



**Mwatsahu & 4 others v Krystalline Salt Limited & another (Civil Appeal E006 of 2022) [2024] KECA 90 (KLR) (9 February 2024) (Judgment)**

Neutral citation: [2024] KECA 90 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CIVIL APPEAL E006 OF 2022  
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA  
FEBRUARY 9, 2024**

**BETWEEN**

**RAMADHAN ALI MWATSAHU ..... 1<sup>ST</sup> APPELLANT  
MOHAMED MENZA YAMA ..... 2<sup>ND</sup> APPELLANT  
HAMISI HASSAN MWATSAHU ..... 3<sup>RD</sup> APPELLANT  
BURU MGANDI NYOTA ..... 4<sup>TH</sup> APPELLANT  
TAHIR MWATSAHU MWADZAYA (AS A MEMBER OF MWADZAYA  
WACHANDA CLAN WELFARE REGISTERED TRUSTEES) .... 5<sup>TH</sup> APPELLANT**

**AND**

**KRYSTALLINE SALT LIMITED ..... 1<sup>ST</sup> RESPONDENT  
NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal against the Ruling and Orders of the Environment and Land Court of Kenya at Malindi (M. A. Odeny, J.) dated 4th November 2021 in E.L.C No. 29 of 2017)*

**JUDGMENT**

1. By a plaint dated 13<sup>th</sup> February 2017, the appellants instituted civil proceedings against the respondents in the Environment and Land Court at Malindi in ELC Suit No. 29 of 2017 praying for an order of vacant possession of two properties previously registered as CR55422/LR No. 29027 and CR 55423/LR No. 29026 (the suit properties) at the 1<sup>st</sup> respondent's cost; mesne profits; and costs of the suit.
2. The appellants' case was that they were the rightful owners of the suit properties by virtue of the fact that, sometime in 1966, the Kaloleni African Court determined that the suit properties belonged to one Ali Mwadzaya (deceased) of Mariakani, who was at the time acting for and on behalf of the Wachanda clan of Mitangoni; that the Kaloleni African Court prepared a map of



the area in dispute, clearly showing the boundaries of the area in dispute to which the judgment related; that Ali Mwadzaya died in 1980, and the appellants in Mombasa High Court Succession Cause No. 16 of 2011 were granted letters of administration to the deceased's estate on behalf of the Wachanda clan of Mitangoni; that the 1<sup>st</sup> respondent, Krystalline Salt Limited encroached on their land and unprocedurally registered and/or acquired the suit properties, which formed part of the appellants' land, without the appellants' knowledge or consent; that, following several complaints, the 2<sup>nd</sup> respondent, the National Land Commission, revoked the 1<sup>st</sup> respondent's Grant in respect of the suit properties *vide* Gazette Notice No. 5022 dated 1 July 8, 2014, which had previously been issued to one Ali Kithiaka Challos on February 15, 2011; that the said Grant was transferred to Mombasa Bond Warehouses Limited on 30<sup>th</sup> March 2012 and, subsequently, to the 1<sup>st</sup> respondent on 26<sup>th</sup> September 2012; that despite revocation of the 1<sup>st</sup> respondent's Grant, it refused to vacate the suit properties or otherwise "regularize their stay" thereon; and that the 1<sup>st</sup> respondent's continued occupation of the suit properties is in violation of their constitutional right to property, and of their legitimate expectation of a lawful process of revocation of title.

