

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 688 OF 2017 (O.S)

**IN THE MATTER OF: THE ESTATE OF GEOFFREY OKOTH OYOYE
(DECEASED)**

**IN THE MATTER OF: AN APPLICATION BY MARK COLLINS
OKOTH, JAMES OMONDI OKOTH, ROSELYNE ACHIENG OKOTH,
ALICE ANYANGO OKOTH, KEVIN OPIYO OKOTH, JULIUS ODONGO
OKOTH AND CHRISTOPHER OKELLO OKOTH**

**IN THE MATTER OF: A CLAIM FOR ADVERSE POSSESSION
PURSUANT TO SECTION 38 OF THE LIMITATION OF ACTIONS
ACT (CAP 22)**

AND

IN THE MATTER OF: TITLE NO. 345/W. NYOKAL/KANYIKELA

BETWEEN

**MARK COLLINS OKOTH AND JAMES OMONDI OKOTH
(SUING AS ADMINISTRATORS TO THE ESTATE OF**

**GEOFFREY OKOTH OYOYE, DECEASED)....
.....APPLICANTS/PLAINTIFFS**

VERSUS

**SUKARI INDUSTRIES LIMITED..... 1st
RESPONDENT**

**AMRITA KAUR RAI.....2nd
RESPONDENT**

ONKAR SINGH RAI.....3rd
RESPONDENT
TEJVEER SINGH RAI.....4th
RESPONDENT
JASWANT SINGH RAI.....5th
RESPONDENT

RULING

1. This Ruling relates to the Notice of Motion dated **16th November 2023** and filed by the Applicants, **Mark Collins Okoth and James Omondi Okoth**, suing as the administrators to the estate of the late **Geoffrey Okoth Oyoye**, on their own behalf and on behalf of the other beneficiaries of the estate.
2. The said application is expressed to be brought under the provisions of Sections 13 of the Environment and Land Act, The inherent Powers & Jurisdiction of the Court and all other enabling provisions of the law and Article 159 of the Constitution of Kenya, 2010.
3. The application seeks, inter alia, the following substantive orders as set out verbatim in the motion:
 - a) Spent
 - b) **THAT** pending the hearing and determination of this application inter partes, the Honourable Court be pleased to stay any eviction of the applicants/plaintiffs, pulling

down of their residential houses erected on **TITLE NO. 345/W. NYOKAL/KANYIKELA**, or destruction of their said houses by the respondents.

c) **THAT** pending the hearing and determination of this application, the applicants/plaintiffs seek orders of this Honourable Court setting aside the orders given on 16th October 2023 and in place thereof, the Court grants an order reinstating the Originating Summons dated 1st June 2017 filed in Court on 12th June 2017 together with the status quo orders given on 19th September 2017.

d) That upon hearing and determination of this application, the applicants/plaintiffs seek orders of this Honourable Court setting aside the orders given on 16th October 2023 and in place, the Court grants an order reinstating the Originating Summons dated 1st June 2017 filed in Court on 12th June 2017, together with the status quo orders given on 19th September 2017.

e) That costs be in the cause.

4. The application is supported by the affidavit of **Jaoko Alexender** sworn on the same date and is premised on the grounds appearing on the face of the motion. The deponent explains that the suit was **dismissed for want of prosecution on 16th October 2023** owing to what the applicants describe as an **excusable mistake or miscommunication as to the hearing date**. It is deposed that the applicants' advocate and witnesses

had been in court on **5th October 2023**, when the matter was **adjourned at the instance of the defence counsel**, and they understood the next hearing date to be **16th November 2023**.

5. The deponent further avers that the applicants were **ready to proceed with the hearing** and had made all necessary preparations, including **securing the attendance of one witness who had travelled from Germany**. He therefore urges the court to **exercise its discretion** in the interests of justice by **setting aside the dismissal order, reinstating the suit**, and **restoring the status quo** to preserve the applicants' **occupation and possession of the suit property**, being **Title No. 345/W. Nyokal/Kanyikela**, where they and the estate of the deceased have **resided for over three decades**.
6. The respondents oppose the application through a **Replying Affidavit sworn on 5th February 2024 by Collins Aluku**, the **Human Resource and Administrative Manager** of the 1st respondent. They contend that the application is **devoid of merit**, having been brought **after an inordinate and unexplained delay**, and in circumstances that **demonstrate lack of diligence** on the part of the applicants and their counsel. It is deposed that the **dismissal of the suit on 16th October 2023** was **proper, lawful, and justified**, the matter having remained pending in court since **2017** with numerous adjournments largely occasioned by the applicants.

