



**Mwanduka & 3 others v Gio Fo Investment Ltd (Civil Appeal  
E019 of 2021) [2023] KECA 768 (KLR) (23 June 2023) (Judgment)**

Neutral citation: [2023] KECA 768 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CIVIL APPEAL E019 OF 2021  
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA  
JUNE 23, 2023**

**BETWEEN**

**MARTINI CHARO MASHA MWANDUKA ..... 1<sup>ST</sup> APPELLANT  
KARISA MASHA ..... 2<sup>ND</sup> APPELLANT  
GEORGE MASHA ..... 3<sup>RD</sup> APPELLANT  
KAHINDI MASHA ..... 4<sup>TH</sup> APPELLANT**

**AND**

**GIO FO INVESTMENT LTD ..... RESPONDENT**

*(An appeal from the Ruling and Order of the Environment and Land Court of Kenya at Malindi (J. O. Olola J.) dated 17th June 2020 in Malindi Civil Case No. 59 of 2006)*

**JUDGMENT**

1. On June 17, 2020, the Environment and Land Court at Malindi (JO Olola J) delivered a ruling dismissing an application dated October 12, 2018, filed in Malindi ELC Case No 59 of 2006 by Martini Charo Masha Mwanduka, Karisa Masha, George Masha and Kahindi Masha, the Appellants herein. The said application had sought the setting aside of an earlier order issued by the trial Court on October 11, 2018 that dismissed the Respondent's suit for want of prosecution. The Appellants were the original defendants in the suit in the Environment and Land Court, in which they had been sued for trespass by Gio Fo Investments Ltd, the original plaintiff and Respondent herein.
2. The Appellants' case in the trial Court was that they had filed an application therein on July 23, 2013 to amend their defence dated August 1, 2006 and introduce a counter claim, however that the Court file thereafter went missing, and they were not aware nor served with the Notice to Show Cause that led to the dismissal of the suit on October 11, 2018. The Appellants deponed that prior to the issuance of the dismissal notice the 1<sup>st</sup> Appellant had taken steps to follow up the said file at the registry by



a letter addressed to the Deputy Registrar by the Appellants dated March 15, 2018, and had taken steps to prepare the application for reconstruction of the file after receipt of the said dismissal notice. Further, that this was a land dispute regarding agricultural land transferred to a company owned by foreigner and the Appellants' families were ejected from the said property which belonged to their forefathers. Lastly, the Appellants averred that on October 11, 2018, their previous advocate on record who was well equipped with the file failed to give the necessary information knowing well that a counterclaim had been filed. Therefore, that the failure on the part of the Appellants to take action was not intentional and it was not true that they had not taken necessary steps.

3. The Appellants' application dated October 12, 2018 was opposed by the Respondent through its Director Alfonso Forino, in a Replying Affidavit sworn on November 30, 2018. He asserted that it is more than 12 years since the suit was filed in the year 2006 and was dismissed for want of prosecution on October 11, 2018. Further, the Appellants sought to reinstate the suit and prosecute an application seeking to introduce time barred claims without due leave of the Court and the dismissal of the suit for want of prosecution denoted that the litigants involved failed to actively prosecute the suit in question. The Respondents stated that the Appellants' application did not provide proof that they took steps to prosecute this suit in the 12 years to advance their defence or counterclaim. Further, there was nothing new the Appellants were introducing in the counterclaim that was not in their original 12-year-old defence. The Respondent deponed that it was not in dispute that the Respondent Company was in active possession and registration of the suit property and had for decades run and operated a five- star resort thereon known as Twiga Beach Club Viaggi Resort.
4. After hearing the parties, the trial Judge (JO Olola J) noted that the Respondent filed the suit on July 6, 2006 and the Appellants filed their Statement of Defence on August 2, 2006 and the parties did not take any steps in the suit after a ruling delivered on November 13, 2006 on applications filed by the parties for injunctions, until six years later in November 2012 when they tried to fix it for hearing. That from the record, nothing much happened for another four years, and on June 20, 2016, the parties appeared for the hearing of an application by the Defendants to amend the Defence dated July 23, 2013 which did not proceed, and no proceedings were again taken in the matter for two years. That by a Notice to Show Cause dated July 30, 2018, the lower Court directed the parties to appear before it on October 11, 2018 to show cause why the suit should not be dismissed for want of prosecution, and the suit was accordingly dismissed on that date the parties having failed to show cause.
5. The learned trial Judge found that the Appellants had not brought any evidence to show that the Court file was missing and for what period, nor of any efforts they had diligently made on their part since this suit was filed to prosecute their defence and Counterclaim. That given the history of the proceedings, he was not persuaded that this is a matter in which he should exercise his discretion to reinstate the suit, and the learned Judge accordingly dismissed the Appellants' application dated October 12, 2018 with no order as to costs.
6. The Appellants being dissatisfied with the said ruling proffered this appeal and have raised four (4) grounds of appeal in the memorandum of appeal dated February 10, 2021, namely:
  1. The Learned Judge erred in law and fact by dismissing the Appellant's application dated October 12, 2018 requesting for the orders issued on October 11, 2018 set aside.
  2. The Learned Judge erred in law and in fact by finding fault with the Appellant and not putting into consideration that the file was lost and once it was found the Appellants were not informed instead the suit was dismissed by the Deputy Registrar