3. In addition to the plaint, the appellants filed a notice of motion dated 13<sup>th</sup> February 2017 seeking orders for vacation or directions that the 1<sup>st</sup> respondent do vacate the suit properties and surrender vacant possession thereof; and for costs of the application. The Motion was anchored on 7 grounds, which are substantially a restatement of the averments in the plaint, and which we need not replicate.
4. The appellants' motion was also supported by the annexed affidavit of Mohamed Menza Yama, the 2<sup>nd</sup> appellant, sworn on 13<sup>th</sup> February 2017 essentially deposing to the facts set out in their plaint.
5. Opposing the appellants' Motion, the 1<sup>st</sup> respondent filed its replying affidavit sworn by Hasmita Patel on 13<sup>th</sup> March 2017 stating that the 1<sup>st</sup> respondent was the duly registered owner of the suit properties, having acquired ownership from the previous owner (Mombasa Bond Warehouse Limited) *vide* a transfer dated 24<sup>th</sup> September 2012; that the 1<sup>st</sup> respondent entered into a sale agreement after conducting due diligence by carrying out a search on the suit properties and visiting the site on several occasions; that the 1<sup>st</sup> respondent successfully obtained the requisite consent to transfer and change of user; that the 1<sup>st</sup> respondent spent a sum of Kshs. 83,638,000 on purchase of LR No. 29027 and Kshs. 61,312,000 on purchase of LR No. 29026, whereupon it paid the stamp duty, and has since been paying land rates thereon; that, on the other hand, the appellants had failed to provide any evidence of ownership of the suit properties; that the 1<sup>st</sup> respondent was the absolute and indefeasible owner thereof under and by virtue of section 26 of the *Land Registration Act*, 2012; that the 1<sup>st</sup> respondent did not participate in any fraudulent act in acquiring title to the suit properties; that the 2<sup>nd</sup> respondent's decision to revoke its titles was subsequently quashed by the High Court at Mombasa in Judicial Review Petition No. 172 of 2014 – *Republic v National Land Commission & Tropical Treasure Limited, Ex Parte Krystalline Salt Limited* [2015] eKLR; that, in the said case, the learned Judge found that the 2<sup>nd</sup> respondent's decision was illegal, and that the subsequent actions of the appellants to evict the 1<sup>st</sup> respondents were also unlawful; that the whole suit was anchored on a decision that was subsequently declared an illegality, and should therefore be struck out; that the subject matter of the application was the same issue in dispute in Mombasa ELC Suit No. 158B of 2015 – *Tropical Treasures Limited v Krystalline Salt Works & 3 others*, which was scheduled for pre-trial conference on April 3, 2017; that the appellants' application failed to meet the threshold for the order of mandatory injunction as sought; that the suit was premised on an illegality committed by the 2<sup>nd</sup> respondent and, consequently, the appellants did not have a prima facie case before the court; and that they failed to demonstrate that any injury which they might suffer could not be adequately compensated by an award of damages.



6. On its part, the 2<sup>nd</sup> respondent did not file any affidavit in reply to the appellants' Motion and, when the Motion came for hearing on 25<sup>th</sup> April 2017, the appellants withdrew it with costs to the 1<sup>st</sup> respondent. The court then directed the parties to fix the suit for pre-trial directions before the Deputy Registrar. It is noteworthy that there is nothing on record to suggest that any of the respondents had, by this time or thereafter, filed their defence to the appellants' case.
7. It would appear that the appellants had not taken any steps since April 2017 to prosecute their case, which prompted the court to issue a notice to show cause why the suit should not be dismissed for want of prosecution. Prodded by the notice, the 1<sup>st</sup> appellant (Ramadhani Ali Mwatsahu) filed an affidavit sworn on 2<sup>nd</sup> November 2021 deposing that the appellants were interested in prosecuting their case against the respondents; that their learned counsel M/s. Ondabu & Co. invited the then advocates for the 1<sup>st</sup> respondent, M/s. Arwa Advocates LLP to fix a date for directions on 16<sup>th</sup> July 2021 with a copy to the Deputy Registrar via email; that, when their counsel attended court virtually on 16<sup>th</sup> July 2021, he was allegedly informed that there were no hearing dates, and that he should invite parties afresh on 22<sup>nd</sup> October 2021 to fix a date for directions; that on that date, he was again advised to issue another invitation for 28<sup>th</sup> October 2021, which he did; that, when counsel attended court virtually on 28<sup>th</sup> October 2021, he was informed that the matter was listed for hearing of notice to show cause on 4<sup>th</sup> November 2021. On the hearing date, they requested that the notice be vacated on the grounds that the suit had not been listed for hearing due to the scaling down of judicial activities on account of the COVID-19 pandemic.
8. By a brief order dated 4<sup>th</sup> November 2021, the ELC (Odeny, J.) dismissed the appellants' suit for want of prosecution. In her decision, the learned Judge observed: "No cause has been shown. This matter was last in court in 2017. Matter dismissed for want of prosecution."
9. Dissatisfied with the decision of Odeny, J., the appellants moved to this Court on appeal on 5 grounds set out on the face of their memorandum of appeal dated 17<sup>th</sup> February 2022 faulting the learned Judge for: holding that there was no evidence showing cause why the suit should not be dismissed for want of prosecution, and yet the appellants had filed an affidavit sworn by the 1<sup>st</sup> appellant on 2<sup>nd</sup> November 2021 giving reasons why the suit should not be dismissed; misapplying the law on dismissal of suits under order 17 of the Civil Procedure Rules; holding that the appellants failed to show cause, and yet there was evidence on record in that regard; not considering that the appellants had instructed the firm of M/s. Ondabu & Company in place of Jackson Muchiri & Associates, which firm was new in the matter and ready to prosecute the suit to conclusion; and for failing to hear the advocates for both parties, who had logged onto the virtual court.
10. When the appeal came for hearing before us on October 4, 2023, learned counsel for the appellants Mr. Ondabu made oral submissions, but cited no judicial authorities in support of the appeal. On their part, learned counsel for the 1<sup>st</sup> respondent, M/s. Arwa & Change, made brief oral highlights of their written submissions dated October 2, 2023. Counsel cited 7 judicial decisions, including the cases of Ecobank Ghana Limited vs. Triton Petroleum Co. Limited & 5 Others [2018] eKLR and Peter Kipkurui Chemwoiwo v Richard Chpsergon [2021] eKLR, where this Court set out the guiding principles that a court should consider when determining whether to dismiss a suit for want of prosecution; and Mwangi S. Kimenyi v Attorney General & Another [2014] eKLR, where the High Court considered what constitutes inordinate delay.
11. With regard to the alleged mistake of counsel, learned counsel for the 1<sup>st</sup> respondent drew our attention to the High Court decisions in Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR and Tana and Athi Rivers Development Authority v Jeremiah Kimigbo Mwakio & 3 Others [2015]