7. The respondents further aver that the applicants have **failed to establish sufficient cause** to warrant the exercise of this court's discretion to **set aside the dismissal order**. They maintain that the **respondents are the bona fide registered proprietors** of the suit property, being **Title No. 345/W. Nyokal/Kanyikela**, and that the applicants have **no lawful claim or right of occupation** thereon. It is further contended that to reinstate the matter at this stage would occasion **grave prejudice** to the respondents, who have since **considered the litigation concluded** and have made administrative and financial arrangements on the basis that the matter was finally determined.
8. The court directed that the application be canvassed by way of written submissions. The applicants filed their submissions dated **1st February 2024**, while the respondents filed theirs on **11th February 2024**. The court has carefully considered the motion, the affidavits on record, the rival submissions and the applicable law.

Submissions by the Parties

Applicants' Submissions

9. In their written submission, the applicants reiterated that their application is premised on the Notice of Motion dated 16th November 2023 seeking to stay eviction and to set aside the dismissal orders issued on 16th October 2023. It was their contention that the said dismissal arose purely from an excusable mistake and inadvertence,

and not from any deliberate inaction on their part.

10. Counsel submitted that the plaintiffs' advocate was present in court on 5th October 2023 together with four witnesses, among them **Mark Collins Okoth** and **James Omondi Okoth**, when the matter was adjourned at the instance of the defence counsel. The next hearing date, they averred, was understood to be 16th November 2023, and the applicants duly attended court on that date only to discover that the matter had been dismissed on 16th October 2023 for want of prosecution.
11. The applicants' counsel, averred that the dismissal was occasioned by a bona fide mistake that should not be visited upon innocent litigants who have shown sustained interest in prosecuting their claim. He cited the constitutional guarantee of the right to a fair hearing under **Article 50(1)** of the Constitution, emphasizing that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before an independent and impartial court. Counsel urged the court to exercise its discretion to do substantive justice rather than uphold procedural technicalities that may result in grave hardship and possible eviction of the applicants from land they have occupied for over thirty years.
12. To buttress their position, the applicants relied on several judicial authorities. They cited **Patriotic Guards Ltd v James Kipchirchir Sambu [2018] eKLR**, where the Court of Appeal emphasized that mistakes of counsel should not bar a litigant from accessing justice. They also referred to **Phillip Keipto Chemwolo & Another v**

Augustine Kubende [1986] KLR 495, where the court held that “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 having his case not heard on its merits.”

13. Counsel further relied on **Bamanya v Zaver (2002) 2 EA 329**, where Mukasa-Kikonyongo DCJ held that the mistakes or dilatory conduct of counsel should not be visited upon a litigant, and on **Patel v E.A. Cargo Handling Services Ltd (1974) EA 75**, where the East African Court of Appeal underscored that the court’s discretion to set aside orders is wide and unfettered, save that it must be exercised to achieve justice. The applicants therefore urged the court to find that sufficient cause had been shown, and that no prejudice would be suffered by the respondents if the suit were reinstated for hearing on its merits.

Respondents’ Submissions

14. The respondents, through **Olendo, Orare & Samba LLP**, filed their written submissions opposing the application. It was their contention that the applicants have not demonstrated any sufficient cause to warrant the setting aside of the dismissal order of 16th October 2023. Counsel submitted that the applicants have been indolent since the inception of the suit in 2017, and that the record clearly shows a history of delay, non-attendance, and lack of diligence. The respondents argued that the motion was brought after an unreasonable delay of over six years since the filing of the original Originating Summons, and thus offends the principles of equity and diligence in litigation. They asserted that the present application was

filed merely as an afterthought once the suit had already been dismissed.

15. Counsel for the respondents maintained that the court's discretion to set aside ex parte or dismissal orders must be exercised judiciously and only upon demonstration of sufficient cause. They relied on the decision in **JAM v FOK [2019] eKLR**, where the court held that the discretion to set aside is intended to avoid injustice resulting from accident or excusable mistake but is not designed to assist a litigant who has deliberately sought to obstruct or delay the cause of justice.
16. They also cited **Auto Selection (K) Ltd & 2 Others v John Namasaka Famba [2016] KLR**, where Mativo J. (as he then was) explained that "sufficient cause" means more than a mere explanation; it requires that a party must show bona fide and absence of negligence. Further reliance was placed on **Wachira Karani v Bildad Wachira [2016] eKLR**, where the court emphasized that an applicant seeking reinstatement must demonstrate that they were prevented from taking necessary steps by sufficient cause, not by neglect.
17. The respondents further submitted that inaction or indifference by counsel cannot be excused as inadvertence. In this regard, they cited **Dilpack Kenya Limited v William Muthama Kitonyi [2018] eKLR and Berber Alibhai Mawji v Sultan Hasham Lalji & 2 Others [1990-1994] EA 337**, where it was held that inaction on the part of an advocate, as opposed to a mere slip or error of judgment, is not an excusable mistake.

