



**Kyania & 2 others (All suing as the officials of the A-A Mbuu Clan Association-Kenya) v Kamolo & another (Civil Appeal E003 of 2020) [2023] KEHC 20636 (KLR) (19 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20636 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E003 OF 2020**

**FR OLEL, J  
JULY 19, 2023**

**BETWEEN**

**MATHEW KIOKO KYANIA ..... 1<sup>ST</sup> APPELLANT  
BENJAMIN MUATHE MWEU ..... 2<sup>ND</sup> APPELLANT  
JAMES MUINDI ..... 3<sup>RD</sup> APPELLANT  
ALL SUING AS THE OFFICIALS OF THE A-A MBUA CLAN ASSOCIATION-  
KENYA**

**AND**

**FRANCIS MUOKI KAMOLO ..... 1<sup>ST</sup> RESPONDENT  
ELIUD KINYAE ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application before this court is the Notice of Motion application dated February 27, 2023 brought pursuant to provisions of Section 1A, 3A & 79 of the *Civil Procedure Act*, Order 5 Rule (1), (6), (21), Order 9 rule 9 & 10 and (22), Order 12 rule 7, Order 51 rule 1 of the of the *Civil Procedure Rules* and all other enabling provision of law. Prayers 1,2 and 3 of the said application are basically spent and the main prayer sought are prayers (4), (5) and (6) which sought for prayers that ;
  - a. That the honorable court be pleased to set aside the orders given on January 16, 2023 dismissing the appellants appeal dated September 24, 2020 and the notice of motion dated September 30, 2020 for want of prosecution.
  - b. That the honorable court be pleased to reinstate the appellants Appeal dated September 24, 2020 and the notice of motion dated September 30, 2020 for hearing and disposal on merits.
  - c. That costs of this application be provided for.



2. The application is supported by the grounds on the face of the said application and the supporting affidavit of Mathew Kioko Kyania dated February 27, 2023. The applicants state that the appeal and their application was dismissed on January 16, 2023 for want of prosecution. The dismissal was occasioned by failure by their former counsel on record to prosecute the appeal and not attending court despite having been served with notice to show cause why the appeal should not be dismissed.
3. The appellants aver that they were not aware of the dismissal until February 24, 2023 when some documents/fliers were dumped at the church compound at AIC Ivia Itune, where the 1<sup>st</sup> applicant mother worships and she called the 1<sup>st</sup> appellant/applicant informing him of what had transpired. The appellants had appointed a new counsel and were keen and desirous to prosecute this appeal and protect innocent members of the Aambu clan from being victims of leadership wrangles between the appellants and the respondent's in church.
4. The respondents would not be prejudiced should the orders sought be granted and the appeal reinstated. Finally, they submitted that it would be just and proper to let the appeal be canvassed on merits
5. The Respondent's did oppose this application by the Replying Affidavit Sworn by one Francis Muoki Kamolo dated March 13, 2023. They stated that the said application was not meritorious, was fatally defective and otherwise constituted a gross abuse of the process of court. The applicants had not offered any cogent explanation as to why they had delayed in prosecuting this appeal despite being served with several notices by the deputy registrar.
6. The applicant's previous counsel too was served with the notice to show cause why the matter should not be dismissed and the applicant's acknowledged as much that their counsel did not show cause and the appeal was dismissed. That from the record it can be seen that the appellants advocate received numerous notices from court and failed to appear, which act/omission cannot be excused. The applicants were bound by the acts and/or omissions of their advocate and thus could not be said to have been condemned unheard. As owners of the case, they too had the duty to follow up on their case and find out its progress. They could no leave the entire case to their advocate.
7. There was no good reason advanced for the orders sought to be granted and the said application ought to be dismissed with costs.

### **Appellant's Submissions**

8. The appellant filed submission dated July 10, 2023. They submitted that the dismissal of the appeal was occasioned by failure of counsel to attend court on January 16, 2023, despite being served with the notice to show cause why the appeal should not be dismissed. The appellants themselves were not aware of the said notice to dismiss the appeal or the subsequent dismissal until on February 24, 2023, when the dismissal order was dumped within the compound of AIC Ivia Itune church, where the 1<sup>st</sup> appellant mother worships and she subsequently informed the 1st appellant of what had transpired.
9. They further submitted that, they had appointed a new advocate and were interested in perusing the appeal for the reason that they needed to protect the innocent members of the Ambua clan from being victims of leadership wrangles between the appellants and the respondent's and they will be forced to make contribution of money when there is no clear leadership structure. If the appeal and the application were not reinstated, they would be seriously prejudiced and it would be just and prudent to have the appeal heard on merits.
10. The appellants further submitted that the mistake of their previous counsel ought not to be visited upon the appellants and/or their advocates on record. Reliance was placed on *Omwoyo v African*



Highlands & Produce Ltd (2002) KLR, Philip chemwolo & Another v Augustine Kubede ( 1982 -88 ) KLR 103, Belinda Muras & 6 others v Amos Wainaina (1978 ) KLR and Shah v Mbogo & Another ( 1967 ) EACA.

