

**IN THE COURT OF
APPEAL AT KISUMU**

(CORAM: ASIKE-MAKHANDIA, OMONDI & KIMARU,

JJ.A.) CIVIL APPEAL NO. 112 OF 2019

BETWEEN

**JUANITA ADHIAMBO OTIENO (Suing on behalf of the estate of
SOLOMON OCHIENG OYOKO (DECEASED)).....APPELLANT**

AND

**MARTIN OUMA OKUMU.....1ST
RESPONDENT BEATRICE SIJENYI AYODO.....
2ND RESPONDENT THE HONOURABLE ATTORNEY GENERAL
..... 3RD RESPONDENT**

*(Being an appeal from the ruling and order of the Environment &
land court of Kenya at Kisumu, (Kibunja, J.) dated 27th March, 2019*

in

ELC NO. 325 OF 2013)

JUDGMENT OF THE

COURT

[1] This is an appeal against the ruling and order of the Environment and Land Court at Kisumu **“the ELC”** delivered by Kibunja J. on 27th March 2019 in ELC Case No. 325 of 2013. By that ruling and order, the ELC dismissed the application by the appellant to have her suit which had earlier been dismissed for want of prosecution reinstated.

[2] The background to this dispute is that, **Juanita Adhiambo**

Otieno

suing on behalf of the estate of **Solomon Ochieng Oyoko
(deceased)**,

“the appellant”, commenced a suit in the ELC by way of a plaint seeking declaratory reliefs in respect of ownership of all that piece or parcel of land known as **Kisumu/Manyatta “A”/659**, **“the suit property”**, permanent injunction restraining the respondents from interfering with the suit property, and other ancillary reliefs including costs of the suit. However, upon filing the suit, the appellant took no steps at all to prosecute it resulting in its dismissal by court for want of prosecution on the 1st respondent's application.

[3] Subsequently, the appellant took out a motion on notice seeking the setting aside of the order of dismissal aforesaid and reinstatement of the suit on the grounds that she was prevented from prosecuting it due to factors beyond her control as she was out of the country at the material time. She tendered in evidence her passport showing exit and entry stamps, to support her absence from the country. She also contended that she had always been desirous of prosecuting the suit but was hindered by family ailments and mental distress as a result, and urged the court to reinstate the suit in the interest of justice.

[4] The application was opposed by the 1st and 3rd respondents. They asserted that the application had been brought under the wrong provisions of the law given that the dismissal was on account of want

of prosecution and not want of attendance when the suit was called out for

hearing; the reasons advanced in support of the application were grounds for an appeal and or review; the appellant had taken three months since the order of dismissal was made to file the application for the setting aside which delay had not been explained; the application had therefore failed to meet the threshold for the court to exercise its discretion in favour of the appellant; and that though the 2nd respondent, **Beatrice Sijenji Ayodo**, had been made a party to the suit, she had never been served with summons to enter appearance leading to the eventual dismissal of the suit against her under **Order 5 Rule 2** of the Civil Procedure Rules. That some of the witnesses of the said respondents had died and therefore reinstating the suit would greatly prejudice them in the prosecution of their respective defences. Given all the foregoing the said respondents urged for the dismissal of the application.

[5] The ELC, after considering the application, rival affidavits, and oral submissions, found that the appellant had not provided a reasonable explanation for the prolonged delay in prosecuting the suit, nor had she taken steps to serve the 2nd respondent or reissue summons as required under the Civil Procedure Rules. The ELC, concluded that reinstating the suit would prejudice the respondents, particularly the 1st respondent who had been in occupation of the suit property for

over fifteen years. The ELC also agreed with the respondents that the application was brought

under the wrong provisions of the law and that **Article 159** of the Constitution could not come to her aid. Finally, it held that the grounds advanced in support of the application were fit for either an appeal or an application for review. Consequently, the application was dismissed with costs to the participating respondents thereby precipitating the instant appeal.

[6]The appellant contends in her grounds of appeal that the ELC erred in fact and in law in failing to find that: she had a good claim which raised triable issues; the 1st respondent's application to dismiss the suit for want of prosecution was premature as she had provided proof of being out of the country during the period in question; the 1st respondent's application as allowed in the ruling breached fundamental legal principles in respect of the interest of justice; there was no proof adduced by the respondents in their claims that some of the witnesses had died; adopting a restrictive interpretation of the law and human rights Articles under the Constitution of Kenya and in completely failing to appreciate the appellant's case; and that on the whole, the ELC's decision was contrary to law.

[7]The appellant ultimately prayed that this appeal be allowed, the ruling and order of the ELC be set aside; that the appellant's application for

reinstatement of the suit be allowed; and that the costs of this appeal together with the costs of the proceedings in the ELC be awarded to her.

[8] When the appeal was called out for hearing, **Ms. Olum**, learned counsel appeared for the appellant. There was no representation for the respondents, though it was self evident that they had been served with the hearing notice by court. Indeed the counsel for the appellant went further and served the 1st respondent personally with the hearing notice for the day. However the 3rd respondent had filed written submissions opposing the appeal. Counsel for the appellant, who had also filed written submissions in support of the appeal indicated that she entirely wished to rely on those submissions.