18. Counsel also cited **Cecilia Wanja Waweru v Jackson Wainaina Muiruri & Another [2014] eKLR**, where the Court of Appeal held that a party who has slept on their rights cannot be aided by equity. It was submitted that the six-year delay in actively prosecuting the suit was inordinate and deliberate, and that the applicants only woke from their slumber upon the dismissal of the case.
19. The respondents concluded by submitting that reinstating the suit would cause grave prejudice to the respondents, who are the registered proprietors of the suit property and have since taken possession. They contended that the respondents have a legitimate expectation that the litigation had been concluded, and reopening the case would deny them the fruits of their judgment and cause difficulty in securing witnesses and evidence. They therefore prayed that the application be dismissed with costs.

Issues for determination

20. The discrete issues for determination are:
- a) Whether the applicants have demonstrated sufficient cause to warrant the setting aside of the dismissal order issued on **16th October 2023**.
 - b) Whether the Plaintiff/Applicant is entitled to the relief sought.
 - c) Who will bear the cost of the Notice of Motion dated **16th November 2023**.

Analysis and Determination

Issue No;1 Whether the applicants have demonstrated sufficient cause to warrant the setting aside of the dismissal order issued on 16th October 2023.

21. The applicants seek to set aside the order dismissing this suit for want of prosecution on **16th October 2023**, explaining that their absence on that date arose from a genuine and excusable mistake in diarising the hearing date. They aver that on **5th October 2023**, when the matter last came up, it was adjourned at the instance of the defendants' counsel, who reported being hospitalized.
22. The court, while granting that adjournment, expressly marked it as the *last one* and ordered the defendants to pay **Kshs.150,000** as thrown-away costs before the next hearing date. The applicants' counsel states that he understood the next hearing to be on **16th November 2023**, not **16th October 2023**, and by the time he and his witnesses one of whom had travelled from **Germany** attended court, the suit had already been dismissed.
23. When a party seeks to set aside an order of dismissal for want of prosecution, the court is guided by the provisions of **Order 12 Rule 7 of the Civil Procedure Rules**, which provides that: "*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.*"

24. The legal substratum for dismissal of suits for want of prosecution is anchored on the principle that **litigation must be conducted expeditiously**. Parties who approach the court for justice must pursue their cases diligently to assist in clearing case backlogs and restoring public confidence in the judicial process. This principle is encapsulated in the maxim *“justice delayed is justice denied.”* However, where delay or non-attendance is shown to have arisen from a **substantive, justifiable, and excusable cause**, the court should not visit the mistake of counsel upon a party, as that would amount to grave injustice.
25. From the record, this matter has been before court since **2017**. The plaintiffs have consistently attended court, while the defendants and their counsel have frequently failed to appear or sought adjournments on **25th April 2018, 18th December 2018, 5th June 2023, and 5th October 2023**, among others often citing illness or other logistical constraints. On several of those occasions, the court-imposed **costs** on the defendants for wasted attendances, acknowledging that the plaintiffs had travelled with multiple witnesses and were ready to proceed.
26. These facts do not disclose indolence or neglect on the part of the plaintiffs. Their non-attendance on **16th October 2023** was neither deliberate nor inexcusable but arose from an honest and understandable mistake. The court is guided by the decisions in **Shah v Mbogo & Another (1967) EA 116**, which emphasized that discretion to set aside a dismissal should be exercised to avoid injustice or hardship resulting from accident, inadvertence, or

excusable mistake.

27. In the totality of circumstances, and taking into account the plaintiffs' consistent readiness to prosecute the matter and the respondents' history of adjournments, this court is satisfied that the applicants have demonstrated **sufficient cause** to warrant the setting aside of the dismissal order issued on **16th October 2023**. Justice will be best served by reinstating the suit to be heard and determined on its merits.

Issue no 2: Whether the Plaintiff/Applicant is entitled to the relief sought.

