

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ELCL APPEAL NO. E033 OF 2025
FORMERLY EMBU ELC CASE NO. 265 OF 2015

ANTONINA MUTHONI NJIRU alias

MUTHONI

MANUNGA(Deceased)

.....**APPELLANT**

ALEXANDER NYAGA MWAKE.....SUBSTITUTED
APPELLANT

VERSUS

ERNEST MWANGI T/A

MWANGI AUCTIONEERS.....1ST
RESPONDENT

GEOFFREY MUNENE KITHUMBU.....2ND
RESPONDENT

(Being an appeal from the Ruling of Hon. Edwin Wasike (SRM) delivered on 22/10/2020 in Siakago MCL&E Case No. 67 of 2018 Muthoni Manuga v Ernest Mwangi Njoroge T/A Mwangi Auctioneers & Anor)

JUDGMENT

1. The Appellant was the Plaintiff before the trial court, having instituted suit against the Respondents vide a Plaint dated 18/02/2015. In that suit, she challenged the legality of the

auction through which her land parcel No. Nthawa/Riandu/1027 was sold to the 2nd Respondent by the 1st Respondent in recovery of a debt of Kshs. 83,858/= allegedly owed by the Appellant. She sought, inter alia, a permanent injunction restraining the Respondents, whether by themselves, their agents or servants, from trespassing upon, offering for sale, disposing of, selling, transferring, alienating, constructing on, or in any other manner interfering with the suit property.

2. The suit was subsequently dismissed for want of prosecution on 01/08/2019 pursuant to an application by the Respondents dated 02/05/2019. Thereafter, by a Notice of Motion dated 22/01/2020, the Appellant sought, inter alia, leave for the firm of Kalamu Ndolo & Co. Advocates to come on record for the Appellant; that the dismissal orders issued by the court on 01/08/2019 be set aside/reviewed and the suit be reinstated for hearing and determination.
3. She averred that her former advocate made an application to cease acting for her, which application was heard and determined on 29/05/2017. That shortly thereafter, she was diagnosed at Mbeere District Hospital with hypertension, which illness seriously affected her health and led to her being admitted to hospital on several occasions. She averred that due to her health condition and doctor's advice, she was not supposed to engage in straining and stressful activities, and therefore she was not able to pursue her case. That due to her deteriorating health, she was also unable to engage in any

income generating activities to raise funds to instruct an advocate to pursue the proceedings on her behalf.

4. She stated that in January 2020, she regained her health and, upon the advice of her doctor, began pursuing the suit. When she visited the ELC registry at Embu, she was informed that her suit had been transferred to Siakago Law Courts for hearing. She averred that she was not notified of the transfer of the suit to Siakago, neither was she served with the Respondents' application dated 02/05/2019 seeking to dismiss her suit for want of prosecution. She contended that the affidavit of service sworn by one Wilfred Njeru Kigoro, a process server, was defective, as it purported that she had been served with the application on 12/04/2019, whereas the application itself was dated 02/05/2019.
5. She further averred that the delay in prosecuting the suit was due to her ill health, that she had brought the application without delay, and that the Respondents would not suffer any prejudice if the application was allowed. She annexed to the application, a copy of a medical report from Mbeere District Hospital.
6. In opposition to the application, the 2nd Respondent Geoffrey Munene Kithumbi filed a replying affidavit dated 27/02/2020 and averred that the application lacked merit and ought to have been dismissed with costs. He stated that the Appellant had been indolent in prosecuting her case and that even going by the medical report which stated that she became unwell in March 2019, she did not explain her whereabouts since 29/05/2017 when her former advocate was allowed to cease

acting for her. He disputed the allegation that the Appellant was advised by her doctor not prosecute her case and averred that she went into slumber upon being granted temporary orders of injunction on 03/03/2015.

7. He stated that the Appellant had been notified, through a letter dated 27/03/2018, that her suit had been transferred to Siakago, a copy of which he annexed. He further averred that the application seeking to dismiss her suit was duly served upon her, as evidenced by the affidavit of service sworn by the process server, which erroneously indicated the date of service as 12/04/2019 instead of 06/07/2019, when the Appellant was actually served. He annexed an affidavit sworn by the process server clarifying that the indicated date was an error. He contended that the Appellant failed to oppose the application to dismiss her suit for want of prosecution and therefore it was allowed. That there was no basis for setting aside or reviewing the orders dated 01/08/2019 dismissing her suit for want of prosecution.
8. In its ruling dated 22/10/2020, the trial Court found that it was not satisfied that the Appellant was notified of the transfer of the transfer of the suit. The court considered the letter dated 27/03/2018 addressed to the Appellant indicating that the suit had been transferred from Embu Law Courts to Siakago Law Courts. The Court noted that the letter did not indicate the postal address of the Appellant and there was no affidavit of service to show that she was served. On that basis, the court held that it could not be certain that the Appellant was duly notified of the transfer.

