Mauti v Nyamuro & another (Environment and Land Appeal E026 of 2022) [2025] KEELC 6712 (KLR) (1 October 2025) (Ruling)

Neutral citation: [2025] KEELC 6712 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT AND LAND APPEAL E026 OF 2022

M SILA, J

OCTOBER 1, 2025

BETWEEN

WISLEY OMBOGO MAUTI ..... APPELLANT

AND

WILLIAM RATEMO NYAMURO ..... 1ST RESPONDENT

WYCLYF MOTANYA ..... 2ND RESPONDENT

RULING

1. The application before me is that dated 24 March 2025 filed by the appellant. It is said to be brought pursuant to the provisions of Section 1A, 1B, 3A of the *Civil Procedure Act*, Order 45 Rule 1, 2 and 5, and Order 51 Rule 1, 3 and 4, of the *Civil Procedure Rules*. The substantive prayer is prayer (3) thereof which seeks the following order :

   (3) That the honourable court be pleased to review, rescind, vary and/or set aside the order dismissing the appeal.

2. The application is opposed.

3. To put matters into perspective, the appellant filed a Memorandum of Appeal on 8 November 2022 against the judgment in the suit *Ogembo SPMCC No. 44 of 2019* which judgment was delivered on 26 October 2022. I do not have the facts of that case as none has been provided, and all I see in the Memorandum of Appeal which can give me an idea of what was in dispute was, is the contention that the trial Magistrate erred by not factoring in "that the land in dispute is ancestral land belonging to the appellant and his family members who are not disputing the title being registered in his name."

4. Despite filing the Memorandum of Appeal on 8 November 2022, the appellant took no step to progress the appeal to a hearing. On 8 August 2023, given that the matter had remained idle, the court registry fixed the matter for mention on 6 September 2023 before the Deputy Registrar to confirm if

the record of appeal would have been filed. On 6 September 2023, the matter was placed before Hon. Kugwa, the Deputy Registrar. Only counsel for the respondent appeared and there was no appearance on the part of the appellant. The court directed that the matter be mentioned on 29 November 2023 but the court was not sitting on that day and the matter was given the mention date of 2 March 2024. On that day, there was no appearance on the part of either appellant or respondent. The court directed the matter to be mentioned on 22 May 2024 but yet again there was no appearance on the part of both parties. There were further mentions on 3 July 2024 , 14 August 2024, and 16 October 2024 without either party appearing. On 16 October 2024, the Deputy Registrar directed the case to be placed before the Judge for mention on 21 November 2024. On that day, only Mr. Ochwangi, learned counsel for the respondent appeared, and he mentioned that since being served with the Memorandum of Appeal, the appellant had not taken any step on it.

5. I did observe that there was no movement on the appeal since it was filed and I caused a notice to be issued for the appellant to show cause why the appeal should not be dismissed for want of prosecution. The notice was duly issued for 28 January 2025. On that day, Mr. Mawenzi, learned counsel for the appellant appeared and Mr. Ochwangi for the respondent was also present. Mr. Mawenzi submitted that the appellant had failed to give instructions but he had gotten hold of him that morning. He asked for two weeks to enable him 'sit with his client'. I gave the two weeks sought with a rider that I will be hard pressed to give more time and directed the matter to be mentioned on 6 March 2025. On that day, there was still no record of appeal filed. Mr. Mawenzi submitted that he requested for proceedings on 25 January 2025 and paid for the same on 4 March 2025 which I observed was just two days to the mention and way outside the two weeks that I gave the appellant on 28 January 2025. Ms. Nyaenya who appeared holding brief for Mr. Ochwangi for the respondent submitted that the appellant was not serious with prosecuting the appeal considering that it was filed in 2022. Mr. Mawenzi asked for a final chance but I was not persuaded. I noted that the appeal had been filed on 8 November 2022 and more than two years had lapsed. I further noted that despite giving the appellant the two weeks requested on 28 January 2024, the appellant did nothing within those two weeks and only paid for proceedings two days to the mention date of 6 March 2025. I held as follows :

> " On 28 January 2025, counsel for the appellant asked for some time to seek instructions and I gave two weeks. I would have thought that the appellant would move with haste and take action within the two weeks but he has only paid for proceedings two days ago, way after the two weeks and that is for an appeal that was filed more than two years ago. In as much as the appellant pleads in the interest of justice, justice cuts both ways. The appellant cannot file an appeal and sit on it to the detriment of the respondent. I am not persuaded to keep this appeal any longer in the courts and it is hereby struck out for failure to prosecute. Costs will be to the respondent."

6. It is following the above orders of dismissal that this application was subsequently filed and I have already mentioned that it seeks orders to have this court review its orders dismissing the suit and reinstate the appeal.

7. The application is supported by the affidavit of the appellant. He inter alia avers that the appeal was dismissed because he delayed in paying for the proceedings within the two weeks given. He avers that the laches was as a result of miscommunication between himself and his advocate and he pleads that the mistakes of his advocate should not dispossess him the right to appeal. He adds that in any case he has now paid for the proceedings.

