



**Mbugi & another v Matundio (Environment and Land Appeal 4 of 2021) [2024] KEELC 1393 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1393 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITUI  
ENVIRONMENT AND LAND APPEAL 4 OF 2021  
LG KIMANI, J  
MARCH 7, 2024  
(FORMERLY MACHAKOS ELCA NO. 24 OF 2019)**

**BETWEEN**

**JOHN MBITI MBUGI ..... 1<sup>ST</sup> APPELLANT**

**STEPHEN MUTINDA KAWALO T/A BIG STEP ENTERPRISES  
AUCTIONEERS ..... 2<sup>ND</sup> APPELLANT**

**AND**

**SAMUEL MATUNDIO ..... RESPONDENT**

**RULING**

1. The Appellants/Applicants have made an application by way of Notice of Motion dated 15<sup>th</sup> August 2023 seeking for the following orders:
  1. That this Honourable Court be pleased to set aside the dismissal order issued on 21<sup>st</sup> April 2022 and reinstate the appellants appeal.
  2. That costs of this Application be in the cause.
2. The application is supported by the affidavit by John Mbiti Mbugi, the 1<sup>st</sup> applicant where he deposes that together with the 2<sup>nd</sup> Applicant they had instructed the firm of Munyoki Peter & Co. Advocates to act for them in the appeal herein. They claim to have later lost contact with the said advocate.
3. The 1<sup>st</sup> Appellant fell sick while in the process of instructing another advocate and could not acquire one due to financial constraints. While in the process of instructing another advocate the Appellants found out that the appeal had been dismissed on 21<sup>st</sup> April 2022 for want of prosecution.
4. The Appellants contend that they had not been served with any notice before the matter was dismissed hence the dismissal is irregular. The appellant believes that they have a prima facie case with a



probability of success and it is only fair that the appeal herein is reinstated so that they will not be condemned unheard.

### **The Respondent's Replying Affidavit**

5. The Respondent filed a notice of preliminary objection dated 3<sup>rd</sup> October 2023 which was withdrawn through the consent dated 24<sup>th</sup> October 2023. The Respondent swore a replying affidavit on 9<sup>th</sup> November 2023 giving a background to the court attendances in the suit. He deposed that there was no action from the appellants for two (2) years and four (4) months as they were absent for several court attendances such as the mention on 7<sup>th</sup> October 2021, 24<sup>th</sup> January 2022 and 16<sup>th</sup> March 2022 despite being served with notices. The Respondent attached the various affidavits of service.
6. Notice to show cause as to why the suit should not be dismissed for want of prosecution was served on the parties on 20<sup>th</sup> March 2022 by the court's registry. The matter came up for notice to show cause on 24<sup>th</sup> April 2022 when the respondent's advocates were present but the Appellants' advocates Messrs. Munyoki Peter & Co. advocates did not attend court. The appeal was subsequently dismissed for want of prosecution with costs.
7. On 1<sup>st</sup> August 2023, the respondent's advocates filed a bill of costs dated 27<sup>th</sup> June 2023 and served it on the appellants' advocate on 6<sup>th</sup> August 2023. The appellants did not file a response to the bill of costs and the matter was set down for taxation on 13<sup>th</sup> September 2023 and on 4<sup>th</sup> October 2023 the bill of costs was taxed at Kshs.90,000/=
8. The Respondent stated that since the court's power to give orders of reinstatement are discretionary, the same should only be exercised for sufficient and overwhelming reasons.
9. The respondent deposes that the 1<sup>st</sup> Appellant has not attached any documentation to prove that he has been sick as he alleges. He also states that the applicant's former advocates' offices have not changed location. Further, he states that the appellants have made no effort to personally come to court to follow up on their appeal.
10. It is the respondent's contention that 1 year and 5 months is an unreasonable delay and that delay vitiates the right to apply for reinstatement. He pleaded that he should be able to enjoy the fruits of an order made in his favour since he has shown that due process was followed in effecting service upon the appellants' advocate on record. The respondent therefore urges the court to dismiss the instant application with costs.