9. The court found the Appellant's claim of ill health to be insincere and farfetched. It noted that although she alleged that she had been admitted to hospital on several occasions and she had been advised not to undertake stressful activities, she did not produce admission or discharge records to fortify the issue of her admissions, nor a substantive medical history report covering the period between 2017-2019. The Court noted that the only document produced was a medical write up dated 15/01/2020, which the court found to be scanty, vague, and lacking in medical substance. The court further held that no evidence was presented to show she was advised not to engage in stressful activities, and that in any event, following up on one's case did not amount to a stressful activity.
10. The court noted the Respondents' position that the Appellant was duly served with the application dated 02/05/2019 was supported by an affidavit of service. It also noted that although the first affidavit indicated the date of service as 12/04/2019, a subsequent affidavit sworn on 27/02/2020 rectified the error and confirmed the correct date of service as 06/07/2019. The court therefore found that the Appellant was duly served but failed to oppose the application for dismissal and that she also failed to make an application to cross examine the process server if she had an issue with the content of his affidavits. The Court dismissed the application with costs to the 2nd Respondent.
11. The Appellant was aggrieved by the impugned decision and preferred the present Appeal on the following grounds;

1. That the learned Senior Resident Magistrate erred in law and fact when he exercised his discretion wrongly thereby denying her the opportunity to be heard on merit.
 2. That the learned Senior Resident Magistrate erred in law and fact in failing to consider that the nature of the Appellant's claim was land which an emotive issue.
 3. That the learned Senior Resident Magistrate erred in law and fact in failing to consider that justice would still have been done and fair trial conducted despite the delay.
 4. That the learned Senior Resident Magistrate erred in law and fact when he failed to consider that the delay that might have occurred could be put right by payment of costs.
 5. That the learned Senior Resident Magistrate erred in law and fact in holding that the reasons given by the Appellant for the delay were not sufficient.
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12. The Appellant sought to have the ruling of the trial Court set aside and the suit be reinstated for hearing on merit.
 13. When the appeal came up for directions, the parties agreed to canvass the appeal by way of written submissions. The record shows that as the time of writing this judgement, only the Appellant had filed their submissions. The substituted Appellant filed submissions dated 04/12/2025 on behalf of the Appellant who is now deceased.
8. They submitted that Order 17 Rule 2 of the Civil Procedure Rules vests the Court with discretionary power to reinstate dismissed suits, and that the Court failed to properly exercise this discretion thereby committing an error of law. They

submitted that the dismissal of the suit was based on defective and contradictory service, and that the second affidavit correcting the date of service to 06/07/2019 was filed without leave of the court, thereby rendering it irregular, incompetent, and unlawfully introduced into the record. It was submitted further, that the Appellant was condemned unheard, contrary to Article 50 of the Constitution which guarantees the right to a fair hearing before an adverse decision is made and therefore the dismissal was therefore unconstitutional and void ab initio.

9. It is further submitted that the medical evidence was dismissed without legal basis. That the court rejected the medical report for not indicating inability to engage in strenuous activities, thereby substituting medical opinion with its own. It was contended that illness is a reasonable explanation for delay and should not be subjected to an impossible standard of proof. It was further submitted, that the matter involved land, a constitutionally protected right under Article 40 of the Constitution, and that the court improperly elevated procedural technicalities over substantive justice, contrary to Article 159(2) of the Constitution which requires that justice be administered without undue regard to procedural technicalities. The court was urged to allow the appeal.

10. The issue for determination is whether the trial court properly exercised its discretion in declining to set aside the order dismissing the Appellant's suit for want of prosecution and in refusing to reinstate the suit for hearing on its merits.

11. The law on reinstatement of suits dismissed is Order 12 Rule 7 of the Civil Procedure Rules, where the court may set aside the dismissal order, on such terms as may be just. The power to reinstate is discretionary.
12. In the case of *Ivita v Kyumbu* [1984] KLR 441 the Court held that, the considerations to be made 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.
13. In the present case, the suit was filed on 18/02/2015 and proceeded before the Embu Law Courts until 29/05/2017, when the Appellant's then advocate was granted leave to cease acting. The record shows that the matter was later transferred to Siakago Law Courts on 15/03/2018. The Court notes that the suit remained inactive for a period of two years between 29/05/2017, when the Appellant's advocate ceased acting, and 18/07/2019, when it was dismissed for want of prosecution. The explanation offered by the Appellant is that during this period she was unwell and therefore unable to effectively follow up the matter, and further that she was not notified of the transfer of the suit to Siakago Law Courts.
14. The trial court, in considering the letter alleged to have notified the Appellant of the transfer of the suit, correctly observed that it did not contain a postal address or any evidence of service upon the Appellant. On that basis, the

court was not satisfied that proper notification had been effected.

15. On the issue of illness, the Appellant produced a medical report indicating that she suffered from hypertension, which she contended affected her ability to attend court and instruct counsel. She also stated that she was financially constrained during this period as she was unable to engage in income generating activities. Having considered the explanation offered, this Court is satisfied that the explanation for the delay, taken as a whole, was reasonable and that this was a proper case for the exercise of discretion in favour of the Appellant.

16. Accordingly, the appeal succeeds. The ruling of the trial court is hereby set aside, and the Appellant's suit is reinstated and remitted back to the trial court for hearing and determination on the merits before a different Magistrate.

17. The costs of this appeal shall be in the cause.

DATED, DELIVERED AND SIGNED AT EMBU THIS 14TH DAY OF MAY, 2026

HON. E.C CHERONO
ELC JUDGE, EMBU

In the presence of;

1. M/S Beth Ndorongo for the Respondent
2. 3rd Appellant-present
3. M/S Ruth C/A

