



THE JUDICIARY



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ELC APPEAL NO 14 OF 2019

JAMES

KAMAKEI

KARIA.....APPELLANT/APPLICANT

VERSUS

KASHU OLE PERE.....

RESPONDENT

RULING

1. The Application for determination is the one dated **12th March 2025**, which is brought under various provisions of law among them **Order 12 rule 7** and **Order 17 Rule 2** of the **Civil Procedure Rules**, and **Article 159(1)(d)** of the **Constitution**, wherein the appellant/applicant has sought for these orders;
 - i) That the court do set aside and/ or vary the dismissal order dated 1st August 2022, of the appellant's appeal dated 6th August 2019, and any subsequent order thereof.**
 - ii) That the appeal herein be reinstated and be admitted for hearing and determination on merit and directions be issued in that respect.**
 - iii) That costs of the application be provided for.**

2. The application is supported by the grounds set on the face of the application and the Supporting Affidavit of **James Kamakei Karia**, the applicant herein.
3. The grounds in support of the application are; the applicant through his then advocate **Godfrey Otieno Advocates** filed a **Memo of Appeal** dated **6th August 2019**, after being dissatisfied with the Judgment of the trial court dated **24th July 2019**, in **Narok CMCC No. 12 of 2018**; that the said Advocate had instructions to pursue the appeal, to its conclusion, and which appeal had been filed during the **Covid 19 Pandemic** period; therefore, it was difficult to travel to his advocates office and to court, which destabilised the applicant's effort to follow up the progress of the appeal;
4. Further, that the applicant has recently learnt that his appeal was dismissed, and when he perused the court file, it was clear all the mention notices were served upon his previous advocates, who neglected to inform him of the court proceedings, including the said dismissal.
5. That failure to prosecute the appeal was purely a mistake of his advocate, and his actions or omissions should not be visited upon the applicant, who is an innocent litigant; further that failure to prosecute the appeal was not out of recklessness or negligence, and therefore the court ought to exercise its discretion to reinstate the appeal for determination on merits.

6. That no prejudice will be caused to the Respondent if the appeal is reinstated, and the applicant has shown keen interest to prosecute the said appeal. Further, that failure to reinstate the appeal, the applicant stands to suffer irreparable loss and damage.
7. In his Supporting Affidavit, **James Kamakei Karia** reiterated the contents of the grounds in support of the application, and further averred that it is in the interest of justice that the appeal be reinstated, as there will be no prejudice that will be caused to the Respondent if the appeal is reinstated.
8. The application is vehemently opposed by the Respondent herein **Kashu Ole Pere**, through his Replying Affidavit dated **19th May 2025**, wherein he averred that his advocate has informed him that the instant Application is **frivolous, devoid of merit, incompetent, misconceived** and is **an abuse of the court process** and should be dismissed with costs.
9. Further, he averred that this appeal was rightfully dismissed by the court on **1st August 2022**, for wasn't of prosecution and failure by the applicant as the appellant to take steps to have appeal prosecuted.
10. He contended that the applicant has not offered any sufficient or reasonable explanation for the inordinate delay of more than **6 years** in moving this court for the prosecution of the appeal. That the entire period of the delay has not been accounted for in a credible manner, and the applicant has

only shifted the blame to his previous advocates, without showing any personal efforts made to follow up on the appeal.

11. The Respondent averred that litigation must come to an end, and that reinstating this appeal will greatly prejudice him since he is enjoying quiet possession of the suit land **Cis Mara/Ololulunga/11221**, as awarded to him by the trial court, and re-opening the matter will only cause undue hardship and uncertainty over the suit property that had long been settled.
12. It was the Respondent's further averment that his advocate has advised him that the appeal discloses no arguable issues, and is **frivolous, vexatious** and is an **attempt to delay justice**. Therefore, it is in the interest of **justice, fairness and finality of litigation** that this application should be dismissed with costs.
13. The application was canvassed by way of written submissions. The Applicant/Appellant filed his written submissions dated **4th November 2025**, through **E M Wanjiku & Associates Advocates**, and urged the court to allow the application.
14. The applicant set out one issue for determination being; **whether the Appellant's Memorandum od appeal dated 6th August 2019, should be reinstated.**
15. It was his submissions that failure to prosecute the appeal was caused by the **Covid 19 Pandemic**, and the actions of his

previous advocate not to follow the matter in court. He argued that his Appeal raises serious arguable grounds that go to the root of the ownership and possession of the suit property, and these issues are not **frivolous**, but raise **substantial question of law and fact**, which merit full consideration by this court.

16. The Applicant took cognizance of **Article 159(2)(c)** of the **Constitution** which places responsibility on the courts to determine disputes without undue delay; sections **1A & 1B** of the **Civil Procedure Act** on the **Overriding Objective** of the Act, and on furthering the said Overriding Objective.