3. The Learned Judge erred in law and in fact by failing to consider the miscarriage of justice that would be occasioned to the Appellant on dismissal of the suit
  4. The Learned Judge decision, albeit a discretionary one, is plainly wrong.
7. The Appellants therefore pray that the orders issued in October 11, 2018 dismissing the Malindi ELC 59 of 2006 be set aside and the suit therein be reinstated. We heard the appeal on this Court’s virtual platform on February 27, 2023, and learned counsel Mr Ole Kina holding brief for learned counsel Ms Mwangi appeared for the Appellants, and relied on written submissions dated June 6, 2022 filed by the Appellants’ counsel. There was no appearance for the Respondent despite service of the hearing notice on its advocates on record on February 20, 2023, neither were any written submissions filed on its behalf. This being a first appeal, we are mindful that the duty of this Court as set out in the decision of *Selle & Another v Associated Motor Boat Co Ltd & Others [1968] EA 123* is to reconsider the evidence, evaluate it and draw our own conclusion of facts and law, and we will only depart from the findings by the trial Court if they were not based on evidence on record; where the said Court is shown to have acted on wrong principles of law as was held in *Jabane v Olenja [1968] KLR 661*, or where its discretion was exercised injudiciously as held in *Mbogo & Another vs Shah (1968) EA 93*.
8. The Appellants’ counsel submitted that the issue under contention in the appeal was whether the Judge was justified in dismissing the Appellants’ application to reinstate the suit. The counsel placed reliance on *Utalii Transport Company Limited & 3 others vs NIC Bank limited & another [2014] eKLR* for the principles which guide the exercise of discretion by court in an application for dismissal of suit for want of prosecution. On whether there has been inordinate delay in prosecuting the suit in the trial Court, and if the delay had been explained, the counsel conceded that the suit had been pending for a long time but denied that it was fully the Appellants’ fault, since after June 20, 2016, the court file went missing and all efforts to trace it had been fruitless. Further, the Appellants had sent a letter dated June 8, 2017 asking for the file and after nine (9) months, the Court sent a letter suggesting that the parties apply for reconstruction of the file. The Appellants placed reliance on the case of *Peter Wambugu Kariuki & 16 others vs Kenya Agricultural Research Institute [2020] eKLR* on the steps to take where a file was missing, and the case of *Abdul Karim Omar v Stephen Ngumbau Kitbuka [2017] eKLR*, where it was stated that reconstruction of a missing court file is an internal matter to be addressed by the office of the Registrar, the official and legal custodian of all the court files. Therefore, that the Appellants could not be faulted as a result of the court’s conduct that contributed to the dismissal of the matter. The counsel concluded that the Appellants had an arguable case with a high chance of success, and if the appeal was not granted, they would suffer irreparable loss.
9. The grounds upon which we can interfere with the exercise of the learned trial Judge’s discretion were set out in *United India Insurance Co Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd v East African Underwriters (Kenya) Ltd [1985] eKLR* as follows:

‘ 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.'

