

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY**  
**ENVIRONMENT AND LAND COURT ENVIRONMENT AND**  
**PLANNING APPEAL NO. E001 OF 2023**

**MICHAEL OMWANDA.....**

**APPELLANT**

**VERSUS**

**MAURICE ODAWO ONDURU.....1<sup>ST</sup>**

**RESPONDENT**

**HOMABAY COUNTY GOVERNMENT.....2<sup>ND</sup>**

**RESPONDENT**

***(Being an Appeal from the Ruling delivered by Hon.  
Julius Nang'ea in Homa-Bay MCELC E001 of 2023)***

**JUDGEMENT**

**1.** By way of a Notice of Motion dated 21<sup>st</sup> June 2023, the Appellant sought the following orders in the trial court;

**1) Spent**

**2) That the Honourable court be pleased to set aside the order issued on the 21<sup>st</sup> day of June 2023 dismissing this suit pursuant to the orders of this court issued on the 26<sup>th</sup> April 2023 and reinstate the same.**

**3) That costs of the application be in the cause.**

**2.** The application was premised on the grounds on the face of it and the averments in the affidavit sworn in support of the same by Humphrey Obach, Counsel for the Applicant.

**3.** The deponent averred that on 26<sup>th</sup> April 2023, the court ordered the plaintiff pay throw away costs of Kshs. 10,000 to

the 1<sup>st</sup> defendant within 15 days from the date of the ruling. Further, that on 3<sup>rd</sup> May 2023 the parties agreed, and court made orders pursuant to the agreement, that the costs be paid before close of business and the 1<sup>st</sup> defendant file and serve documents within 7 days. He urged that he gave instructions to his associate Ms. Ochieng who indicated that the cheque was to be issued on the same day and counsel holding brief for the 1<sup>st</sup> defendant agreed that the same would be picked from his office. He stated that he wrote a cheque to that effect and on the same day but counsel for the 1<sup>st</sup> defendant failed to pick it, annexing and marking a copy of the cheque as HO1.

4. The deponent averred that the same cannot be blamed on the plaintiff in case counsel holding brief had failed to communicate the same upon the 1<sup>st</sup> defendants' counsel. Additionally, he urged that the 1<sup>st</sup> defendants' counsel had not complied with the court orders on filing and service and therefore, had not come to equity with clean hands. He urged the court to allow the application as prayed.
5. The respondent opposed the application vide a replying affidavit dated 5<sup>th</sup> July 2023 and sworn by Roselyn Obare Advocate. She deponed that the order of the court was self-executing and non-compliance meant that the suit would automatically remain dismissed for want of prosecution. Further, that the 15 days lapsed on 11<sup>th</sup> May 2023 but even then the applicant failed to comply with the orders. Additionally, that at no point did she suggest that she would go to the applicants' offices in Homa Bay, which is 107 Kms

from Kisumu to pick the cheque. She urged the court to dismiss the application with costs.

6. The trial court considered the application, responses and evidence tendered and vide a ruling delivered on 26th October 2023, the trial magistrate dismissed the suit with costs to the 1<sup>st</sup> defendant.

7. Dissatisfied with the decision of the trial court, the appellant instituted the present appeal vide a Memorandum of Appeal dated 8<sup>th</sup> November 2023 premised on the following grounds;

**1) That the Trial Magistrate erred in law and in fact in failing to satisfy the principles governing what constitutes reinstatement of a suit thereby arriving at an erroneous decision with regard to the application for reinstatement brought by the Appellant.**

**2) That the Trial Magistrate erred in law and in fact in failing to constructively evaluate the entire evidence on record in coming to his impugned ruling.**

**3) The Trial Magistrate erred in fact and in law in dismissing the Appellant's application for failing to comply with the orders issued initially when the said Application was to be treated distinctively from the initial application in which the said orders were issued and dispensed with.**

**4) The Trial Magistrate erred in fact and in law in arriving at his decision that he could not allow**

**the Appellant's application since the orders issued previously had not been complied with yet there was no way to practically comply with those orders when the suit already stood dismissed.**

8. The appeal was canvassed by way of written submissions.

**Appellants' Submissions**

9. On whether the Appellant demonstrated reasonable grounds for the reinstatement of his suit counsel submitted that when a party wishes to set aside an order of dismissal of suit for want of prosecution are guided by the provisions of Order 12 Rule 7 of the Civil Procedure Rules. That the legal substratum for dismissal of suits for want of prosecution is founded on the principles that litigation must be expedited, and concluded by parties who come to court for seeking justice. In an application for reinstatement of a dismissed suit or application, an applicant appeals to the discretion of the Court. The Court must caution itself not to exercise its discretion in a manner that will result in an injustice. He cited the case of **Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 Others [2013] eKLR** in this regard.