17. Reliance was also sought on **Order 10 Rule 11** of the **Civil Procedure Rules**, which grants the court discretion to set aside or vary any judgement and any of its consequential orders upon such terms that are just. Reliance was further sought in the cases of **Mwangi Kaimenyi vs Attorney General & Another Misc Civil Case No 720 of 2009; Lucy Bosire vs Kehancha Div Land Disputes Tribunal & 2 others ; Films Rover International Ltd vs Cannon Films Sales Ltd (1986) All ER 772; CMC Holdings ltd vs Nzioki(2004) 1KLR 173; Shanzu Investment Ltd vs Commissioner of Lands Civil Appeal No 100 of 1993 and Patel vs East Africa Cargo Holdings Services Ltd (1974) EA 75 which cited the case of Lochab Bros Ltd vs Peter Kaluma T/A Lumumba Mumma & Kaluma Advocates & 2 others (2013) eklr at page 4.**

18. It was the applicant's further submissions that he is desirous of prosecuting this appeal, since the Judgement rendered on **24th July 2019**, has gravely prejudiced him, as he is a bonafide and rightful owner of the land parcel No **Cis Mara/Ololulunga/11221**, which the Respondent has unlawfully remained in possession of.
19. He further submitted that he had severally attempted to contact his previous advocates to no avail, and he should not be punished for the mistake of his counsel. It was his argument that the Respondent will not be prejudiced by reinstatement, but failure to reinstate the appeal will shut him from fighting for what is rightfully owned by him. He urged the court to opt for the lower rather than the higher risk of justice as was held in the case of **Films Rover International Ltd vs Cannon Film Sales Ltd(supra)**.
20. He urged the court to use its discretion and reinstate the appeal for the interest of justice and fairness, so that the appeal can be heard and determined on merit.
21. The Respondent filed his submissions in opposition to the Notice of Motion through **Masikonde & Co Advocates**, which are dated **17th November 2025**.
22. In his submissions, the Respondent set out three issues for determination being;
 - i) **Whether or not the dismissal of the appeal was justified;**

- ii) Whether or not the application to reinstate the appeal is meritorious;**
- iii) Who should bear costs of the application.**

23. On whether or not the dismissal of the appeal was justified; the Respondent relied on **Article 159(2)(B)** of the **Constitution** which gives the court responsibility to dispense justice without delay; Further he relied on **Section 1A(1)** of the **Civil Procedure Act**, which states that the **Overriding Objective** of the Act is to facilitate the **just, expeditious, proportionate** and **affordable resolution** of the civil disputes governed by the said Act.

24. The Respondent relied on case of **Peter Kipkurui Chemoiwo Vs Richard Chepsergon (2021) eklr;** to buttress his position on why the Appeal should not be reinstated; in the above case, the Court of Appeal held;

“From our own assessment of the matter, the leaned Judge did not err. The Appellant filed his memorandum of appeal on 15th September 2012, filed an application for stay of execution on 2nd October 2012, obtained interim orders maintaining status quo on 3rd October 2012 pending hearing and determination of the application and filed the record of appeal on 5th July 2013. Thereafter, the Appellant made no effort to prosecute his appeal and was only roused from slumber when the Respondent

filed his application to dismiss the appeal for want of prosecution.”

25. He argued that the Applicant’s unreasonable delay led to the dismissal of his appeal for want of prosecution, and thus the said dismissal was justified. Further, it has been more than 3 years since the Appeal was dismissed, and this application is aimed at frustrating the Respondent enjoyment of the fruits of his Judgement.
26. The Respondent further submitted that the Applicant failed to comply with the provisions of **Order 42 Rule 13(4)** of the **Civil Prosecute Rules**, as he failed to file the Record of Appeal, and the said appeal was dismissed for want of prosecution for the interest of justice.
27. On whether the application for reinstatement of the appeal is meritorious, the Respondent relied on the case of **Belinda Murai & Another vs Amos Wainaina (1978) LLR 2782(CALL)** where the court stated;
- “A mistake is a mistake. It is no less a mistake because it is an unfortunate slip....the door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it, if the interests of justice so dictate.”***

28. Further relying on **Order 42 Rule 21** of the Civil Procedure Rules on reinstatement of appeal, he submitted that the said rules allow such reinstatement only in the interest of justice. He argued that the applicant herein does not disclose sufficient grounds to persuade the court to reinstate this appeal.

29. The Respondent relied on the cases of **Richard Ncharpi Leiyagu vs IEBC & 2 Others (2013) eklr; Muchanga Investment Ltd Vs Safaris Unlimited (Africa) ltd & 2 Others Civil Appeal No 25 of 2002(2009) eklr 229; and Mbogo & Another Vs Shah (1968) EA 93**; where the court held;

“that while the court would exercise its discretion to avoid injustice or hardship resulting from inadvertence or excusable mistake or error, it would not assist a person who has deliberately sought to obstruct or delay the court of justice.”

