



REPUBLIC OF KENYA



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**Kushumpa v Kisongo & 2 others (Land Case Appeal E014 of 2024)
[2025] KEELC 4443 (KLR) (12 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4443 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
LAND CASE APPEAL E014 OF 2024
MN MWANYALE, J
JUNE 12, 2025**

BETWEEN

MAIKO OLE KUSHUMPA APPELLANT

AND

PAULINE NAISENYA KISONGO 1ST RESPONDENT

LAND REGISTRAR 2ND RESPONDENT

HON ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

1. Maiko Ole Kushumpa, the Appellant herein being aggrieved by the Ruling and order of Hon. W.C. Waswa (SRM) dated 25th of April 2024 in Kilgoris CMEL No. E0182022 penned 9 grounds of Appeal vide the Memorandum of Appeal dated 21st May 2024.
2. He sought the followings orders in his Appeal.
 - a. That the Honourable court be pleased to set aside the orders issued on 25th April 2024 dismissing the Appellant's Application for reinstatement.
 - b. That the Honourable court be pleased to order and hereby order reinstatement of the suit Kilgoris SPME & L No. E018/2023 for hearing and determination on merit.
 - c. That the Honourable court be pleased to order that the suit be heard by a judicial officer other than Hon. W.C Waswa.
 - d. Costs of the Appeal be awarded to the Appellant.
3. The grounds of Appeal; are as follows; -



- i. That the Learned Trial Magistrate grossly misdirected himself in law and in fact by reaching the wrong conclusion that the appellant's advocate was served with hearing Notice for 29th January 2024 by the Respondent's Counsel.
 - ii. That the Learned Trial Magistrate grossly misdirected himself in fact that the hearing date was taken by consent by both counsel on the 15th day of January 2024 whereas it was taken Ex-parte by the Respondent's/Defendant's Advocate.
 - iii. That the Learned Trial Magistrate erred in law by misinterpreting and misapplying the provisions of Order 12 Rule 3(1) of the Civil Procedure Rules into a gross miscarriage of justice.
 - iv. That the Learned Trial Magistrate erred in law and fact by not according weight to the evidence the Appellant/Plaintiff was never personal served neither by the court nor by the 1st Respondents' Advocate their records were fictitious and hence unreliable.
 - v. That the Learned Trial Magistrate misdirected himself in law and fact by solely blaming the Appellant for non-attendance on the hearing date that he was not personally served.
 - vi. That the Learned Trial Magistrate erred in law and fact by making a verdict in a vacuum by misreading and ignoring the evidence on record to the contrary.
 - vii. The Learned Trial Magistrate erred in law and fact by dismissing the suit without an iota of evidence of proper service of hearing notice of 29th January 2024 upon the Appellant by either the Respondent's Advocate or the court.
 - viii. That the Learned Trial Magistrate grossly misdirected himself in law and fact that the suit had two other defendants who were also not properly served with the hearing Notice of 29.01.2024.
 - ix. That the Learned Trial Magistrate erred in law and fact by failing to consider the possible prejudice the dismissal order would occasion to the Appellant/Plaintiff as against the Respondents/Defendants.
4. On the strength of the above grounds, the Appellant sought for the prayers set out at paragraph 2 of this Judgment.
 5. Upon admission of the Appeal, parties were directed to file written submissions on the same.

APPELLANT'S SUBMISSION.

6. The Appellant submitted on the chronological events leading to the dismissal of the suit and framed three issues for determination. To wit.
 - i. Whether the Appellant had been vigilant and/or keen to prosecute the suit lodged on 19th May, 2022?
 - ii. Whether there has been inordinate delay in prosecuting the suits?
 - iii. Whether the suit should be reinstated?
7. On issue 1, the Appellant submits that he attended court in all proceedings save when the matter was reallocated another court; when his Advocates mis diarised; hence the suit was being prosecuted in a timely manner. The application herein was filed timeously. Relying on Order 12 Rule 7, the Appellants submit that the mistake of the Advocate ought not be visited on the litigant. The Appellant seeks the court to exercise its discretion and allow the application and cites the decision in the case NAIROBI



- HCC No. Utalii Transport Company Limited and 3 Others Vs. NIC Bank, which expounded the principles to guide court in exercise of discretion in an application for dismissal for want of prosecution.
8. The Appellant equally relies on the case of CMC holdings Limited Vs. Nzioki (2004) KLR 173.
 9. The Appellant submits that reinstatement of the suit will not occasion any prejudice to the parties.
 10. On Reinstatement the Appellant relies on Nahason Mwangi Vs. Keny Finance Bank Limited (2015) eKLR.

1ST RESPONDENT'S SUBMISSION.

11. On his part the Respondent through his counsel Mr. Shira has framed two issues for determination
 - i. Whether Appellant has demonstrated reasonable grounds for setting aside orders dated 29.01.2024 and subsequent reinstatement of the suit.
 - ii. What orders ought to issue.
12. On issue 1, the Respondent submits
 - i. that courts discretion should not be used to assist a person who deliberately sought to obstruct the court of justice.
 - ii. That the suit was filed to the Appellant and belonged to him.
 - iii. That the Appellant's Advocate was served with the hearing Notice.
 - iv. The Respondent submits that the case belonged to the Appellant who should have been vigilant. Reliance on this proposition was placed on the decision in the case of Rukenya Buuri Vs. M'airumi Minyara and 2 Others.
13. On costs the Respondent submits that the Appellant has not demonstrated any sufficient cause to make the court set aside the orders issued on 29.01.2024, but in the event of reinstatement an order being made thrown away costs of Kshs.50,000/= be awarded to Respondents.
14. The undisputed facts in relation to this Appeal, are that
 - i. The suit before the lower court was dismissed for non-attendance and want of prosecution on 29/01/2024.
 - ii. An application for reinstatement of the suit dated 26/02/2024 was equally dismissed provoking this Appeal.