10. Learned counsel urged that in this appeal, the Appellant's application for reinstatement of his suit was dismissed by the trial Court despite the appellant's Advocate having drafted a cheque and evidence of the same being presented to the trial magistrate. The Mode of payment had not been set by court and the Court ought not have been hasty to

dismiss the suit when there existed a cheque written on the amount ordered, within the stipulated timelines by Court. Since the orders of the Court on the 26<sup>th</sup> of June 2023 were to the effect that the suit stood dismissed, there was no way for the Appellant herein to ensure that the cheque that had been written to the 1<sup>st</sup> Defendant as throw away costs, was to be paid as it would have served no purpose due to the dismissal. It was therefore upon that ground that the Appellant made an application to the Court in order for the suit to be reinstated and the amounts as drawn be issued for cashing out by the 1<sup>st</sup> Defendant.

- 11.** Learned counsel cited the case of John Nahashon Mwangi vs Kenya Finance Bank Limited (In Liquidation) [2015] eKLR where the court set down the tests to apply in an application to reinstate a suit and submitted that the failure and miscommunication between the advocates as for who should pick and who should deliver the cheque that had already been drawn, should not be visited upon the Appellant as he had already delivered the money to his advocates office for remittance to the 1<sup>st</sup> Defendant's advocate. The Cheque had already been drawn and signed, an effort on the part of the Plaintiff, in compliance with the Court orders as regards payment of throw away costs. This was brought to the Court's attention and evidence of the same also attached to the application to have the suit reinstated. It was therefore prejudicial to the Appellant, on the part of the Court exercising its discretion in a draconian manner and locking out the Appellant from prosecuting his

case on merits. Counsel placed reliance on the case of **HAM v SOS [2021] eKLR** in this regard.

- 12.** Further, learned counsel submitted that Articles 48 and 50 of the Constitution guarantee every Kenyan a right to access to justice and fair hearing and Article 159 requires that justice shall be administered without undue regard to technicalities, whereas Sections 3, 4 and 13 of the Environment and Land Court Act as read together with Section 1A, 1B and 3A of the Civil Procedure Act expects the court to strive towards substantive justice.
- 13.** He added that up to date, the Appellant had been denied use and occupation of his land parcel by the Respondents herein and the order by the court dismissing the matter without determining the merits therein will greatly prejudice the plaintiff as it will deprive him of land that he owns and unjustly enrich the Respondents in the suit herein. That the Appellant's Constitutional Rights as under Articles 40 will be infringed should the Appellants claim not be heard on merits. He will not be able to utilize and realize any profits with relation to land that had already been declared his vide Homa Bay Civil suit no.92 of 2011.
- 14.** Learned counsel placed reliance on the case of Wachira Karani vs Bilbao Wachira [2016] eKLR on the proposition that the applicant has demonstrated sufficient cause which prevented it from attending court and that no prejudice will be occasioned to the respondent if the application is reinstated for interpartes hearing on merits. He additionally cited K.G. Patel & Sons Ltd vs John Kabukuru Gituro eKLR on

the proposition that each party should be given an opportunity to be heard; *Lochab Bros Ltd vs Peter Karuma T/A Lumumba Lumumba Advocates* [2003] eKLR on the proposition that the court should do justice to all parties; and prayed that the court enter judgment in his favor.

### **1<sup>st</sup> Respondents' Submissions**

**15.** On whether the Appellant demonstrated reasonable grounds for reinstatement of his suit, counsel urged that it is prudent to note that the appeal is against orders that we granted by court while exercising the unfettered discretionary power. That the scope of exercise of discretion was defined in the case of **Shah VS- Mbogo & Anor (1967) E.A 470**. Counsel submitted that the brief facts of the appeal are that the appellant filed HOMABAY ELC NO. 20 OF 2020 on or about 26/6/2020 failed to prosecute the case, the court dismissed the suit for want of prosecution pursuant to the provisions of Rule 17 rule 1 of the Civil Procedure Rules 2010. Subsequently the appellant filed an application dated 29<sup>th</sup> September 2022 seeking to set aside the orders dismissing the suit for unit of prosecution and reinstate the suit. The application 2022 was heard and a ruling delivered on 26<sup>th</sup> April 2024 on condition that the appellant pays the 1<sup>st</sup> defendant Kshs. 10,000/= throw away cost in default the matter to stand dismissed pursuant to the orders issued on 29<sup>th</sup> June 2022.