30. On who should bear costs of the Application, the Respondent submitted that the same should be met by the Applicant. He relied on the case of **Richard Murigu Wamai vs Attorney General & Another (2018) eklr**, where the court held;

“The Applicant to pay the Respondent throw away costs for the inconvenience caused and delay in prosecution the matter, costs of the application and in the event the applicant fails to comply, the order setting aside

interlocutory judgment be vacated forthwith and the matter proceed to formal proof.”

31. Ultimately the Respondent submitted that the instant application for reinstatement of a dismissed appeal for want of prosecution is **vexatious** and is meant to frustrate the Respondent from access to justice, and fruits of his Judgment, and therefore should be dismissed for being an abuse of court process, and is not meritorious.
32. The above are the grounds and arguments for the application and opposition to the same, which this court has carefully read and considered, together with the rival written submissions and renders itself as follows;
33. From the court record, it is evident that the Appellant/Applicant filed his Memo of Appeal on **6th August 2019**, through **Geoffrey Otieno & Co Advocates**, and sought for the Appeal to be allowed with costs to the Respondent. The said Appeal was admitted on **20th August 2020**, and Mention Notices were sent out to the Appellant's Advocates on various dates. However, the said Advocate did not appear in court and/ or sent a representative. The Appellant too did not attend court, and on **22nd June 2022**, the said Appeal was dismissed for want of prosecution.
34. The Appellant did not come back to court until **13th of March 2025**, when he filed a **Notice of Change of Advocate**, and the instant Application for reinstatement of the Appeal. This

Application was therefore filed after almost **three years** after the Appeal was dismissed.

35. The Appellant/ Applicant has given the reasons for not prosecuting the Appeal as failure by his Advocate on record then , and also the **Covid 19 Pandemic**. However, this Appeal was filed on **6th August 2019**, and the **Covid 19 Pandemic** period when courts were closed set in in **March 2020**. Further, by **August 2020**, courts had opened remotely, and by 2022, when the suit was dismissed, the courts were in full operation.

36. The Application is opposed by the Respondent who argued that the Applicant has not explained the reasons for the inordinate delay, and by seeking to reinstate the Appeal, he is out to frustrate the Respondent from enjoying the fruits of his judgement.

37. With the above background in mind, this court finds the issues for determination are;

i) Whether the instant application for reinstatement is merited, and

ii) Who should bear costs of the Application.

38. From the court record, when the matter came up for mention on **22nd June 2022**, the Appellant and his Advocate were absent, and the court observed that the *appeal herein was admitted on 26th October 2020*, and since then, the Appellant has never taken any steps to have the Appeal heard and

determined. He is either unable or unwilling to prosecute the Appeal. The same is dismissed for want of prosecution, since both parties were served with the mention Notices.

39. It is therefore clear that the Appeal having been filed on **6th August 2019**, by the time of its dismissal, it was almost **3 years**, and no action had been taken to further the prosecution of the Appeal. The Appellant/Applicant had not even filed the Record of Appeal, and therefore, the court was justified in dismissing the Appeal for want of prosecution, since the law as provided **in Article 159(2) (c) of** the Constitution, and **Sections 1A &1B** of the **Civil Procedure Act**, place a responsibility on the court to ensure that matters appearing in the said court are prosecuted or dealt with without delay. *Justice delayed is justice denied!*
40. The Application herein is anchored under **Order 12 Rule 7** of the **Civil Procedure Rules**, which grants the court discretion to set aside and/or vary dismissal orders or such terms that are just. The Applicant has blamed his advocate for the failure to prosecute the Appeal, and the **Covid 19 Pandemic**, which allegedly made it difficult for him to travel to his advocates office to follow up the matter or to court.
41. However, this court observed that the Appeal was filed **pre Covid 19 Pandemic**, and that cannot be used as an excuse. Further, even during **Covid 19 Pandemic**, parties communicated with their advocates through phones calls, and after **June 2020**, courts were opened remotely, and matters

proceeded online. **Covid 19 Pandemic** cannot be the reasons for failure to prosecute the Appeal. In any event, the Appeal was dismissed on **22nd June 2022**, and by then the courts countrywide had fully operationalised its proceedings either through online proceedings or in person proceedings. The Applicant did none of the above.

