Otieno v Agumba (Environment and Land Appeal 355 of 2017)
[2025] KEELC 18513 (KLR) (17 December 2025) (Ruling)

Neutral citation: [2025] KEELC 18513 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ENVIRONMENT AND LAND APPEAL 355 OF 2017

SO OKONG'O, J

DECEMBER 17, 2025

BETWEEN

ELIZABETH AWINO OTIENO ..... APPELLANT

AND

MUSA NDALO AGUMBA ..... RESPONDENT

RULING

1. Sometime in 2010, the Respondent filed a suit against the Appellant and one Joshua Odhiambo Awinda (hereinafter referred to as "the 1st Defendant in the lower court suit") at the Chief Magistrate's Court at Kisumu, namely, Kisumu CMCC No. 539 of 2010 (hereinafter referred to as "the lower court suit"). In the suit, the Respondent sought, among other orders, a permanent injunction restraining the Appellant and the 1st Defendant in the lower court suit from in any way transferring all that parcel of land known as Title No. Kisumu/Bar/2146(hereinafter referred to as "the suit property") and an order compelling the Appellant and the 1st Defendant in the lower court suit to transfer the suit property to the Respondent, and the land registrar, Kisumu, to facilitate the transfer.

2. The Appellant and the 1st Defendant in the lower court entered an appearance in the lower court through an advocate and filed a statement of defence. Before the lower court suit came up for hearing, the advocates who were on record for the Appellant and the 1st Defendant in the lower court suit were granted leave to cease acting for them. When the lower court suit came up for hearing, the Appellant and the 1st Defendant in the lower court suit, who were served with a hearing notice, did not turn up for the hearing, and the hearing of the suit proceeded in their absence. On 25th October 2011, the lower court entered judgment for the Respondent against the Appellant and the 1st Defendant in the lower court suit as prayed in the plaint.

3. The Appellant and the 1st Defendant in the lower court suit took no action in the matter after the said judgment until 4 years later on 9th February 2016, when the Appellant applied in the lower court for

an order setting aside the lower court judgment aforesaid and the hearing of the suit afresh. The lower court heard the application and dismissed it on 15th July 2016 as having no merit.

4. It was that decision that prompted the filing of this appeal on 11th August 2016. From the record, the appeal came up for the first time for mention on 24th May 2017 when none of the parties appeared. The appeal was listed for another mention on 27th July 2017, when Appellant's advocate appeared. On that day, the appeal was once again listed for mention on 28th September 2017 to confirm if the lower court file had been forwarded to the High Court where the appeal was initially filed. On 28th September 2017, the advocates for both parties appeared before the High Court judge, who, upon realising that the appeal arose from a decision made on a land dispute, transferred the matter to this court, where it was assigned its current case number.

5. From the record, the parties never took any further action in the appeal after it was transferred to this court. On 5th October 2018, one year after the matter was last in court, the Deputy Registrar served the advocates for the parties with a notice to appear in court on 2nd November 2018 to show cause why the appeal should not be dismissed for want of prosecution. The Notice to Show Cause was served upon the Appellant's and the Respondent's advocates personally on 11th October 2018. Both received the Notice to Show Cause and acknowledged service. On the day of the Notice to Show Cause, the advocates for both parties did not appear in court, and since no cause had been shown why the appeal should not be dismissed, the court dismissed the appeal for want of prosecution on 2nd November 2018 and ordered the file closed.

6. What is now before me is an application brought by the Appellant by way of a Notice of Motion dated 17th March 2025, seeking to set aside the order made by this court 6 years earlier on 2nd November 2018, dismissing the appeal for want of prosecution, and a temporary injunction restraining the Respondent from dealing with the suit property pending the hearing and determination of the appeal once reinstated. The application, which was supported by the affidavit and further affidavit of the Appellant, sworn on 17th March 2025, and 28th July 2025 respectively, was brought on the ground that the Appellant was not aware that her appeal had been dismissed and that all along, she thought that the appeal was pending judgment. The Appellant averred that it was when she filed another fresh suit against the Respondent that she learnt of the dismissal of the appeal. The Appellant averred that her previous advocates told her that they were unable to reach her for instructions. The Appellant averred that that was not true because the said advocates had her telephone contact. The Appellant averred that she should not be punished for the negligence or mistake of her advocates.

7. The application was opposed by the Respondent through a replying affidavit sworn on 23rd May 2025. The Respondent averred that the Appellant was guilty of laches. The Respondent averred that even if the Appellant was sick and was being attended to in Nairobi, the Appellant had an advocate on record, and the prosecution of the appeal did not require her personal presence in court. The Respondent averred that the application lacked merit and should be dismissed.

