**Kithome v Musyoka (Environment and Land Appeal 23 of 2021) [2025] KEELC 5425 (KLR) (17 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5425 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITUI**

**ENVIRONMENT AND LAND APPEAL 23 OF 2021**

**A KANIARU, J**

**JULY 17, 2025**

**BETWEEN**

**JACOB MUSEMBI KITHOME ..... APPELLANT**

**AND**

**MARY MUTEITHIA MUSYOKA ..... RESPONDENT**

**RULING**

1. The application before me for ruling is a motion on notice dated 6/8/2024. The application is expressed to be brought under Order 12 Rule 7, Order 17, and Order 51 Rules 1 and 15 of *Civil Procedure Rules*, Sections 1A, 1B, 3, 3A and 63 (e) of *Civil Procedure Act*, Articles 50 and 159 of the *Constitution* and all enabling provisions of law. The appellant – Jacob Musembi Kithome – is the applicant and is seeking two prayers as follows:

    1. That the honourable court be pleased to set aside the order given on 26/4/2022 withdrawing the appellant's appeal hereof and reinstate the same for hearing and determination.

    2. That the costs of the application be in the cause.

2. The respondent – Mary Mutethya – had a dispute with the appellant in the lower court at Kyuso – the dispute being PM ELC No. 27 of 2017, Kyuso – where she was awarded Kshs. 108,874/=. The amount was awarded after the court found that the appellant had encroached upon the respondent's land and caused some loss and damage.

3. The appellant decided to appeal and even filed an appeal at the High Court here. At the time, there was no Environment and Land Court here in Kitui. The appellant said that he was informed that his matter would be taken to Machakos where such court existed. He went to Machakos several times to follow up on the issue. The first few visits did not yield much as the file was allegedly not traced. His last visit was said to be in April 2021 when the file was found but had allegedly not been registered yet. He was told registration would be done and the new number given to the matter would be communicated

to him. He went home and waited. No communication was forthcoming. Then on 7/7/2024, he went back to Machakos and was told that the matter was never registered there. What he was told is that all matters relating to land situated in Kitui were referred to Kitui Law Courts as the Environment and Land Court had already been established there.

4. The appellant then came to Kitui, went to the court registry, enquired about his matter, discovered that the matter had actually been brought to Kitui, mentioned in his absence several times, and eventually dismissed. He is now contesting that dismissal and would wish to see his matter reinstated. To him, the dismissal is tantamount to condemning him unheard.

5. The respondent responded to the application via a replying affidavit filed on 8/10/2024 and dated 4/10/2024. To her, the appellant failed to prosecute his appeal. It remained inactive for two (2) years fourteen (14) days. He was issued with a notice to show cause why it should not be dismissed for want of prosecution and on the day set for him to appear in court to show cause, he didn't show up. His appeal was therefore dismissed.

6. The respondent disputed the appellant's averments that he visited court at Machakos several times. No evidence for such visits has been made available, the respondent said. There is no evidence also for the appellant's alleged communication with court registry concerning his appeal. The position of the respondent is that the appellant should have been more fleet-footed in pursuing his appeal. He was said to have failed to prosecute his appeal and this is what caused it's dismissal. The dismissal was said to be regular as the appellant had already been served with notice to show cause.

7. The application was canvassed by way of written submissions. The appellant's submissions are dated 8/10/2024. The submissions capture the substance of both the application and the response made by the respondent. Then there is an analysis in which the appellant states that his right of hearing was infringed. He said the power of the court to dismiss an appeal is discretionary but the discretion to do so is supposed to be exercised judicially in order to do justice to both sides. Also pointed out is that dismissal should not take place where directions have not been taken in an appeal. He said that directions had not been taken in the appeal that was dismissed.

8. To drive all these points home, several cases were cited and quoted as deemed relevant and/or appropriate. They include *Wachira Karani v Bildad Wachira*: HCC No. 101 of 2011, Nyeri [2015] KEHC 1850 (KLR) and *Michael Njoroge & Another v John Ngugi Monyo*: Civl Appeal No. 96 of 2021 [2024] KEHC 3164, among others.

9. The respondent's submissions are dated 11/11/2024. The submissions contain a narrative concerning the circumstances that led to the dismissal of the appeal. According to the respondent, the court needs to consider whether there are reasonable grounds warranting reinstatement of the appeal. It also needs to consider the balance of convenience.

10. The respondent then reiterated that the appellant never provided evidence of his alleged efforts to follow up on his appeal at Machakos. The respondent's position is that the appellant's conduct in relation to the prosecution of his appeal was dilatory.