11. The appellants thus prayed that their application should be favorably considered and it be allowed with costs.

### **The Respondent's Submissions**

12. The respondent's filed their submissions on June 26, 2023 and stated that there was no proper basis laid for discretion to be exercised in favour of the applicants. No reason was given why the appeal had never been prosecuted from September 24, 2020, when it was filed nor had the record of appeal been compiled and filed. The appeal was left lying in abeyance for over three years and thus it was rightly listed for dismissal. Reliance was placed on shah v Mbogo (1967) EA 166, Mobile Kitale services Station v Mobil oil Kenya Limited & Another { 2004} eKLR , Tana & Athi Rivers Development Authority v Jeremiah Kimigbo Mwakio & 3 others { 2015} eKLR. & Patritoc Guards ltd v James Kipchirichir Sambu {2018} eKLR.
13. Further the respondents further submitted that, the applicants and their advocate had a duty to follow up on their matter and failed to do so. Their action smirks of negligence and the court should not excuse such negligent conduct. The court record would bear it out that at no time ever did the applicants ever attend court sessions, since inception of the appeal, despite the numerous notices being sent to their advocate. The application was not merited and the same ought to be dismissed with costs.

### **Analysis & Determination**

14. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit and both parties' written submissions and discern that two issue arise for determination.
  - a. Whether this court should set aside its orders dated January 16, 2023 dismissing the appeal and whether the said appeal should be reinstated for hearing on merit.
  - b. The second issue is who should bear costs of this appeal.
15. The Court of Appeal in Murtaza Hussein Bandali T/A Shimoni Enterprises v. P. A. Wills [1991] KLR 469; [1988-92] held that there is inherent power to restore a case for hearing after it has been dismissed. However, the decision whether or not to reinstate a dismissed appeal is no doubt an exercise of discretion. This being an exercise of judicial discretion, like any other judicial discretion must be based on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. See Gharib Mohamed Gharib v Zuleikha Mohamed Naaman Civil Application No Nai 4 of 1999.
16. The circumstances under which a court sets aside its default orders were set out in Shah v Mbogo (1967) EA 166 in which the Court stated that;
  - “ this discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”



17. There is no dispute of fact that this appeal was filed on September 24, 2020 and as the time it was being dismissed on January 16, 2023 the appellants had not prepared the record nor had they moved court during that period to set it down for hearing and/or directions. The court before issuing the dismissal order did serve both counsels on record and the appellants counsel never showed cause why the matter should not be dismissed. The appellants admit as much that their counsel was served but unfortunately did not attend court to protect their interest.
18. The applicants too had a duty to follow up on their appeal and ensure it is heard expeditiously. This was not done. There was laxity and negligence on their part and they cannot lay blame on the doorstep of their advocate for their indolence.
19. In *Mobil Kitale service station v Mobile oil Kenya Limited & Another* (2004) eKLR (Warsame J, as he was then) observed that;
 

“I must say that the courts are under a lot of pressure from backlogs and increasing litigation, therefore it is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past. Justice would ebb better served if we dispose matters expeditiously. Therefore, I have no doubt the delay in the expeditious prosecution of this suit is due to the laxity, indifference and/or negligence of the plaintiff. That negligence, indifference and/or laxity should not and cannot be placed at the doorstep of the defendant. The consequence must be placed on their shoulders”
20. The inability or laxity in prosecuting the appeal for over three (3) years was not caused by inadvertence or excusable error. In the courts view the appellants were fully aware of this appeal but for reasons best known to them chose not to pursue the same. They must lie on the thorn bed they made of indifference and laxity. The interest of the larger Ambua clan as claimed can still be ventilated in the primary suit, where the matter is still pending or as advised in the primary court ruling resolve the same through mediation. The court has a duty to balance the interest of both parties and I do find that the respondent stands to be more prejudiced if this application is allowed as they will unnecessarily have an albatross on their neck of never-ending litigation, which should have been long concluded.

**Disposition**

21. Taking all relevant factors into consideration I do find that;
  - a. The notice of motion application dated February 27, 2023 lacks merit and the same is dismissed with costs to the respondents.
  - b. The costs of this Application are assessed at Ksh.30,000/= all inclusive. The same is to be paid within the next 30 days failure of which the respondent’s will be at liberty to execute.
22. It is so ordered.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 19<sup>TH</sup> DAY OF JULY 2023.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**Delivered on the virtual platform, Teams this 19th day of July 2023**

**In the presence of;**

.....For Appellant  
 .....For Respondent



.....Court Assistant

