



Mutiso (Dcd) & 3 others v Nzau (Environment and Land Appeal 49 of 2017) [2024] KEELC 3993 (KLR) (29 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3993 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 49 OF 2017**

**A NYUKURI, J
APRIL 29, 2024**

BETWEEN

**NZAU KONGU MUTISO (DCD) 1ST APPELLANT
PAUL MUTISO NZAU 2ND APPELLANT
BONIFACE KITWA NZAU 3RD APPELLANT
THOMAS KYALO NZAU 4TH APPELLANT**

AND

SIMON MUEMA NZAU RESPONDENT

RULING

Introduction

1. Before court is the notice of motion dated 12th April 2023, filed on even date by the appellants, seeking the following orders;
 - a. That the order dated 8th March 2019 be set aside and that the said appeal be reinstated for benefit of justice.
2. The application is predicated on the grounds on its face as well as the affidavit sworn on 12th April 2023 by Paul Mutiso Nzau the 2nd appellant. The applicants' case is that the appeal herein was dismissed on 8th March 2019 but he was not notified of such dismissal, until 4th October 2022, when he was served with a taxation notice. The deponent alleged that the appeal file went missing for about one and half years after the judgment. Further that at the same time his father's death certificate which was in the respondent's custody also went missing and it was impossible for him to prosecute the appeal.
3. The deponent also deposed that it is unfair to condemn the appellants unheard and that executing the bill of costs without hearing the appeal on merit would be unjust. He blamed the Covid-19, pandemic



- alleging that it hindered him from prosecuting the appeal. He attached authority to plead; copy of his father's death certificate; order of 8th March 2019; and rulings of 14th August 2015 and 29th January 2016.
4. The application is opposed. Simon Muema Nzau the respondent filed a replying affidavit sworn on 29th April 2023. He stated that this appeal was filed on 16th February 2011, whereof the appellants obtained orders of stay of execution pending appeal, subject to deposit of security of Kshs 19,410/=, which condition they contested but that their contest was dismissed by court. He stated that the appellants had delayed in not filing the record of appeal and their reasons for delay are insufficient as there is no evidence that the file was missing or their effort in obtaining the missing file if at all. That this application was filed only after the appellants were served with the respondent's bill of costs and that their allegation that the death certificate went missing has no proof.
 5. He further stated that the memorandum of appeal was filed in 2015 and dismissed in 2019 before the onset of the Covid-19 pandemic, and that now we are all past the Covid-19 era. He stated that four years have passed since the appeal was dismissed with no effort on the part of the appellants, who have not been vigilant. He maintained that the Constitution provides for expeditious justice. He attached the order of dismissal.
 6. The application was disposed by way of written submissions. On record are submissions filed by the applicants on 13th July 2023 and those filed by the respondent on 10th May 2023; both of which the court has duly considered

Analysis and determination

7. The court has carefully considered the application, the response, rival submissions and the record. The sole issue for determination is whether the applicant deserves orders setting aside orders dismissing the appeal.
8. Order 42 Rule 35 allows the dismissal of an appeal where, if within one year after service of the memorandum of appeal, the appeal has not been set down for hearing.
9. The court's discretion to set aside an order of dismissal for want of prosecution is unfettered, but it must be exercised judiciously and the party seeking such an order is obligated to explain to the satisfaction of the court, reasons for the delay. The discretion is to be exercised to avoid injustice or hardship resulting from an excusable mistake but not meant to assist a party to delay or derail the course of justice. (See *Shah v Mbogo* (1967) EA).
10. In the instant matter, this appeal was filed on 16th March 2011 in the High Court at Machakos. It was later transferred to Nairobi and returned to this court in 2017. Since filing the memorandum of appeal, the appellant is yet to file the record of appeal, which is about 13 years since the appeal was filed. Although he blames Covid-19 pandemic, that cannot be a plausible excuse for the delay because, the Covid-19 pandemic was first reported in Kenya in March 2020, which is twelve months after the appeal had been dismissed for want of prosecution. On the issue of the missing death certificate, and missing court file, no evidence was presented by the applicant to demonstrate such a position.
11. The appeal herein was dismissed on 8th March 2019 and the application herein was filed on 12th April 2023, which is over four years. This in my view amounts to an inordinate delay. I have considered the explanations given for the delay and, I find that they do not give any plausible explanation for the inordinate delay, as no evidence of missing file or death certificate was presented and the excuse based on the Covid-19 pandemic is a red herring because the dismissal happened before the arrival of the



Covid-19 pandemic in the country, and there is no record of appeal filed by the appellant till now, which is 13 years after filing the appeal.

12. In the premises, I find no merit in the application dated 12th April 2023 and I hereby dismiss the same with costs to the respondent.

13. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 29TH DAY OF APRIL 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Ms. Macharia holding brief for Mr. Makau for respondent

Mr. Paul Mutiso the 2nd appellant in person present

Court assistant – Abdisalam