11. On allegations by the appellant that the appeal was dismissed prematurely, the respondent submitted that the appeal was filed in the year 2020 in the month of April and this is contrary to the appellant's assertion that the matter came to court on 9/9/2021 only to be dismissed on 26/4/2022. Then on allegations that the matter was dismissed when directions had not been given, the respondent submitted that the matter was mentioned several times for directions but the appellant never appeared.

12. Further, the respondent submitted that she is the one who will suffer greater inconvenience than the appellant if the appeal is reinstated. She said she will suffer prejudice by being forced to spend her time litigating over a matter that ended long time ago.

13. The respondent also placed reliance on some cases, among them was *Chebii Kipkoech v Barnabas Tuitoek Bargoria & Another* [2019] eKLR and *DEB Primary School v Catherine Wangui Kariuki* [2014] eKLR.

14. I have considered the application, the response made to it, rival submissions, and the entire court record generally. From the appellant's own account, he went to Machakos in April 2021 and his file was found. By then however, it had not yet been registered. He was told to go home and await communication regarding registration. The next time he went there was in July 2024. He said he didn't receive any communication.

15. It is clear that the appellant waited for over three years without making a follow up on his matter. A period of three years is a long time. It should have been possible for the appellant to go back to Machakos much earlier to find out what was happening. He didn't do so. In my view, the appellant did not exercise diligence. He appears to have gone home and forgotten his case.

16. The court record relating to the matter here in Kitui shows that the respondent was more active than the appellant. She appeared several times, sometimes through counsel and other times in person. She complained about inaction on the part of the appellant concerning the appeal. That is what led the court to issue a notice to show cause. The records show the court noting that the appellant had been served with notice to show cause. The appellant says he was not served. I have to make a choice as to who to believe. I chose to believe the court. I choose to do so because it is clear to me that the appellant had not been very active in pursuing his matter in the past. The court also had no interest in dismissing the matter. It did so simply because of how the facts spoke to it.

17. The appellant also took the position that his appeal could not lawfully be dismissed because no directions had been given. He even quoted authorities – see for instance *Michael Njoroge's case* (*supra*) – to drive his point home. With respect, this legal position is not cast in stone. It is a position that can easily be abused. All what an appellant needs to do to punish a respondent who is interested in expediting a matter is to fail to initiate the process of taking directions. It is always the appellant's duty to move the court to give directions. In this particular matter, the matter was mentioned in court several times and directions would certainly have been if the appellant had appeared. He failed to appear in court.

18. To illustrate that it is not an iron-clad position that directions must have been given first before an appeal is dismissed for want of prosecution, there is the case of *China Road & Bridge Corporation v John Kimenye Muteti* [2019] eKLR where there was a clear departure from that position. The court expressed itself as follows:

> "It is clear that it is upon the appellant to trigger the process of giving directions and an appellant who sits on his/her laurels and when confronted with an application to dismiss the suit contends that no directions have been given when he has not moved the court to give the said directions cannot but face censure from the court. To contend that an application for dismissal of an appeal is premature for failure to give directions when the appellant himself has not moved the court to give directions to my mind cannot be taken seriously where the delay is contumelious. Nothing bars the court from dismissing an appeal even where no directions have been given." (emphasis: mine)

19. For this same position, the case of *Abraham Mukhola Asitsa v Silver Style Investment Company Ltd*: [2020] eKLR is also apt and instructive.

20. The appellant also emphasized that dismissal of his appeal was tantamount to condemning him unheard. It is true that the right of hearing is sacrosanct and no court can easily accept to deny it to a party before it. But the law itself allows instances where it is waived. This is particularly so where a party has had opportunity to exercise it but has not done so either from indolence, neglect, dilatoriness, or other justifiable reason. It is particularly allowable to waive it where failure to utilize it is causing injustice to the other side. That is what was precisely happening in this matter. The respondent had been coming to court. She wanted to proceed. But the appellant was nowhere to move his appeal forward. In this matter the considered view of the court is that the appellant is the author of his own misfortune.

21. The upshot, in light of the foregoing, is that the application herein is found unmeritorious and the same is hereby dismissed with cost to the respondent.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT KITUI THIS 17TH JULY, 2025.**

In the presence of,

Mageto for Appellant

Ms. Valerie Warusee for Respondent

Court Assistant - Musyoki

**A. KANIARU**

**JUDGE- ENVIRONMENT & LAND COURT, KITUI**

**17/07/2025**