28. Having found that the applicants have demonstrated sufficient cause to warrant the setting aside of the dismissal order, the next question is whether they are entitled to the reliefs sought in their Notice of Motion dated **22nd January 2024**. The substantive relief sought is the **reinstatement of the suit** and the restoration of the status quo pending hearing and determination of the case.

29. The applicants submit that they have been in **continuous, peaceful, and uninterrupted possession** of the suit property, **Title No. 345/W. Nyokal/Kanyikela**, for over three decades, and that the dismissal of the suit has exposed them to the risk of eviction by the respondents before the matter can be determined on its merits. They contend that they have a genuine and arguable claim founded on **adverse possession** under **Section 38 of the Limitation of Actions Act**, which they have diligently prosecuted since 2017. They

urge the court to exercise its inherent power under **Sections 1A, 1B, and 3A of the Civil Procedure Act** to ensure the just, expeditious, and proportionate disposal of proceedings.

30. On the other hand, the respondents argue that once the suit was dismissed, the court became **functus officio**, and that reinstatement would unfairly prejudice them as **registered proprietors** who have, since the dismissal, considered the dispute concluded. They assert that the applicants have not come to court with clean hands, having been indolent for several years, and that reinstating the suit would defeat the very purpose of **Order 17 Rule 2** and **Order 12 Rule 7** of the Civil Procedure Rules**, which are designed to promote diligent litigation.
31. It is, however, trite that the **power to reinstate a dismissed suit** is discretionary and must be exercised to advance the cause of substantive justice. In **Shah v Mbogo & Another (1967) EA 116**, the court stated that the discretion to set aside a dismissal is intended “to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake.”
32. In the present case, the court record demonstrates that the **applicants have consistently attended court** and have actively taken steps to prosecute the suit. The **prejudice to the respondents**, if any, can be compensated by way of **costs**, whereas denying reinstatement would permanently bar the applicants from ventilating a dispute involving their long-standing occupation of land, a right protected under **Article 40 of the Constitution**.

33. Accordingly, this court finds that the applicants are **entitled to the relief sought**, namely the setting aside of the dismissal order and the **reinstatement of the suit** for hearing and determination on the merits. The prayer for restoration of the **status quo** is equally merited to preserve the subject matter pending full adjudication.

Issue no 3: Who will bear the cost of the Notice of Motion dated 16th November 2023

34. The final issue concerns the question of **costs** of the present application. The general principle under **Section 27(1) of the Civil Procedure Act** is that “*costs shall follow the event,*” meaning that the successful party is ordinarily entitled to costs unless the court, for good reason, directs otherwise. The award of costs, however, remains a matter of judicial discretion, to be exercised judiciously and in furtherance of the ends of justice.

35. In the present matter, while the court has found merit in the application and reinstated the suit, it is equally evident that both parties have contributed, in varying degrees, to the protracted history of this case. The record shows that on several occasions, the defendants sought adjournments on grounds of illness or unavailability, thereby delaying the progress of the matter. Conversely, the applicants, though generally diligent, did contribute to the mishap leading to the dismissal through their counsel’s error in recording the wrong hearing date.

36. Given this shared responsibility and in keeping with the spirit of fairness, the court finds that this is not a proper case for punitive or

compensatory costs. The purpose of reinstatement is to ensure that the dispute is heard and determined on its merits, not to impose an additional financial burden that could further strain the parties' positions.

37. In the circumstances, the **fairest order on costs** is that **each party shall bear its own costs**.

Final Disposition

38. In light of the foregoing analysis, and upon consideration of the record, the affidavits, and submissions of counsel, this court is satisfied that the applicants have demonstrated **sufficient cause** for non-attendance on 16th October 2023 and that the **interests of justice** favour reinstatement of the suit. The court takes the view that denying the applicants an opportunity to be heard on the merits, despite their consistent participation and the respondents' own history of adjournments, would occasion **grave injustice**. Accordingly, the court finds merit in the application.

Orders:

- a) The dismissal order issued on **16th October 2023** is hereby **set aside**.
- b) The **suit is reinstated** for hearing and determination on its merits.

c) The **status quo** obtaining prior to dismissal shall be **maintained** pending hearing.

d) Each party shall **bear its own costs** of the Notice of Motion dated **22nd January 2024**.

It is so ordered!

DATED, SIGNED and DELIVERED virtually at **NAIROBI** on this **31st** day of **October, 2025**.

MOHAMMED N. KULLOW
JUDGE

Ruling delivered in the presence of: -

N/A for the Applicant

N/A for the Respondent

Philomena W. Court Assistant