eKLR where the court correctly held that it is not enough for a party in litigation to simply blame the advocate on record for all manner of transgressions in the conduct of the litigation and that, while the mistake of counsel is excusable, if it is accompanied by a litigant's carelessness and inactivity, then the refusal by the court to exercise discretion in favour of such a party cannot be impugned. See also the case of *Salkas Contractors Limited vs. Kenya Petroleum Refineries Limited* [2014] eKLR where this Court held that the longer the delay, the greater the prejudice.

12. On the other hand, the 2<sup>nd</sup> respondent did not appear or otherwise participate in the hearing of the appeal.
13. Having carefully considered the record as put to us, the impugned order, the rival submissions of counsel for the appellants and for the 1<sup>st</sup> respondent, and the law, we form the view that the appellants' appeal stands or falls on our finding on the decisive issue as to whether there is justifiable cause to interfere with the discretion of Odeny, J. in dismissing the appellants' suit.
14. We take to mind the hallowed principle that "to whom much is given, much is required." One of the latitudes given to judges and judicial officers in the course of their work is judicial discretion. *Black's Law Dictionary*, 10<sup>th</sup> Edition defines judicial discretion as:

"The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right."
15. Madan JA (as he then was) in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] E.A had this to say on the matter:

"The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."
16. Admittedly, counsel for the appellants took no steps to prosecute their suit for a period exceeding four (4) years. The 1<sup>st</sup> of learned counsel's emails addressed to the respondents' counsel inviting them to fix hearing dates came four years after the court had directed the parties to set the matter down for pre-trial directions. The subsequent two emails of 21<sup>st</sup> and October 25, 2021 appear to have been in response to, and designed to defeat the intent of, the notice to show cause scheduled for hearing on November 4, 2021. Be that as it may, the delay was by all means inordinate.
17. We form this view cognizant of this Courts holding in *Mwangi S. Kimenyi v Attorney General & Another* (*supra*) thus:

"There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of case; the nature of the case; the explanations given for the delay; and so on and so forth."
18. In the same vein, the appellants' attempt to lay blame on the COVID-19 pandemic cannot hold. We take judicial notice of the fact that the pandemic ushered in less robust judicial activities with effect



from the year 2020. But prior to that, it is evident that the appellants took no positive steps to prosecute their case for a period of three years from April 25, 2017, and they provided no explanation for this. In the circumstances, we find no fault in the learned Judge’s finding that “... no cause had been shown and that the matter was last in court in 2017.” Likewise, it is no excuse that their counsel had taken over the matter from their previous advocates, who took no steps to advance their cause. As the High Court (F. Gikonyo, J) stated in Habo Agencies Limited v Wilfred Odhiambo Musingo and Tana and Athi Rivers Development Authority v Jeremia Kimigbo Mwakio & 3 Others (*supra*), mistake of counsel is no excuse for a litigant’s inaction or sheer laxity. Moreover, it is the litigant’s case and not of the advocate whose transgressions are inexcusable except, perhaps, in circumstances where the Court is persuaded that human error may, for good reason, be pardoned. Even so, the errant litigant cannot be excused on account of mistake of counsel to the prejudice of their adversary.

19. In view of the foregoing, we find nothing to suggest that the learned Judge’s discretionary decision was by any means wrong, and as such, we have no reason to interfere with that decision. Finally, we reach the inescapable conclusion that the appeal fails and is hereby dismissed with costs to the 1<sup>st</sup> respondent. Those are our orders.

**DATED AND DELIVERED AT MOMBASA THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

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**JUDGE OF APPEAL**

**G.V. ODUNGA**

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**JUDGE OF APPEAL**

*I certify that this is a True copy of the original*

**DEPUTY REGISTRAR**

