



**Kinyanjui (Suing as the legal representatives of the Estate of Kinyanjui
Kamau – Deceased) v Njoroge (Environment and Land Appeal
E116 of 2022) [2024] KEELC 6281 (KLR) (16 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6281 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E116 OF 2022
BM EBOSO, J
SEPTEMBER 16, 2024**

BETWEEN

**SAMUEL THUKU KINYANJUI (SUING AS THE LEGAL REPRESENTATIVES
OF THE ESTATE OF KINYANJUI KAMAU – DECEASED) APPELLANT**

AND

GEORGE KAMAU NJOROGE RESPONDENT

RULING

1. This appeal was initiated on 6/12/2022 through a memorandum of appeal dated 30/11/2022. No step was subsequently taken by the appellant to prosecute the appeal. Consequently, on 27/11/2023, the Deputy Registrar of this court issued a notice to the appellant inviting the appellant to attend court and show cause why the appeal should not be dismissed for want of prosecution. The notice to show cause was listed for hearing on 7/3/2024. The appellant did not attend court on 7/3/2024. Consequently, the court [Eboso J] dismissed the appeal on the ground of want of prosecution on the said day.
2. Subsequent to that, the appellant brought a notice of motion dated 12/6/2024 seeking, among other reliefs: (i) an order setting aside the dismissal order; and (ii) orders of interlocutory injunction. At the hearing of the said application on 16/7/2024, the appellant abandoned the plea for orders of interlocutory injunction. He only pursued the plea for an order setting aside the order that dismissed the appeal. The said application dated 12/6/2024 is the subject of this ruling.
3. The application was premised on the grounds set out in the motion and in the appellant's supporting affidavit dated 12/6/2024. It was canvassed through written submissions dated 10/7/2024 and oral submissions tendered in the virtual court on 16/7/2024. In summary, the appellant blamed his previous advocates, M/s Patricks Law Associates, for failing/neglecting to attend court and for failing to prosecute the appeal. He contended that the mistake of counsel should not be visited on an "innocent client".



4. The application was opposed by the respondent through a replying affidavit dated 3/7/2024. In addition the respondent uploaded a supplementary affidavit dated 3/9/2024 long after the court had reserved a ruling date on the application. The supplementary affidavit was filed without leave of the court. Clearly, this was irregular. The court will, in the circumstances, disregard the supplementary affidavit which was uploaded on or about 4/9/2024.
5. The case of the respondent was that the application lacked merit. The respondent contended that the question as to whether the late Kinyanjui Kamau [hereinafter referred to as “the deceased”] had an interest in the suit land was adjudicated by three courts: (i) the Chief Magistrate Court; (ii) the High Court; and (iii) the Court of Appeal. He added that all the three tiers of courts came to the finding that the deceased did not have any legitimate interest in the suit land and rejected the deceased’s claim. It was the case of the respondent that the suit giving rise to this appeal was res judicata. He added that the Chief Magistrate Court at Kiambu properly found that it lacked jurisdiction to entertain the suit.
6. The court has considered the application, the response dated 3/7/2024, and the parties’ respective submissions. The single issue to be determined in this ruling is whether the application dated 12/6/2024 meets the criteria for setting aside an order dismissing an appeal on the ground of want of prosecution. The court has already observed that the respondent’s supplementary affidavit dated 3/9/2024 was irregularly uploaded by the respondent. The court will therefore not consider the contents of the said affidavit in determining the application.
7. The jurisdiction which the court is invited to exercise is a discretionary one. The discretion is, however, exercised on well settled principles. In *Kasturi Limited V Nyeri Wholesalers Limited* [2014] eKLR, the Court of Appeal emphasized that:

“The overriding objective principle is not aimed at giving justice to one party at the expense of another”
8. In *Wilson Cheboi Yego V Sameul Kipsang Cheboi* [2019] eKLR, the Court of Appeal observed that sufficient cause must be demonstrated by the applicant to warrant exercise of discretion to re-admit or re-instate a dismissed appeal. Does the present application meet the above threshold?
9. The memorandum of appeal through which this appeal was initiated was filed on 6/12/2022. Up to the time the appeal was dismissed for want of prosecution on 7/3/2024, the record of appeal had not been filed by the appellant. Indeed, none was exhibited to demonstrate the appellant’s genuine desire to pursue the dismissed appeal. No explanation was tendered as to why the record of appeal has never been prepared and filed. Secondly, on all the occasions that the appeal was mentioned before the Deputy Registrar, there was no attendance by the appellant.
10. The only explanation tendered by the appellant as a justification for the order sought is that he instructed an advocate to file and prosecute the appeal. He did not demonstrate any positive step which he personally took towards prosecuting the appeal. No evidence of any kind of personal follow-up was demonstrated or exhibited by the appellant.
11. Besides the above glaring omission, the appellant/applicant did not bother to respond to the three Judgments exhibited by the respondent. The three exhibited Judgments show that the question as to whether the late Kinyanjui Kamau had any interest in land parcel number Kiambaa/Kihara/T.327 [the suit land] had been heard and determined by all the three tiers of our civil courts, namely, the Magistrate Court; the High Court; and the Court of Appeal. The three Judgments disclose that the three tiers of courts did not find merit in the deceased’s claim. Despite the fact that the appellant had brought the dismissed appeal and the instant application on behalf of the estate of the deceased, he chose to



say nothing in response to the three exhibited judgments. A proper response to the three exhibited Judgments would, in my view, inform the court as to whether the appellant has an arguable case that would warrant re-admission/re-instatement of the dismissed appeal through exercise of discretion. The applicant elected to say nothing about the three exhibited Judgments.

12. In the above circumstances, I do not think the applicant has made out a proper case to justify the setting aside of the dismissal order dated 7/3/2024. The result is that the application dated 12/6/2024 is rejected and dismissed for lack of merit. The applicant/appellant will bear costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 16TH DAY OF SEPTEMBER 2024

B M EBOSO

JUDGE

In the Presence of: -

Ms Mary Muigai for the Respondent

Mr Mwangi for the Applicant

Court Assistant: Melita

