissions**

10. The appellant filed written submissions dated 16/03/2022. She set out 4 issues for determination; (i) whether the appellant was entitled to the orders sought (ii) whether setting aside the dismissal order would be prejudicial to the respondents, (iii) what relief does the appellant seek from this honourable court and, (iv) who should bear the costs.
11. On the first issue, it is the appellant's position that the motion was intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error. She relied on the case of *Mbogo & another v Shah* EALR 1908 and *Philip Chemwolo & another v Augustine Kubede* [1982-88] KAR 103. She also relied on the case of *John Nabashon Mwangi v Kenya Finance Bank Limited (in liquidation)* [2015] eKLR which restated the principles of reinstatement; the court should consider whether there were reasonable grounds to reinstate the suit considering the prejudice that the party would suffer if the suit was not reinstated against the prejudice the opposing party would suffer if it was not.
12. On the second issue, the appellant submitted that the 1<sup>st</sup> respondent had not demonstrated that she would be prejudiced if the appeal was reinstated. On the flipside, she asserted that she would be



prejudiced if the suit was not reinstated. On issue 3, the appellant asserted that she was entitled to orders sought. On the fourth issue, she prayed that the court be guided by section 27 of the *Civil Procedure Act* and award her costs of the motion. Only two of the authorities cited were tendered to this court; *Philip Chemwolo & another v Augustine Kubede* (*supra*) and *Richard Ncharpi Leiyagu v Independent Electoral and Boundaries Commission & 2 others* (2013) eKLR.

### The respondents' submissions

13. The 1<sup>st</sup> respondent put in written submissions dated 17/03/2022 and she identified the 1<sup>st</sup> issue as whether the court had the powers to set aside the orders issued on 14/02/2022 and grant a stay of execution. She cited the case of *Mbogo v Shab* [1968] EA 93, 95 which stated that the intent of setting set aside an ex parte judgment was to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but was not designed to assist a person who had deliberately sought to obstruct or delay the course of justice. It was her position that the court could not come to the aid of the appellant and on this, she relied on the case of *Gideon Mose Onchwati v Kenya Oil Company Limited* [2017] eKLR.
14. The 2<sup>nd</sup> and 3<sup>rd</sup> issue was whether the court had jurisdiction to hear and determine the motion. It was her submission that as soon as the court dismissed the appeal, the court became functus officio. She on relied several authorities including *Brian Muchiri Waibanya v Jubilee Hauliers Limited & another; Geminia Insurance Company Limited (interested party)* [2018] eKLR and Election Petition Number 4 and 5 *Raila Odinga & 3 others v IEBC & others* [2013] eKLR. On the issue of costs, the 1<sup>st</sup> respondent urged the court to award her costs. Some of the authorities were improperly cited and none of them were tendered to this court.

### Analysis and determination

15. In its determination dated 14/02/2022, the court held inter alia;

‘it seems the appellant is not keen to prosecute the appeal. The court has given them several chances to comply but they have not done so. The appeal is hereby dismissed with costs to the respondents.’
16. Is the court functus officio having rendered this decision? My answer is in the negative. Once a judgment is rendered, the judge is functus officio; she has no power to make changes in her decision, which can only be questioned by her under review or by others presiding in further Courts of Appeal. See also the Supreme Court of Kenya decision in *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others* [2013] eKLR which cited with approval Daniel Malan Pretorius, in “*The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law*,” (2005) 122 SALJ 832:
17. Does a prayer for reinstatement of an appeal fall within the ambit of a matter that could be deemed functus officio? Order 42 Rule 21 allows an appellant to apply to this court to re-admit an appeal if it was dismissed for non attendance. The Rules therefore provide room for an appellant to file an application for reinstatement of the appeal if it was dismissed for non attendance. This court does not find that it is functus officio.
18. In dealing with a prayer for reinstatement, the court exercises its discretion as it deems fit. Such discretion should be exercised judicially.
19. The fundamental principles of justice are enshrined in the entire Constitution and in this context articles 159 and 50 of the *Constitution*. Article 159 recognises that justice should be done to all, it should



not be delayed and the purpose and principles of the Constitution should be protected and promoted. Article 50 states that every person has a right to fair trial.

20. The considerations to be made in determining whether or not to reinstate a case was considered in the well tested case of Ivita vs Kyumbu, Civil Suit No. 340 of 1971 (1975) EA 441, 449, where Chesoni J. held as follows: -

“...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...”

21. Borrowing from the above, this motion was filed close to two weeks from when the appeal was dismissed and the appellant is not guilty of inordinate delay in moving this court. The appellant’s counsel sought for typed proceedings close to 4 months after she had filed the memorandum of appeal but apparently in the wrong file; she sought for the proceedings of this court and not of the trial court. She proffered sufficient reasons why the record of appeal was not filed in time. I am satisfied with the reasons for the delay.
22. It is my finding that the appellant moved the court promptly to reinstate the appeal and the inconvenience that maybe suffered by the 1<sup>st</sup> respondent maybe be adequately remedied by an award of throw away costs. This court will thus exercise its discretion and reinstate the appeal with appropriate conditions.
23. Before I issue my disposal orders, I have to address one important issue that goes to the root of the appeal, I have looked at the omnibus memorandum of appeal and some of the grounds relate to the ruling of the trial court rendered on 26/11/2020. These particular grounds were filed outside the statutory period of 30 days as envisaged by section 16A of the Environment and Land Court Act and this court finds them incompetent.
24. Accordingly, for the reasons set out above, this court issues the following disposal orders: -
- a) The order dismissing the appeal for want of compliance is hereby set aside and the appeal herein is hereby reinstated.
  - b) The appellant shall pay the 1<sup>st</sup> respondent throw away costs of Ksh. 20,000/- within 14 days from today and in default, the order reinstating this suit shall stand vacated.
  - c) The appellant is hereby directed to file her record of appeal within fourteen (14) days from the date of this order, failure of which the appeal will stand dismissed.
  - d) Grounds of appeal in the memorandum of appeal on the ruling dated 26/11/2020 are hereby expunged from the court record.
  - e) Costs of this application will abide the result of the appeal.

It is so ordered.

**DELIVERED AND DATED AT SIAYA THIS 2<sup>ND</sup> DAY OF JUNE 2022.**

**HON. A. Y. KOROSS**

**JUDGE**

**2/6/2022**



**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:**

M/s. Stephanie Akinyi for the appellant

N/A for the respondent

Court assistant: Ishmael Orwa

