



**Migot v Otiemo (Sued as the Legal Representative of the Estate of Jemima Akinyi Oyare, Deceased)
(Environment and Land Appeal 57 of 2019) [2025] KEELC 4847 (KLR) (26 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4847 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL 57 OF 2019
SO OKONG'O, J
JUNE 26, 2025**

BETWEEN

WUODGOT ODHIAMBO MIGOT APPELLANT

AND

SAMUEL ONGONG'A OTIENO RESPONDENT

**SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JEMIMA
AKINYI OYARE, DECEASED**

RULING

1. The Appellant filed this appeal on 31st December 2019 against the judgment of Hon. C.L.Yalwala, PM delivered on 4th December 2019 in Maseno PMCC No. 4 of 2010 (O.S) (hereinafter referred to as “the lower court”). On 3rd February 2020, the Appellant filed an application dated 30th January 2020 seeking a stay of execution of the judgment of the lower court pending the hearing and determination of this appeal. The Appellant’s application was heard and allowed conditionally on 25th February 2020. The court granted the Appellant an order of stay of execution on condition that the Appellant deposits Kshs. 112,800/- together with the Respondent’s taxed costs in court within 30 days from the date of the order. The Appellant did not comply with the condition on which the stay was granted, and the Respondent moved the lower court to execute the lower court decree.
2. The Appellant filed an application dated 16th November 2024 seeking an order to restrain the Respondent from executing the lower court decree. On 29th November 2024, the Appellant was directed to serve the application and appear before the court on 3rd December 2024 for directions on the hearing of the application. The Appellant did not appear in court on 3rd December 2024 as a result of which the court dismissed the application. Since the matter had been pending since 2019 and the Appellant had not taken any step towards prosecuting the appeal, the court directed that a notice to show cause be served upon the parties to appear in court on 4th February 2025 to show cause why the appeal should not be dismissed. The Notice to Show Cause was taken out on 6th December 2024 and



served upon the parties. On 4th February 2025, none of the parties appeared in court and the court, having satisfied itself that they were served, dismissed the appeal for want of prosecution.

3. What is now before the court is the Appellant's Notice of Motion dated 8th February 2025 seeking the following orders;
 - a. That the court be pleased to set aside the orders issued on 4th February 2025 dismissing the appeal;
 - b. That the attached affidavit showing cause be deemed as duly filed upon the appeal being reinstated; and
 - c. That the costs of this application be in the cause.
4. The Appellant's application was based on the grounds set out on the face thereof and on the supporting affidavit of the Appellant's advocate, Solomon Mukhwana. In summary, the Appellant contended that the Appellant was aware that the appeal was coming up on 4th February 2025 for a Notice to Show Cause but on 31st January 2025, the Appellant checked the status of the appeal on the Judiciary Case Tracking System (CTS) and noted that the appeal was indicated to be coming up for mention on 10th February 2025. The Appellant contended that his advocates checked the cause list for 4th February 2025 and found the appeal not listed for the Notice to Show Cause on that day. The Appellant averred that his advocates made inquiries at the court registry, which confirmed that the appeal was fixed for mention on 10th February 2025. The Appellant averred that given these developments, the Appellant did not appear in court on 4th February 2025 for the Notice to Show Cause when the appeal was dismissed, but instead arranged to appear in court on 10th February 2025 when he was informed the matter was to come up. The Appellant averred that it was when his advocates were filing an affidavit in answer to the Notice to Show Cause that they learnt that the appeal came up for Notice to Show Cause on 4th February 2025 and was dismissed. The Appellant claimed that the court unilaterally altered the date for the Notice to Show Cause from 10th February 2025 to 4th February 2025, thereby prejudicing the Appellant. The Appellant contended that he did not appear in court on 4th February 2025 because the matter was not listed and he had been informed that the matter would come up on 10th February 2025.
5. The application was opposed by the Plaintiff through a replying affidavit sworn by the Respondent, Samwel Ongongá Otieno on 24th February 2025. The Respondent averred that the Appellant had failed to comply with the condition for stay given by the court despite having been given more time to do so. The Respondent averred that, given the Appellant's conduct, the Appellant was not deserving of the orders sought. The Respondent averred that since the appeal had been pending for 6 years without any steps being taken by the Appellant to prosecute it, the court was justified in dismissing the same. The Respondent averred that the Appellant had not given any valid reason why the appeal should be reinstated. The Respondent urged the court to dismiss the Appellant's application.