### **Applicants' submissions.**

11. Counsel for the Applicants submitted that in setting aside an order of dismissal of a suit for want of prosecution, this honourable court ought to be guided by the provisions of Order 12 rule 7 of the Civil Procedure Rules as well as Article 159 of the Constitution of Kenya, 2010 and the overriding objective of the Court.
12. Since their former advocate on record did not take measures to prosecute the matter leading to the dismissal, they submit that their current advocate has taken steps to trace the trial file.

### **The Respondent's submissions**

13. The Respondent submitted that the appeal went unprosecuted for 2 years and 4 months, after the Appellants and their advocate failed to appear in court several times, despite being served with notices.



14. It is their submission that reinstatement of a suit is discretionary and relied on the determination by Justice Gikonyo in *John Nabashon Mwangi v Kenya Finance Bank Limited* (in liquidation) (2015) eKLR, counsel submitted that the Appellants have not put forth reasonable grounds for failing to prosecute the appeal since the said Munyoki Peter & Co. Advocates have not changed location since 2019 when the appeal was instituted and the Appellant cannot claim to have lost contact with the said advocates.
15. On the matter of the 1<sup>st</sup> appellant being ill, it was submitted that he who alleges must prove as it was held by the court of appeal in *Mary Wambui Kabugu v Kenya Bus Services Limited* (1997) eKLR. The appellants having not provided any proof of illness and the claim remains a mere unsubstantiated allegation that cannot be a reason for failing to follow up on the suit. The respondent views this as indolence, relying on the case of *Habo Agencies Limited v Wilfred Odhiambo Musingo* (2020) eKLR and that the case belongs to a litigant as was cited by Kimaru J in *Savings and Loans Limited v Susan Wanjiru Muritu Nairobi HCCC 397/2002* and that the Appellants should have followed up with their advocate.
16. On whether the balance of convenience tilts in favour of reinstating the appeal, they relied on the court's holding case of *Bryan Chebii Kipkoech v Barnabas Tuitok Bargoria & Another* (2019) eKLR and submitted that the appeal is at the execution stage of the bill of costs and the Respondent should not be denied the fruits of the award of costs given to him by the court. He submitted that he will suffer prejudice in terms of time and additional legal costs if litigation in this matter does not come to an end.
17. The respondent relied on the holding of the Supreme Court in the case of *Nicholas Kiptoo arap Korir Salat v. IEBC & 7 others* (2014)eKLR where it was stated Article 159 of *the Constitution* is not a panacea in each and every instance of breach of procedure and it only avails in deserving cases. It is their submission that the 4-year delay in prosecuting the appeal is not reasonable and that Article 159 cannot be rightfully invoked in this case.

### **Analysis and determination**

18. This is an application seeking reinstatement of the appeal that was dismissed on the 21<sup>st</sup> of April 2022 for want of prosecution. The Application is brought pursuant to Order 12 rule 7 of the *Civil Procedure Rules* which provides that:

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”
19. The grounds relied on are that the applicants lost contact with their previous advocate on record Munyoki Peter & Co. Advocates and that the 1<sup>st</sup> Appellant fell ill and was financially constrained to instruct another advocate immediately. It is only after perusing the court file that they found out that the appeal had been dismissed.
20. Counsel for the Applicants relied on Article 159(2)(d) of *the Constitution* of Kenya (2010) which provides that in exercising judicial authority, the courts and tribunals shall be guided by the principle that justice shall be administered without undue regard to procedural technicalities.
21. Counsel for the Respondent's position is that the Appellants have not given reasonable grounds for not prosecuting their case, having not attached any proof of the 1<sup>st</sup> Applicant's illness, stating that he who alleges must prove on a balance of probabilities.
22. The Respondent also submitted that the applicants should have followed up on the case since a case belongs to a litigant and not to her advocate. They rely on the holding in the case of *Savings and Loans*



