



**Mutali (Suing as a Personal Representative of the Late Mulati Wabuge) v Luchivya & another
(Environment and Land Appeal E048 of 2021) [2025] KEELC 4375 (KLR) (21 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 4375 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E048 OF 2021**

**A NYUKURI, J
MAY 21, 2025**

BETWEEN

**MARGARET NAFULA MUTALI (SUING AS A PERSONAL REPRESENTATIVE
OF THE LATE MULATI WABUGE) APPLICANT**

AND

KEVIN MARISIO LUCHIVYA 1ST RESPONDENT

PATRICK SHIYOKHA LUCHIVYA 2ND RESPONDENT

RULING

1. Before court is a Notice of Motion dated 2nd July 2024 filed by the appellant seeking orders that the court reinstates the appeal herein for hearing and sets aside orders for the dismissal of the appeal made on 5th October 2022. She also sought costs.
2. The motion is predicated on grounds on its face and the supporting affidavit dated 1st July 2024 sworn by the appellant. The appellant's case is that the appellant and her counsel were not made aware of the mention date slated for 5th October 2022 when the appeal herein was dismissed. Further that the appellant lost communication with her advocate as they only communicated through a relative who passed on during the covid pandemic. She contended that she had an arguable appeal with chances of success and that she only learnt of the dismissal of her appeal on 1st July 2024 when she visited Butali court registry. She also maintained that she should not be taken advantage of due to her old age.
3. The application was opposed. The respondents filed grounds of opposition dated 29th October 2024, wherein they stated that the application had been filed after two years of the order sought to be set aside without any explanation and that the delay was inordinate. Further that the applicant had not annexed a record of appeal to demonstrate seriousness in the prosecution of the appeal.



4. They also asserted that the appellant had never served the respondents with any notices in respect to the appeal and that she has never had an advocate hence cannot blame failure to attend court on an advocate.
5. The court directed parties to file submissions in support of their respective cases. On record are the submissions filed by the respondent dated 22nd January 2025 which this court has duly considered.
6. The court has carefully considered the application, response thereto and submissions. The only issue that arise for the court's determination is whether there is good and sufficient cause to set aside the ex parte orders made on 5th October 2022.
7. It is trite that the court's discretionary power to set aside an ex parte order ought to be exercised judiciously upon considering the reasons for non-attendance.
8. Order 51 Rule 15 of the Civil Procedure Rules grants this court the jurisdiction to set aside ex parte orders.
9. In the case of *Shah v Mbogo* (1967) EA 116, the Court of Appeal of East Africa stated as follows;

“ This discretion (to set aside ex parte proceedings or decision) is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.”
10. In the instant matter, the mention date of 5th October 2022 was fixed by court in open court on 2nd June 2022 in the absence of both parties. The court directed the Deputy Registrar to serve. Subsequently on 5th October 2022, both parties were absent and therefore the court dismissed the appeal for non-attendance.
11. Order 42 Rule 35 of the Civil Procedure Rules grants this court power to dismiss an appeal for want of prosecution as follows;

“ 35.

 - (1) Unless within three months after the giving of directions under Rule 13 the appeal shall have been set down for hearing by the appellant, the Respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.
 - (2) If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.”
12. Therefore, there are two instances when an appeal may be dismissed for want of prosecution, namely, where an appeal has not been listed for hearing within three months after directions have been given under Order 42 Rule 13; and where if after one year since service of the memorandum of Appeal, the appeal has not been listed for hearing.
13. In the instant matter, this appeal was filed on 1st November 2021 and the order dismissing the same was made on 5th October 2022; which is less than a year after the appeal was filed. In addition, at the time of dismissal of the appeal, no directions had been given by court in accordance to Order 42



Rule 13. Besides, the appeal was coming up for mention on 5th October 2022 and not for dismissal. This therefore means that it is clear that the appeal was neither coming up for dismissal nor was it due for dismissal as of 5th October 2022 when the matter came up for mention. The applicant who appears in person, stated that she was not made aware of the mention date for 5th October 2022 and that she was not dealing with court directly but through an intermediary. The respondents have not challenged or controverted this assertion. The record shows that on 5th October 2022 the respondents and their advocates were also not in court, hence it is apparent that the applicant was not made aware of the mention date. The record shows that the mention notice was stamped with registry mail for 23rd August 2022 and the same is addressed to the parties with a postal address indicated. It is not clear whether the postal address indicated belongs to the applicant. The respondents have argued that there was no legal representation for the applicant. But looking at the documents filed, which have been signed by the applicant by thumb print it appears to me that the appellant may not be in a position to personally prepare court pleadings and it is apparent that the pleadings on record were prepared by a person upon whom the appellant relied on. It is clear though that there was no diligence on the part of the appellant, who took some time to move the court for reinstatement of the appeal. The question therefore is whether justice can still be done despite the delay? The respondents have not demonstrated that they stand to suffer prejudice that cannot be compensated in costs, if orders sought are granted and they were also absent in court when the orders of 5th October 2022 were issued and therefore, I find and hold that justice can still be served by reinstatement of the appeal despite the delay.

14. In the premises, and for the reasons that the appellant was not aware of the mention date when her appeal was dismissed; on the date of the dismissal of the appeal, directions had not been given by court under Order 42 Rule 13 of the Civil Procedure Rules; and one year had not lapsed since filing of the appeal when the same was dismissed, I find and hold that the application dated 2nd July 2024 is merited and the same is hereby allowed. The orders of 5th October 2022 are hereby set aside and this appeal is reinstated for hearing and determination. The appellant shall bear the costs of the application as she has occasioned the delay in this matter. As this appeal is an old matter having been filed in 2021, the appellant is ordered to file and serve record of appeal and submissions in respect of the appeal in sixty (60) days of this ruling.

15. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 21ST DAY OF MAY, 2025

A. NYUKURI

JUDGE

In the presence of;

Ms Margaret Mulati the appellant/applicant in person

Mr. Patrick Shiyokha Luchivya the 1st respondent in person

No appearance for 2nd respondent

Court Assistant: M. Nguyai