8. The respondents have opposed the application through a replying affidavit sworn by William Ratemo Nyamuro, the 1st respondent. He deposes that the appeal was dismissed for failure by the applicant to

comply with the legal timelines. He adds that no sufficient reason was given as to why the record of appeal was not filed within time and that even after the court granted more time the record of appeal was not filed and has not been filed to date. According to him, sufficient time was given by the court to enable the applicant file his appeal.

9. I directed that the application be heard through written submissions and I have seen and considered the submissions filed by both Mr. Mawenzi for the applicant and Mr. Ochwangi for the respondent.

10. The applicant seeks a review and I stand guided by Order 45 Rule 1 which provides as follows :

    1. Any person considering himself aggrieved—

        a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

        b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

    2. A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

        From a reading of Order 45 Rule 1 (1) (a) it will be seen that one can seek review on the following grounds :

        i. Discovery of new and important evidence that was not available and could not have been available when the order was made;

        ii. Mistake or error apparent on the face of the record;

        iii. Any other sufficient reason.

11. In his submissions, Mr. Mawenzi submitted that the applicant come under the umbrella of "any other sufficient reason" in seeking review of the order made dismissing the appeal. My further reading of his submissions does not however expound what this "sufficient reason" may be. There is indeed nothing new that has happened since the dismissal of the appeal on 6 March 2025. There is even no mention that a record of appeal has been prepared and there was indeed none annexed to the application.

12. In his affidavit, the applicant averred that the appeal was dismissed because he did not seek to pay for the proceedings within the two weeks given by court. That could not have been the only reason why the appeal was dismissed. The appeal was dismissed for want of prosecution and this is covered under Order 42 Rule 35 which provides as follows :

    Dismissal for want of prosecution [Order 42, rule 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.

13. It will be seen that under subrule (2) if within one year of service of the memorandum of appeal, the appeal is not set down for hearing, the appeal is to be listed for dismissal by the Judge. In our case, the order listing the appeal for dismissal was made on 21 November 2024, more than two years since the memorandum of appeal was filed. Indeed, the applicant benefited by an extra one year, for the appeal was subject to dismissal within one year of its filing, given that no step had been taken to prosecute it. To clear the air, the appeal was not dismissed because the applicant failed to seek proceedings within two weeks of 6 March 2025. It was already ripe for dismissal on 6 March 2025 but the court extended grace to the applicant by giving him two more weeks. If it was a match of football, you could say that the two weeks was something akin to injury time or added time, for the time for the match had already ended. If you score no goal within added time, you cannot now complain that the referee has ended the match. The applicant ought to have taken advantage of the grace extended to him to ensure that he has paid for the proceedings, followed up on the same, and prepared the record of appeal for he was already on borrowed time. That would have demonstrated seriousness to prosecute the appeal. He however continued with his dilatory attitude. The two weeks given ended without him doing anything. He suddenly woke up two days to the mention date of 6 March 2025 to pay for the proceedings, which was more than a month later. I am afraid that this was now too late in the day.

14. As I stated in my order dismissing the appeal, justice cuts both ways and one tenet of justice in our *Constitution* at Article 159 (2) (a) is that justice shall not be delayed. There are time lines given for taking certain actions within a case. I would take it that these timelines are the ones to guide the court and the parties as to whether or not justice is being delayed. The assumption to be made is that when one party moves out of these timelines then he is delaying justice. Justice is for both the claimant and the respondent and therefore cuts both ways. In this instance, the applicant contends that he should not be denied the justice of having his appeal heard. But what about the respondent ? Should he be denied the right to have a case determined without unreasonable delay ? Should he kept in court indefinitely when the applicant fails to adhere to statutory timelines and even timelines extended to him through grace ? Should he remain in court for the duration of time that the applicant determines for himself ?

15. Whichever way you look at it, two and half years since filing an appeal and not taking any step to prosecute it is an injustice to the respondent. The applicant had sufficient time to prepare his appeal but he failed to do so. He also failed to take positive steps within the time given by court. It will be grossly unfair to the respondent to allow the appellant conduct his appeal at the pace that he wants without a care to the respondent.

16. In short I am not persuaded to review my orders of 6 March 2025. The applicant is the sole author of his misfortune. He made his bed and now he needs to lie on it. Just like a game of football, litigation also needs to come to an end.

17 I find no sufficient reason given to set aside the orders of 6 March 2025 dismissing this appeal and I proceed to dismiss this application with costs to the respondent. The appeal remains dismissed for want of prosecution as ordered on 6 March 2025.

18. Orders accordingly.

DATED AND DELIVERED THIS 1ST DAY OF OCTOBER 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in presence of :

Mr. Ochwangi for the respondent

No appearance on part of Mr. Mawenzi for the appellant/applicant

Court Assistant – Michael Oyuko.