ISSUES FOR DETERMINATION.

15. Having analyzed, the record of Appeal, the submissions and considered the law, the court frames the following as issues for determination.
 - i. Whether or not the appeal is merited, and in deciding this issue the court shall consider whether the application for Reinstatement before the trial court was merited?
 - ii. What orders ought to issue?
 - iii. Who bears the costs of the appeal?



ANALYSIS AND DETERMINATION.

16. Pursuant to the duties of this court as a first appellate court to interalia, “reconsider the evidence, evaluate it itself and draw its conclusions” as was stated in *Selle and Another vs Associated Motor Boat and Another*, the court has reviewed the record of Appeal and in particular the proceedings of 15/01/2024 and 29/01/2024 where the court recorded that the Plaintiff (Appellant) was absent on both dates. Mr. Shira for the defendant was present on 15/01/2024 and again on 29/01/2024.
17. I herewith reproduce the verbatim proceedings for the said dates.

“ 15/01/2024

Before Hon. W.C Waswa – SRM

C/A: Mempe/Sandra

Plaintiff: Absent

1st defendant – Mr. Shira Advocate.

Mr. Shira advocate – I filed my statement of defence. We received a reply to the defence. I pray for a hearing date and leave to file my supporting list of documents.

Directions

Both parties have leave to file supporting documents within 14 days.

Hearing on 29/01/2024.

Hon. W.C. Waswa

SRM

01.2024

29/01/2024

Before Hon. W.C Waswa – SRM

C/A: Veronicah

Mr. Shira Advocate for the 1st Defendant.

No appearance for the plaintiff.

Mr. Shira advocate - I am ready to proceed.

11.32 a.m.

Mr. Shira advocate for 1st defendant.

No appearance for the plaintiff.

Mr. Shira advocate – We took today’s date with Mr. Maswari Advocate holding brief for Mr. Sagwe advocate for the plaintiff and his advocate are absent.

This case was filed in May 2022. The plaintiff has not been here to prosecute this case. I pray that this case be dismissed for non-attendance and want of prosecution.

RULING



It's 11.35 a.m. the plaintiff as well as his counsel are absent. No witness has ever testified in this case. This is a 2022 case. This suit is dismissed for non- attendance and want of prosecution. Costs to the 1st defendant.

Hon. W.C. Waswa

SRM

29/01/2024”

18. It is the dismissal of the said suit that provoked an application dated 26/02/2024 for reinstatement which application was dismissed provoking this appeal pursuant to leave granted to the Appellant.
19. Grounds d, e f appearing at page 73 of Record of Appeal in support of the application that the 1st Defendant was never served with any hearing Notice to the plaintiff, and that the 1st Defendant advocate misled the court that the date had been taken by consent in the presence of Mr. Maswari Advocate who was not in court then.
20. Having reproduced the record of proceedings of 15/01/2024 and 29/01/2024, it is the evident that the hearing date of 29/01/2024 was taken exparte by the 1st Defendants Advocate as Mr. Maswari Advocate was not recorded as having being present yet alone holding brief for Mr. Sagwe.
21. The Record of Appeal shows Mr. Mashwari was always present save for the two dates preceding the dismissal of the case and the Appellant is deemed to have desirous of prosecuting his case.
22. This issue formed the grounds in support of the application, and since no hearing notice was exhibited by way of an affidavit on 29/01/2024, the court heavily relied on the misleading submissions that the date had been taken by consent, whereas that was not the case, the court ought to have considered the said ground in support in of the application as the said ground was factual and had merits. Indeed, it follows that, The application for reinstatement before the trial court was merited as no hearing Notice was exhibited as having been served on the Appellant and the fact that the date was not taken by consent, as had been submitted by Mr. Shira Advocate.
23. The hearing Notice allegedly served was only exhibited to the court in response to the application for reinstatement, but was not the basis of the decision to dismiss the suit, the basis being that the date had been taken by consent which was not the case the court fell in error to dismiss the application, as the same was merited.
24. Having found that the application before the trial court was merited and the appeal herein being based on the same grounds as the application before the trial court, the court finds that the Appeal herein is merited.
25. In answer to issue number 1 the court finds that the Appeal herein is merited, and ought to be allowed.
26. On what orders, ought to issue, the order commending itself is that the;
 - i. Appeal is merited and Kilgoris CME & L No. 18/2022 is reinstated for hearing and determination before the Chief Magistrate Court.
 - ii. The said suit shall be heard by any Judicial Officer other than Hon. W.C. Waswa.
 - iii. The costs of the appeal and the application dated 26/02/2024 are awarded to the Appellants.
 - iv. Judgement accordingly.

DATED AT KILGORIS THIS 12th DAY OF JUNE 2025.



HON. M.N. MWANYALE

JUDGE

In the presence of

CA – Emmanuel/Sylvia

Mr. Mashwari for Appellant/Applicant

Mr. Shira for the Respondents