Analysis and Determination

6. The application was argued orally on 27th February 2025. I have considered the Appellant's application together with the affidavit filed in support thereof. I have also considered the affidavit filed by the Respondent in opposition to the application. Finally, I have considered the submissions by the advocates for the parties. The Appellant's application was brought principally under Order 12 Rule 7 and Order 51 Rule 15 of the Civil Procedure Rules, which give the court the power to set aside an ex parte judgment, and order, respectively.



7. Order 12 Rule 7 of the Civil Procedure Rules provides as follows:

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”
8. Order 51 Rule 15 of the Civil Procedure Rules, on the other hand, provides that:

“The court may set aside an order made ex parte.”
9. The powers conferred upon the court under Order 12 Rule 7 and Order 51 Rule 15 of the Civil Procedure Rules are discretionary. The burden was upon the Appellant to establish that there exists sufficient grounds to warrant the setting aside of the order made herein on 4th February 2025.
10. In *Patriotic Guards Ltd v. James Kipchirchir Sambu* [2018]eKLR, the court stated as follows:

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”
11. In *Patel v. E.A Cargo Handling Services Ltd.*[1974]E.A 75, the court stated that:

“There are no limits or restrictions on the judge’s discretion except that if he does vary the judgement he does so on such terms as may be just ... The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules.”
12. In *Shah v. Mbogo* [1967] EA 116 the court stated that:

“This discretion 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 the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”
13. The Defendant had a duty to persuade this court that it deserved the exercise of its discretion.
14. In *National Bank of Kenya Ltd. v. E. Muriu Kamau & another* [2009]eKLR, the court stated that:

“...there is plainly a duty on all advocates to exercise exceptional care in handling matters on behalf of their clients.”
15. In *Shabbir Din v. Ram Parkash -Anand* [1955]22 EACA 48 Briggs JA stated at page 51 as follows:

“...In particular, mistake or misunderstanding of the appellants’ legal advisers, even though negligent may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of that particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised.’



16. In Philip Chemwolo & Another v. Augustine Kubende (1982 – 88) 1 KAR 1036, Apaloo, J.A stated as follows:

“...Blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case heard on merits. I think the broad equity approach to this matter, is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said, exists for the purpose of deciding the right of the parties and not for the purpose of imposing discipline.”

17. I agree with the Respondent that the conduct of the Appellant, if not explained, does not deserve the exercise of this court’s discretion in the Appellant’s favour. It is as a result of this conduct that the appeal was dismissed for want of prosecution. The Appellant has, however, contended that he was condemned unheard and that he had a reasonable explanation to give for the delay in complying with the court order given on 25th February 2020 and the prosecution of the appeal. The Appellant has attributed his failure to attend court on 4th February 2025 to what he has described as the confusion caused by the CTS. I have looked at the record of this court, both on the physical court file and the CTS. The records in both mediums in which the court proceedings are held are consistent. I have not come across any discrepancies or alterations. This court fixed the appeal for Notice to Show Cause on 4th February 2025. The matter came up as scheduled, was in the cause list for the day and was dealt with by the court. The Appellant’s allegation that the Notice to Show Cause was to come up on 10th February 2025 and that the date was unilaterally changed to 4th February 2025 is not supported by the court record. The foregoing notwithstanding, I will, in the interest of justice, give the Appellant a chance to appear and show cause why this appeal that has been pending since 2019 should not be dismissed for want of prosecution.

Conclusion

18. In conclusion, I hereby make the following orders on the Appellant’s application dated 8th February 2025;

1. The orders made on 4th February 2025 dismissing the appeal herein are set aside, and the appeal is reinstated.
2. The parties shall appear on a date to be fixed by the court to show cause why this appeal should not be dismissed.
3. The Respondent shall have the costs of the application.

DELIVERED AND SIGNED AT KISUMU ON THIS 26TH DAY OF JUNE 2025

S. OKONG’O

JUDGE

The ruling was delivered through the Microsoft Teams Video Conferencing platform in the presence of;

Mr. Luvutse for the Appellant

Mr. Mbeka for the Respondent

Ms. J. Omondi-Court Assistant