8. The application was heard by way of written submissions. The Appellant filed submissions dated 31st July 2025, while the Respondent did not file submissions. I have considered the Appellant's application together with the affidavits filed in support thereof. I have also considered the Respondent's affidavit filed in opposition to the application. Finally, I have considered the submissions by the Applicant's advocate. It is not disputed that the court has the power to set aside an ex parte order dismissing an appeal for want of prosecution and that the power is discretionary.

9. The court's discretionary power must be exercised judiciously. In Patriotic Guards Ltd. v James Kipchirchir Sambu, Nairobi CA No. 20 of 2016, [2018]eKLR, the Court of appeal stated as follows:

> " It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit."

10. The principles to be applied by the court in applications for setting aside ex parte orders were set out in Shah v. Mbogo (1967) E.A 116 as follows:

> " ....the court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice."

11. What I need to determine in the application before me is whether the Appellant has established sufficient cause to warrant the exercise of the court's discretion in her favour. Sufficient cause was defined in Attorney General v. Law Society of Kenya & another [2017]eKLR as follows:

> " Sufficient cause or good cause in law means:

12. ...the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused. See BLACK'S LAW DICTIONARY, 9th Edition, page 251.

13. Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events."

14. Applying the foregoing principles to this case, I am not inclined to exercise my discretion in favour of the Appellant despite the strong and very persuasive arguments put forward by the Appellant's advocate. I have set out earlier in the ruling the background of the present appeal. At the lower court, the court proceeded with the hearing of the suit in the absence of the Appellant who had been duly served with a hearing notice but failed to attend court. The Appellant moved the lower court 4 years after judgment was entered against her by the lower court, seeking an order to set the same aside. In the lower court, the Appellant's advocates had sought and were granted leave to cease acting for her for lack of instructions. In the present appeal, no action was taken by the Appellant to prosecute the appeal for more than 1 year. The court, on its own motion, served the parties with a notice to appear before the court and show cause why the appeal should not be dismissed. As mentioned earlier, the Appellant's advocate did not appear in court to show cause why the appeal should not be dismissed. According to the letter from the Appellant's previous advocates annexed to the Appellant's affidavit in support of the application, the said advocates informed the Appellant that they took no action in the matter due to a lack of instructions from the Appellant. It is worth noting that again in this appeal, the Appellant has sought to set aside the order dismissing her appeal for want of prosecution, 6 years after the order was made. I find the conduct of the Appellant consistent with that of a party who is out to deliberately obstruct or delay the cause of justice. The Appellant has not explained why she did not follow up on the progress of her appeal since the same was filed 9 years ago. The Appellant did not need to be physically present in Kisumu to give instructions to her advocates. The Appellant was

definitely sick, but there is no evidence placed before the court showing that the Appellant was unable to communicate with her advocates for 9 years due to sickness. To me, this mishap here has nothing to do with the negligence or a mistake of an advocate. It is a case of indolence or lack of interest in the appeal by the Appellant.

15. Even if it were to be taken that the dismissal of this appeal on 2nd November 2018 was as a result of a mistake or negligence of the Appellant's previous advocates, can that justify the grant of the orders sought in the circumstances of this case? I do not think so. In Stephen Ndungu Kimungu v. James Muigu another 2018 KEELC2791(KLR), this court stated as follows:

> " The applicant has blamed his former advocates for his (applicant) failure to attend court for the hearing. He has also taken issue with them over their failure to notify him of the judgment. The hard question that must be answered is who should take responsibility for a party's advocate's failure to perform his professional duties? Is it the opposite party or the court? I believe that the answer would depend on the circumstances of each case. There cannot be a general rule. In the circumstances of this case, I am of the view that the advocate concerned should not only bear the blame but should also carry the loss and damage if any arising from the consequences of his neglect of duty. The justice train can no longer be delayed, stopped, derailed or re-routed by the parties or their advocates. Once the train takes off on a scheduled trip, those left behind must bear the consequences of their failure to get on board."

Conclusion

16. In conclusion, it is my finding that the order made herein on 2nd November 2018 dismissing this appeal was regular and that no sufficient cause has been shown to warrant its setting aside. I therefore find no merit in the Appellant's Notice of Motion application dated 17th March 2025. The application is dismissed with costs to the Respondent.

DELIVERED AND SIGNED AT KISUMU ON THIS 17TH DAY OF DECEMBER 2025

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Mwamu S.C for the Appellant

Ms. Okaka for the Respondent

Ms. J. Omondi- Court Assistant