[9] Counsel for the appellant submitted that, the ELC erred in dismissing the appellant's suit for want of prosecution despite her explanation and proof of absence from the country, and further erred in failing to appreciate that her claim raised triable issues deserving a hearing on the merits. That her application ought to have been allowed, as she had provided sufficient explanation for the delay, including her travels abroad and family ailments. She emphasized that, the appellant had always been fervent in her wish to prosecute the suit and that the dismissal denied her the right to a fair trial. In

support of her submissions, counsel relied

on the guiding principles on the exercise of judicial discretion set out in

Mbogo v Shah (1968) EA 93.

[10] Counsel further cited **Pkiech Chesimaya v Limakorwai Achipa [2020] eKLR**, where the court observed that suits should ordinarily be heard on their merits and before dismissing suits for whatever reason, courts should consider whether a hearing would cause no greater prejudice to either party, while locking out a litigant from the seat of justice would occasion substantial injustice. The court in that case went on to hold that sufficient explanation for delay, even if inordinate, should be considered where the appellant has demonstrated cause. She similarly placed reliance on **John Harun Mwau v Standard Limited & 2 Others [2017] eKLR**, where this Court held that prejudice must be demonstrated by the respondent, such as memory loss or unavailability of witnesses, before a suit can be dismissed for want of prosecution. Without such evidence, the court held, justice is better served by determining suits on their merits.

[11] Counsel also referred to **Essanji & Another v Solanki [1968] EA 218**, where it was observed that the administration of justice requires that disputes be investigated and decided on their merits, and that errors or lapses should not necessarily bar a litigant from

pursuing his rights.

[12] On prejudice, counsel submitted that no evidence was adduced by the respondents to demonstrate that they had suffered prejudice as a result of the delay. She maintained that reinstating the suit would not prejudice the respondents, but dismissing it would occasion irreparable harm to the estate of the deceased as it involves land which is a very emotive issue. In conclusion, the appellant prayed that the appeal be allowed.

[13] The 3rd Respondent's submissions were in respect of the application for reinstatement of the abated appeal which had actually been heard and determined. To that extent the submissions are irrelevant.

[14] Having considered the record, submissions of counsel, authorities cited and the law, the only issue for determination in this appeal is; whether the ELC erred in dismissing the application for reinstatement despite the explanation tendered by the appellant.

[15] We start from the premise that whether or not to allow an application for setting aside and or reinstatement of a suit is an exercise in discretion by the trial court. The guiding principles for the exercise of such discretion have long been settled. The exercise of such discretion can only be faulted by an appellate court primarily when it is abused or is not exercised judicially. It must be

demonstrated that the court erred in specific ways, not merely because a different decision might have been

reached, for instance, if it was exercised upon unsound legal principles, on caprice, whim, likes and dislikes, taking irrelevant considerations into account, misapprehension of law or misapprehension of facts, exercised for improper purpose or bad faith and if the decision is plainly wrong or unreasonable. See generally **Mbogo v Shah (supra)**. Our thorough review and discernment of the record does not accord us with any of the above fears. We are therefore satisfied that the ELC in refusing the application properly exercised its discretion and acted within legal bounds.

[16] It is common ground that the appellant conceded to inordinate delay in prosecuting the suit but argued that the delay was inadvertent. That she had provided sufficient explanation for her delay in prosecuting the suit, including proof of her absence from the country and family ailments. The ELC, however, found the explanation inadequate and dismissed the application. In our view, and just as the ELC, we are not satisfied with her explanation of being overseas and family ailments. After all, she had duly appointed counsel who could have taken necessary steps to progress the suit her absence notwithstanding. With modern technology, communication has become so easy and available, such that it does not require one's physical presence at a location to give instructions. We also note that

the appellant blamed her mental instability at the time as the

further cause of the delay. However, she never elaborated on this nor was there any evidence tendered in support thereof.

[17] As was stated in **Utalii Transport Company Ltd & 3 Others v NIC Bank Ltd & Another [2014] eKLR**, it is the primary duty of a litigant to take steps to progress his case since he is the one who has dragged the defendant to court. The Supreme Court in **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others [2014] eKLR** emphasized that while courts must balance substance over technicalities, litigants must nonetheless comply with procedural requirements and cannot rely on constitutional provisions to sanitize indolence. Obviously this is the case here!

[18] On prejudice, the concerned respondents contended that reinstatement would be prejudicial due to fading memories and deaths of their would be witnesses. The ELC accepted this position, and we find no reason to interfere. The appellant's prolonged inaction of almost four years, failure to serve summons on the 2nd respondent, and delay in seeking reinstatement after dismissal, all point to indolence on the part of the appellant which the ELC considered in refusing the application. Such consideration cannot be impugned or faulted.

[19] In the end, we are satisfied that the ELC properly exercised its

discretion in dismissing the appellant's application for setting aside and or reinstatement of the suit. We find no misdirection in law or fact to

warrant our intervention. The appeal is accordingly dismissed with no order as to costs.

Dated and delivered at Kisumu this 13th day of February, 2026.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

H.A. OMONDI

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed
DEPUTY REGISTRAR