10. From the record of the proceedings in the trial Court, the actions taken in the subject suit from 2016 to the time of its dismissal were as follows:

' May 23, 2016

Before Hon, 0 Angote Court Cletk: Joan Mr Okuto for Defendants

No appearance for the Plaintiffs

Mr Okuto: We did a letter to the Plaintiff while perusing our file, I realised there was a pending application to amend the Defence.

0A ANGOTE-J May 23, 2016

Court: The Application to amend the defence dated July 23, 2013 to be heard on June 20, 2016 by the deputy registrar.

0A ANGOTE-J May 23, 2016

June 20, 2016

Before Hon Wandia JN -DR Court Clerk: Mbaka

Court:

Mr Okuto present for Defendant

Mr Mwadilo holding brief for Maranga for Plaintiff

Mr Okuto: The application dated July 23, 2013 is for hearing. After serving Mr Maosa, he said the date was not convenient. He suggested that we take out this matter. No dates have been given. We can fix dates from registry.

Mr Mwadilo: That is the position. I do not have Mr Manasas diary. They can be invited to take dates from the registry.

Court: Dates to be taken from the registry by both parties. HON JN WANDIA-DR

June 20, 2016

October 11, 2018

Before Justice Olola Court J-Judge Court Clerk: Alex/Petronillah

No appearance for Plaintiff

Mr Mwadilo holding brief for Ms Mwangi for 1<sup>st</sup> Defendant Having taken no action to prosecute this suit for a period of

year(s), the suit is hereby dismissed for want of prosecution under Order 17 Rule 2 of the [Civil Procedure Rules 2010](#)

JO OLOLA-J October 11, 2018'

11. While the trial Judge noted that there was no action recorded as having been taken between June 20, 2016 when the matter was last in the trial Court, and the time of the Notice to Show Cause was issued in July 30, 2018, we noted that the Appellants did annex to their application dated October 12, 2018, a copy of a letter dated March 15, 2018 by the Deputy Registrar of the High Court at Malindi to Messrs



Antony Okuto & Co Advocates with regards to Malindi HCCC No 59 of 2006, informing them that the efforts to trace the file had been unsuccessful and recommending that they make an application for reconstruction of the file. Also annexed was a copy of a Notice of Motion application dated August 26, 2018 and filed on October 12, 2018 seeking orders that a skeleton Court file be constituted in respect of the suit to facilitate the hearing and disposal of the matter.

12. We find that there was evidence of some steps taken by the Appellants to prosecute their application, and that the trial Judge failed to take that evidence into account and therefore relevant factors in this regard. It is however baffling to us that the Appellants' counsel did not bring this information to the attention of the trial Judge during the hearing of the Notice to Show Cause on October 11, 2018. In the circumstances, we find that there are grounds to interfere with the exercise of discretion by the trial Judge and allow the appeal. However, taking into account the time the suit has been pending in the trial Court, we are constrained to make the following orders:

1. The ruling and orders given on June 17, 2020 by the Environment and Land Court at Malindi (JO Olola J) in Malindi ELC Case No 59 of 2006 be and are hereby set aside.
2. The suit in Malindi ELC Case No 59 of 2006 be and is hereby reinstated for hearing
3. The suit in Malindi ELC Case No 59 of 2006 shall be mentioned before the Duty Judge of the ELC within 30 days from the date of delivery of this judgment for purposes of giving directions regarding the hearing and disposal of the suit.
4. We make no orders as regards the costs of the Appellants' application dated October 12, 2018 filed in Malindi ELC Case No 59 of 2006 and as regards the costs of this appeal.

13. It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 23<sup>RD</sup> DAY OF JUNE 2023.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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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.*

*Signed*

**DEPUTY REGISTRAR**