**16.** Learned counsel submitted that the crux of the appeal is that the plaintiff/appellant failed to comply with the order by paying the 1<sup>st</sup> defendant/respondent the Kshs. 10,000/=

ordered by the court within 15(fifteen) days and on 21<sup>st</sup> June 2023, the matter was dismissed for non-compliance with the orders issued by the honorable court on 26th April 2023. The plaintiff/appellant yet again filled another application dated 26<sup>th</sup> June 2023 seeking to set aside the court orders issued on 21<sup>st</sup> June 2023. The trial court, on 3<sup>rd</sup> May 2023, extended an olive branch to the plaintiff/appellant to pay the throw away costs before end of business on 3<sup>rd</sup> May 2023 and the defendant to comply with order 11. The appellant yet again failed to pay the throw' away costs as orders by court and to date the amount remains unpaid.

- 17.** Learned counsel submitted that the golden thread that runs through the several attempts in the lower court and the appeal is that on 3<sup>rd</sup> May 2023, the counsel holding brief for Miss Obware agreed to pass by appellant's office to pick the cheque. The name of the counsel is not given neither an Affidavit from the alleged counsel filed in court to vouch for veracity of the claim. Miss Obware, on the other hand, swore an Affidavit on 6<sup>th</sup> July 2023, in which she denied any agreement to collect the cheque from the appellants advocate's office. The Appellant has not discharged the burden of proof incumbent upon him under the provisions of Sections 107 and 108 of the Evidence Act, which stipulate that he who alleges must prove. Rather than tendering cogent evidence in support of his assertions, the Appellant has merely left it to this Court to fill in the gaps in his case. Counsel posited that our judicial system is adversarial in nature, and parties are duty bound to substantiate their

allegations through credible evidence if they are to find favour before the Court. The failure by the Appellant to do so is fatal to his case.

**18.** It was counsel's argument that courts should be slow in interfering with the orders issued in exercise of discretion unless it is manifestly clear that the court relied on wrong principles in exercise of discretion. That in the instant appeal, the appellant has not demonstrated that the trial court relied on the wrong principles in exercise of the discretion. He placed reliance on the case of Price & Another v Hilder [1986] KLR 95 and The Supreme Court of Uganda, in Kiriisa v Attorney-General and Another [1990-1994] EA 258 in this regard. Counsel urged the court to dismiss the appeal with costs.

**19.** He added that the Appellant will not suffer any prejudice should this Honourable Court uphold the ruling of the trial court. The orders appealed against were granted in the exercise of the court's unfettered discretion, with the sole aim of ensuring fairness and justice between the parties. Further, that the law is clear that prejudice must be real, substantial, and demonstrable, not merely speculative or founded on dissatisfaction with an outcome. In the present case, the Appellant has not shown how the orders have occasioned or will occasion any substantive injustice. At best, the Appellant merely disagrees with the decision of the court, which is not a ground upon which an appellate court can interfere with discretion.

20. Lastly, learned counsel prayed the court dismiss the appeal with costs to the respondent pursuant to the provisions of section 27(1) of the Civil Procedure Act.

**2<sup>nd</sup> Respondents' Submissions**

21. Learned counsel for the appellant submitted that the purpose of reinstatement of suits were addressed in **Ivita vs. Kyumbu [1984] KLR 441** (Chesoni J). Further, that to answer question of whether the Magistrate court did satisfy the principles governing reinstatement of a suit, he referred the court to pages 12, 13, 17 and 18 of the record of appeal.

22. Counsel urged that vide a court ruling dated 26<sup>th</sup> April 2023, the court was merciful enough to grant the appellant a second chance even though she did not produce proof of case citation and Air Ticket to corroborate her argument and thus the court ordered that she pay a throw away cost to the 1<sup>st</sup> defendant a sum of Kshs. 10,000. That it is not in doubt that the honorable court preformed it legal obligation by giving the appellant a chance to prosecute her claim but failed to do so Counsel relied on the maxim of equity that "he who comes to equity must come with clean hands", stating that indeed, this is not the position of the appellant as she cannot come and state the this honorable court did not appreciate the principles governing reinstatement of this suit as she was given multiple chance to redeem her case but failed to do so.