42. It is evident that ordinarily dismissal of suits for want of prosecution turns largely on the delay in getting the suit prosecuted. The overriding principle is that there ought to be no delay in the dispensation of justice, based on the maxim that ***justice delayed is justice denied***.
43. In the instant matter, the court justified why it resorted to the remedy, of dismissal of the Appeal for want of prosecution, being that litigation must be expedited and concluded by the parties. The court noted that the Appellant/Applicant was either unable or unwilling to prosecute the Appeal.
44. Indeed, there can be no justice in filing a cause in court, like the instant Appeal and then leave it parked there, unprosecuted, hanging over the head of the other party (Respondent herein) like the sword of Damocles.
45. It is apparent that dismissals help in clearing backlogs in court, created by parties who lack the will to prosecute their cases. Pendency of unmoving cases create a backlog, which generates a crisis of public mistrust and lack of confidence in the Judiciary. Dismissals reduce the ever-increasing caseloads,

and the backlogs, caused by stale suits clogging the judicial system.

46. Courts have set out the factors or considerations that are to be taken into account, in such cases. In the case of ***Ivita v Kyumbu [1984] KLR 441***, the court held that the considerations were said to include whether the delay is prolonged and inexcusable; whether justice can be done despite the delay; justice is justice for both sides, and so the positions of both sides must be considered; whether the other side would be prejudiced, by justice not being done by the prolonged delay; and the reasons given for the delay.

47. A determination on whether to reinstate a dismissed suit or Appeal like the instant one, requires exercise of discretion in accordance with **Articles 50 and 159** of the **Constitution**, and the Overriding Objective set out in sections 1, 1A and 3A of the Civil Procedure Act, Cap 21, Laws of Kenya. These principles were discussed in the case of ***John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation) [2015] eKLR [2015] KEHC 6789 (KLR)***, where the court stated that the fundamental principles of justice are enshrined in **Article 159** of the Constitution, coupled with **Article 50**, with respect to the right to be heard, and to serve substantive justice to all. It was underscored that those principles ought to be factored when considering reinstatement of dismissed suits, bearing in mind that dismissal of suits is draconian.

48. In the instant matter, the Appeal was filed on **6th August 2019**, through a Memorandum of Appeal. No action was taken after the Memo of Appeal was filed, and No Record of Appeal was filed as required by **Order 42 Rule 13(4)** of the **Civil Procedure Rules**.
49. The Appeal was fixed for mention severally and Mention Notices were sent out to the Appellant's Advocates who was on record then. On **22nd June 2022**, when the matter came up for mention, the Appellant/Applicant and his advocate did not attend court, and Appeal was dismissed for want of prosecution.
50. In the instant application to have the Appeal reinstated, the Appellant/ Applicant offered an explanation for the delay or inaction, being **Covid 19 Pandemic**. However, the court has found that being a lame execute since by 2022, the lockdown had been removed, and there was no evidence that the Applicant visited the Court Registry to inquire about his Appeal.
51. It is evident that the Applicant did not bother to check the progress of his case from **2019 to 2025**, when he filed the instant Application. That was a delay of about 6 years, and he blamed his advocates for failure to give him progress of his case.
52. Courts have variously held that suits belong to litigants, who have a duty to pursue prosecution of their cases to the end,

and should constantly check their advocates on the progress of their matters. See the case of ***Duale Mary Anne Gurre v Amina Mohamed Mahamood & another [2014] eKLR***, where the court held that the suit belongs to the litigant, who has a duty to pursue prosecution of their case, and to constantly check with their Advocates on the progress of the matter.

53. As provided by Sections 1A &1B of the Civil Procedure Act, it is the duty of the parties to assist the court to adjudicate on the matters brought before it expeditiously. See the case of ***Thomas Mwaura & Another Vs Eric Muhati & 2 Others (2012) eKLR, which quoted the findings in Mobil Kitale Service Station vs Mobil Oli Kenya Ltd HCCC No. 205 of 1990(unreported)*** where the court held;

“It is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past. Justice would be better served if we dispose of matters expeditiously.”

54. The Appeal that is sought to be reinstated was filed on **6th August 2019**, and by the time of its dismissal, **3 years** had lapsed without any action, not even filing the Record of Appeal. The Appellant had a duty to follow up his matter, and he cannot blame his advocate.

55. The appeal was dismissed about **3 years** before the instant Application was filed, and the Respondent has been in quiet enjoyment of the suit property and enjoying the fruits of his Judgement. Reinstating the Appeal will indeed prejudice the Respondent, as justice delayed is justice denied.
56. The Applicant has not given sufficient reasons for the inordinate delay in filing the instant Application, and for failure to prosecute the dismissed Appeal. For the above reasons, the court finds and holds the instant Application dated **12th March 2025**, is not **merited** and the same **is dismissed** entirely with costs to the Respondent.

It is so ordered

Dated, signed and delivered virtually at Narok this 29th day of January 2026.

***L. Gacheru
Judge***

Delivered online in the presence of

Elijah Meyoki -Court Assistant

Ms Mburu for Appellant /Applicant

Mr. Masikonde for Respondent

***L. Gacheru
Judge***

29/1/2026