



**Masila v Maitha (Environment and Land Appeal E003 of 2021)
[2025] KEELC 6566 (KLR) (2 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 6566 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL E003 OF 2021**

**EO OBAGA, J
OCTOBER 2, 2025**

BETWEEN

SAMUEL KINYILI MASILA APPELLANT

AND

DAUDI MUSAU MAITHA RESPONDENT

RULING

1. The Plaintiff/Applicant filed the Notice of Motion dated 18th May, 2024 under the provisions of Sections 1A, 1B and 3A of the [Civil Procedure Act](#).
2. The following orders have been sought: -
 1. That this Honourable Court be pleased to allow to set aside the order dated 13/3/2023 dismissing this appeal and reinstate the same for hearing.
 2. Costs in the cause.
3. The application is premised on the grounds appearing on its face together with the supporting affidavit of Samuel Kinyili Masila sworn on even date. The Applicant averred that the suit was in court lastly on 13th March, 2023 but his advocates on record did not hear the case being called out online. The deponent further averred that his advocates' efforts to search for the file were in vain until the file was finally traced in March 2024.
4. It was his contention that upon tracing the file he found out that the matter had been dismissed. Nonetheless, he contended that directions had not been taken on the appeal and neither had the lower court file been availed. The Applicant stated that the appeal was not ready for hearing by the time it was being dismissed. He urged the court to reinstate the case.
5. The Respondent filed grounds of opposition dated 27th March, 2025. He contended that the Applicant filed his appeal on 24th February, 2021 and afterwards did not take any action to prosecute the appeal for



over three years. He further contended that the appeal was rightfully dismissed for want of prosecution. The Respondent asserted that the dismissed appeal had no merits and or chances of success and therefore reinstating it would be a waste of judicial time.

6. Parties took directions to canvass the application by way of written submissions.
7. In the Applicant's submissions dated 8th April, 2025, Counsel argued that the delay in prosecuting the appeal was not by a mistake on their part because if the file had been available, then they could have taken a hearing date. Counsel urged that the application be allowed as prayed.
8. On behalf of the Respondent, Counsel contended that the application was misconceived as the appeal was dismissed on 18th September, 2023 for want of prosecution through a Notice to show cause. Counsel reiterated that the appeal was filed on 24th February, 2021 and that no action was taken by the Applicant to prosecute the matter until the court issued a Notice to show cause out of its own motion. Counsel submitted that the allegation that the file could not be traced had not been demonstrated with evidence of the efforts that had been made to trace it. Counsel urged the court to dismiss the application with costs.
9. Having considered the application, the primary issue for determination is whether the Court ought to set aside the order dated 13th March, 2023 dismissing the appeal herein and subsequent thereto, order for reinstatement of the appeal.
10. The record indicates that the appeal herein was dismissed on 18th September, 2023 for want of prosecution after the matter had been fixed for Notice to Show Cause on 10th July, 2023. The record further indicates that before dismissal, there was no appearance from either of the parties on three previous occasions.
11. Being a discretionary power, the Court of Appeal observed as follows in *CMC Holdings Ltd v James Mumo Nzioki* [2004] eKLR with regard to the setting aside of ex-parte orders: -

“Our view is that in law, the discretion that a court of law has, in deciding whether or not to set aside ex parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle.”
12. The overriding objective under Section 1A of the *Civil Procedure Act* is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. Order 42 Rule 35 (2) of the Civil Procedure Rules, 2010 provides as follows: -

‘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.’
13. The Applicant attributed the failure to attend court when the matter was being dismissed to a mistake on the part of his advocate whom he alleged, did not hear the case being called out. Nonetheless, even though the Applicant explained that his advocates attempted to trace the file which had allegedly gone missing shortly after being dismissed, no evidence was annexed to his application to show the efforts that were made. The Applicant ought to have annexed letters addressed to the Deputy Registrar addressing the case of the missing file and any subsequent follow-ups.



14. In *Shah v Mbogo* [1967] EA 116 at 123B Harris J, judiciously held as follows:-

“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.”

15. The Applicant did not advance a plausible explanation for the efforts made to trace the file if indeed it had gone missing as averred. There was no explanation for the delay in prosecuting an appeal which from the record was filed about four years ago and the Applicant had not set the matter down for directions for hearing and disposal. The conduct of the Applicant in the matter depicts a litigant that is not desirous and intent on carrying on this matter which has been unreasonably protracted.

16. In the end, the Applicant has not demonstrated merit in the application which is hereby dismissed with costs to the Respondent.

HON. E. O. OBAGA

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 2ND DAY OF OCTOBER, 2025.

In The Presence Of:

Mr. Mutuku for Applicant.

Mr. Muia for Respondent.

Court assistant – Steve Musyoki