23. Counsel submitted that the failure by the appellant to comply with court orders is evident as the court had order that Kshs. 10, 000 be awarded to the 1<sup>st</sup> defendant but the

appellant thought is wise not to obey such orders. Further, that it is trite law that orders made by a properly constituted court of law must be obeyed. Counsel placed reliance on the case of *Hadkinson v Hadkinson* [1952], ALL ER in this regard. Additionally, he cited *Teachers Service Commission v Kenya Union of Teachers & 2 others* [2013] eKLR.

- 24.** Counsel submitted that it is necessary to state that litigation must come to an end as it seems that the appellant has no interest in prosecuting his claim. That checking on the history of dismissal of this case from 29/6/2022 to reinstatement in 26/4/2023 to 26/10/2023, it is evident that the appellant has no interest in prosecuting this matter and the same should be dismissed, file closed as it is a waste of courts time and resources. He prayed that the court dismiss the appeal with costs for lack of merit.

#### **Analysis and Determination**

- 25.** In ***Abok James Odera T/A A.J Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates*** [2013] eKLR the Court held as follows;

**“This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”**

- 26.** This being a first appeal, this court has a duty to re-examine and re-evaluate the evidence on record and arrive at its own conclusion, while bearing in mind that it did not

see nor hear the witnesses and therefore give an allowance for the same. In the case of ***Selle & Another vs. Associated Motor Boat Co. Ltd & Others 1968 E.A. 123***, the court enunciated this principle as follows;

**“this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court .... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must re consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.**

27. The following issue arises for determination; ***Whether the trial court erred in dismissing the application dated 21<sup>st</sup> June 2023***
28. The trial court dismissed the Appellants’ suit for want of prosecution. The order of the court was one exercised through the discretion of the court upon considering the facts before it. It was not on the hearing of evidence of the parties as to determine the matter on merits.
29. Contrary to the learned counsel’s submission that an application of this nature, for reinstatement of a suit which had been dismissed for want of prosecution under Order 17 Rule 2 of the Civil Procedure Rules, should be brought under Order 12 Rule 7 of the Civil Procedure Rules, it can only be

brought under provisions stipulated in the Rules. Order 17 Rule 2(1) provides,

*“In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.”*

**30.** This is the provision that lays the basis for dismissal of a suit and even an appeal for want of prosecution. Subrule 6 of the provision is to the effect that where a dismissal has been made, a party may move the court to set aside the order. It provides that,

*“A party may apply to court after dismissal of a suit under this Order.”*

**31.** It is clear that a party has the liberty to move the court under the same Order whereunder the dismissal took place. The duration for one to make such an application is not given. It is expected to be within a reasonable time.

**32.** The fact that the parties quoted wrong provisions did mean that the Court did not have to consider the application on the merits of the appeal. Thus, the parties misapprehended the provision under which the dismissal took place, which was Order 17 Rule 2 of the Civil Procedure Rules would give rise to an application to set aside the orders of dismissal under Order 12 Rule 2 of the Rules. Nothing can be further from the legal position because the latter rule deals with non attendance of a party during the hearing. But for a dismissal under the former, it can occur

even in the presence of the party as long as they do not show cause sufficiently why they did not prosecute their matter within the timelines the law contemplates.

**33.** Be that as it may, from the record of the trial court, it issued a ruling on the Application dated 29<sup>th</sup> September 2022 where the applicant sought orders to set aside the dismissal of the suit for want of prosecution. Upon considering the application, it was allowed on the condition that the Plaintiff pay thrown away costs of Kshs. 10,000/- failure to which the ex parte judgement would remain valid. In a nutshell, the setting aside of the dismissal of the suit was conditional on the payment of the thrown away costs.

**34.** Counsel for the applicant contended that he had communicated to Counsel holding brief for the Respondent to collect the cheque from their offices by close of business some day. In her affidavit in response to the application, Counsel, Roselyn, categorically denied these claims. The appellant did not provide any proof of this alleged communication between himself and counsel. Therefore, I am inclined to agree that there was no such agreement.

**35.** Having considered the record of the trial court and the submissions tendered herein, it is clear that the trial court was correct in its finding on the ruling. In my humble view, the Appellant was given several and enough opportunities to prosecute his case, including leniency in the condition of reinstatement, but failed to do the same. In the premises, I see no error in the trial court's decision. The appeal is without merit and dismissed with no order as costs.

**36.** Orders accordingly.

Judgment **dated, signed** and **delivered virtually via the Teams Platform this 26<sup>TH</sup> day of November 2025.**

**HON. DR. IUR NYAGAKA**

**JUDGE**

**In the presence of,**

Ms. Ochieng Advocate for the Appellant

Ms. Abande for the Respondent (absent)