Limited v Susan Wanjiru Muritu Nairobi (Milimani) HCCS No. 397 of 2002 which was quoted by Justice Okwany in *International Air Transport Association & another v Roskar Travel Limited & 3 others* (Civil Case E457 of 2020) [2022] KEHC 200 (KLR) (Commercial and Tax) (17 March 2022) (Ruling) :

“In Savings and Loans Limited v Susan Wanjiru Muritu Nairobi (Milimani) HCCS No. 397 of 2002 Kimaru, J expressed himself as follows: “Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates failure to attend Court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate’s failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff’s determination to execute the decree issued in its favour is an indictment on the defendant. She had been indolent and taking into account her last conduct in the prosecution of the application to set aside the default judgment that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant. (emphasis added)”

I hold similar view that it is not enough for a party to simply blame an advocate for a mistake but the party must show tangible steps taken by him in following up his matter.”

23. As was stated in the above cited case of Savings & Loans Ltd. v Susan Wanjiru Muritu (*supra*) whose reasoning this Court adopts that a litigant has a duty to pursue the prosecution of his or her case and to constantly check with the advocate the progress of the case. In the present case the appellant filed the appeal on 11<sup>th</sup> June 2019 being Machakos ELC Appeal No. 24 of 2019. The file was transferred to this Court and renumbered Kitui ELC Appeal number 4 of 2021 and was first mentioned before this court on 7<sup>th</sup> October 2021. On all the occasions when the matter was mentioned before this court the advocate for the Applicants did not attend court while the Advocates for the respondent were present. It is apparent that if the applicants had been a diligent litigants, they would have pursued their advocates to prosecute the appeal and would have discovered the proceedings that were going on the absence of their advocates and in their absence.
24. It is noted that the counsel who was on record then for the Appellant is not present to explain the reasons he did not prosecute the appeal and it is easy for the Appellants to blame the said Advocates. It is further noted that the 1<sup>st</sup> Appellant has not attached any medical documents to show that he was so unwell as to not be able to follow up on the appeal for the entire period when the appeal was not prosecuted. It was also not explained why the 2<sup>nd</sup> Appellant could not follow up on the appeal if the 1<sup>st</sup> applicant was so unwell.
25. In the court’s view the Appellants have been indolent and have shown no interest in prosecuting the appeal. There was inordinate delay since the appeal was filed back in 2019 and the appellants failed to appear on numerous court dates. The appeal was dismissed on 24<sup>th</sup> April 2022 but it took more than a year for the applicants to realize that the said appeal was dismissed and to file this application. In the court’s view the Applicant’s slumber was only disrupted by the commencement of the execution process seeking payment of costs and the excuses given do not suffice.



26. Further, the respondent has already commenced the process of executing their award of costs and it would be prejudicial to them to return the matter to a never ending cycle of litigation. The Court of appeal in the case of *M/S Portreitz Maternity V James Karanga Kabia*, Civil Appeal No. 63 of 1997 held that:

“...litigation must come to an end. It is a rule to counter the all-too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.”

27. Setting aside a dismissal order is under the court’s discretion. The law regarding exercise of the Court’s discretion is now settled. From the holding of Harris J (as he then was), where he had this say on the case of *Shah v Mbogo* [1967] EA 116 and 123B:-

“The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”

28. Having considered the matters stated above and taking into account that the court’s power to set aside a dismissal order and reinstate a suit is discretionary, the court finds that the application dated 15<sup>th</sup> August 2023 lacks merit said application is dismissed with costs.

**DELIVERED, DATED AND SIGNED AT KITUI THIS 7<sup>TH</sup> DAY OF MARCH, 2024.**

**HON. L. G. KIMANI**

**JUDGE ENVIRONMENT AND LAND COURT**

The Ruling is read virtually and in open court in the presence of-

Kioko for the Applicants

M/S Gathoni for the Respondent

