



**Wesonga & another v Onyerere (Environment and Land Appeal
1 of 2017) [2024] KEELC 1429 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1429 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL 1 OF 2017**

DO OHUNGO, J

MARCH 14, 2024

BETWEEN

MATHEWS WESONGA 1ST APPELLANT

LEONARD ONYERERA 2ND APPELLANT

AND

BENEDICT ONYERERE RESPONDENT

RULING

1. The Appellants filed this appeal in the High Court at Kakamega on 11th January 2013, against a ruling delivered on 25th August 2010 by Hon. P.N. Ileri (Resident Magistrate) in Kakamega CM Award No. 2005 of 2008. The appeal was serialised as Kakamega HCCA No. 4 of 2013. The appeal was later transferred to this court where it became ELCA No. 1 of 2017.
2. The appeal was dormant for a long time and as a result, the Deputy Registrar of this court issued a notice that the appeal would be placed before the Judge on 10th May 2018 for parties to show cause why it should not be dismissed. It was ultimately listed on 10th May 2018 and there being no appearance for the Appellants, it was dismissed for non-attendance.
3. The matter again remained dormant until 24th October 2023, when the Appellant filed Notice of Motion dated 11th October 2023, seeking its reinstatement. This ruling is in respect of the Notice of Motion.
4. The Notice of Motion is supported by an affidavit sworn by the First Appellant. He deposed that he was involved in a road accident and that he remained paralysed between the years 2016 and 2018. That the Second Appellant was occasionally mentally retarded and could not proceed with the case alone and that they ran out of money to pay their advocate to progress the case. He further deposed that the family requested them to move the case out of court for mediation, but the mediation failed.



5. The Respondent opposed the application through a replying affidavit which he swore on 7th November 2023. He deposed that the Appellants are guilty of delay of Five years and that the allegations of involvement in an accident had not been supported with medical proof. He added that the Appellants were his nephews and neighbours and that the claim that the Second Appellant was mentally retarded was untrue. That the Appellants had failed to explain their failure to attend court on the date of dismissal.
6. Both deponents deposed to other additional matters. I have opted to focus on what is necessary for determination of the present application. The parties relied entirely on the material on record and urged the court to render a ruling.
7. I have considered the application, the affidavits filed and the entire record. The sole issue for determination is whether the order of dismissal made on 10th May 2018 should be set aside.
8. When considering an application such as the present one, the court exercises discretion pursuant to the principles laid down in *Mbogoh & Another v. Shab* [1968] EA 93 and reiterated in *James Kanyitta Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR. The court has unfettered discretion and will consider such factors as the reason for the failure to prosecute the suit, the length of time that has elapsed since the order sought to be set aside was made, the respective prejudice each party is likely to suffer and whether overall it is in the interest of justice to grant setting aside. The court's discretion is to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake, but not to assist a person who has deliberately sought to obstruct or delay the cause of justice.
9. As noted earlier, following the dismissal on 10th May 2018, the matter remained dormant until 24th October 2023, when the Appellant filed the present application. There was thus a delay of Five Years and Three Months. The Appellants have sought to explain that the First Appellant was involved in a road accident which led to him being paralysed between the years 2016 and 2018 and that the Second Appellant could not proceed with the case alone since he mentally retarded. All those are serious medical allegations. No medical evidence has been offered to support the claims. In any case, the alleged paralysis is said to have been up to the year 2018. The First Appellant ought to have filed the application much earlier. Even assuming that parties had opted to pursue mediation, the Appellants should have attended court and informed the court of that decision. Equally, the claims that the Appellants ran out of money are unverified. They did not need much money to travel to court to check on their appeal.
10. I find that the delay herein is inordinate and that the reasons proffered do not add up. The Appellants have failed to persuade me to exercise discretion in their favour.
11. I find no merit in Notice of Motion dated 11th October 2023 and I therefore dismiss the application. In view of the family relationship between the parties, I make no order as to costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 14TH DAY OF MARCH 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:-

No appearance by the Appellants

No appearance for the Respondent

Court Assistant: M Nguyayi

