



**Elaki v District Land Registrar Vihiga & another (Civil Appeal  
220 of 2019) [2021] KECA 340 (KLR) (17 December 2021) (Judgment)**

Neutral citation: [2021] KECA 340 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 220 OF 2019  
HM OKWENGU, AK MURGOR & F SICHALE, JJA  
DECEMBER 17, 2021**

**BETWEEN**

**JACOB BUHUNGI ELAKI ..... APPELLANT**

**AND**

**DISTRICT LAND REGISTRAR VIHIGA ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the ruling and order of the Environment and Land Court at  
Kakamega (N.A Matbeka, J.) dated 23rd July 2019 in ELC Petition No. 3 of 2015)*

**JUDGMENT**

1. The appellant, Jacob Buhungi Elaki filed a Petition dated 20<sup>th</sup> February 2015 in the Environment and Land Court against the District Land Registrar, Vihiga and the Attorney General, the 1<sup>st</sup> and 2<sup>nd</sup> respondents wherein he claimed that despite his being the absolute registered proprietor of all that parcel of land known as NYANG'ORI/HAMISI B/30 (the suit land) from 1999, the 1<sup>st</sup> respondent, while purporting to be so acting on the District Surveyor's letter reference No. H.U.G/MUT/3/VOL.1/33 of 19/7/07, registered a restriction as entry No. 4 of 27.4.07 against the title of the suit land without his knowledge or providing him with any notice; that he had learnt of the restriction sometime in August 2013 when he conducted an official search at Vihiga Land Registry in anticipation of selling a portion of his land.
2. The appellant claimed that in, March 2014, he instructed his lawyers to seek redress and that they wrote to the 1<sup>st</sup> respondent to have the restriction removed but to date, the 1<sup>st</sup> respondent had failed to do so. As such he sought for orders that;
  - (a) The Honourable Court finds the registration of the restriction as entry, no. 4 of 27.4.07 on land parcel NYANG'OR1/HAMISI "B"/305 by the 1<sup>ST</sup> Respondent without disclosing the



purpose for the acquisition was a violation of the constitution and the Petitioners right to private property and so declares.

- (b) The Honourable Court finds and declares that the 1<sup>st</sup> Respondent violated the Petitioners constitutional right of access to information when he denied him information concerning the restriction or a copy of the letter of the DS to inform the purpose, the extend and terms upon which the acquisition of the land was being made.
  - (c) The Honourable Court finds and declares that the delay by the Respondents to finalize the acquisition of the Petitioners land and pay compensation from the year 2007 violates the Constitutional requirement on prompt payment of compensation and is to that extent null and void and of no legal effect.
  - (d) The Honourable Court declared that to maintain the subject restriction on the Petitioner's land any longer as proposed by the Respondent would be a further violation of the Petitioner's rights to the suit land and unlawful and unconstitutional.
  - (e) The Honourable Court do order the immediate removal or cancellation of the restriction filed on land parcel NYANG'ORI/HAMISI"B"/305 as entry No. 4 of 27.4.07.
  - (f) Costs occasioned by this petition be recovered from the Respondents.
3. The respondents opposed the Petition and in a replying affidavit sworn on 10<sup>th</sup> November 2016, averred that the suit land was initially registered in the name of one Renah Bwenda and thereafter, was registered in the appellant's name on 12<sup>th</sup> December 1999; that, the government had already acquired part of the suit land for establishment of the Hamisi District headquarters. It was further asserted that the appellant's constitutional rights were not violated by the restriction since it was intended merely to secure it in public interest. The respondents prayed that the Petition be dismissed with costs.
  4. The Petition was first slated for hearing on 25<sup>th</sup> September 2017. On that date, counsel for the appellant, Mr. Musiega sought for an adjournment on the grounds that they had not served the respondents. The court granted the adjournment which it marked as a last adjournment for the appellant. The matter was then fixed for hearing on 18<sup>th</sup> December 2017 when the parties' counsel agreed to proceed by way of written submissions, following which, the court made the appropriate orders. A mention was fixed for 26<sup>th</sup> February 2018 to confirm compliance.
  5. On the mention date, both parties were yet to file submissions prompting counsel for the appellant to seek for another adjournment, which the learned judge declined to grant for the reason that the court had already notified the parties of the final adjournment on 25<sup>th</sup> September 2017, and on this account, the court dismissed the petition.
  6. The appellant was aggrieved with the ruling and filed an application for review dated 10<sup>th</sup> June 2019 seeking to set aside the order for dismissal and to have the Petition reinstated for the reason that he was not aware that his case was listed for hearing, or that his advocate was required to file written submissions as directed by the court; that further the mistake having been occasioned by his advocate, he should not have to suffer as a result; that he only learnt of the dismissal from the court registry on 21<sup>st</sup> May 2019 when he checked on the status of his case after failing to get any response from his advocate. After considering the application, the court dismissed it in a ruling dated 23<sup>rd</sup> July 2019 for want of merit.
  7. The appellant was dissatisfied with the ruling and filed this appeal on grounds that: i) the failure to reinstate the appellant's suit amounted to a gross violation of the appellant's right of access to justice guaranteed by Article 50(1) of the [Constitution 2010](#); ii) the order was unjust, punitive and oppressive



given that the appellant had complied with the earlier directions; iii) the judge ought to have delivered the judgment in the main cause as opposed to dismissing the application for reinstatement; iv) in punishing the appellant for the failure of his advocate to file written submissions, which was unjust; v) in favouring the respondents who had not opposed the appellant's application; v) and in failing to apply the correct principles of the law when ruling on the application.

8. The appellant submitted that the main issue for determination was whether the judge taking all the relevant facts into consideration rightly exercised her discretion to dismiss the appellant's petition and by extension the suit for want of prosecution.
9. The appellant appeared before us in person while respondents though served on 29<sup>th</sup> April 2021 did not appear. In his submissions the appellant sought to address the question whether the delay was prolonged and inexcusable and if it was, whether justice could be done despite the delay. It was argued that the ends of justice could still be met if the suit was reinstated and set down for hearing.
10. The appellant asserted that the court did not bear in mind the outlined considerations and exercise its discretion judiciously; that the respondent would not suffer any prejudice, while the appellant did not have to suffer for the mistakes of his counsel.
11. We have considered this appeal in light of the background and submissions. This being an appeal arising from an exercise of discretion of the learned judge, we are reminded of our primary role in determining such matters. As was espoused in the case of *Mbogo & Another vs Shah* [1968] EA, p.15, that;

“An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”

12. Taking these guidelines into consideration, it is our view that the issues for consideration are whether the learned judge rightly dismissed the appellant's petition for failure to proceed to file written submissions, and whether the delay in filing the application for reinstatement was properly explained.

13. In dismissing the Petition, the learned judge stated;

“The case was dismissed on the ground that the petitioner applicant's lawyer Mr. Arwanda have not filed written submissions as directed by the court when granting adjournment. I have perused the file and found that the suit was dismissed on 26 February 2018. The date was taken in court by consent and was the final adjournment as the matter was filed way back on the 25<sup>th</sup> September 2017. It is (sic) was not until the 10<sup>th</sup> June 2019 that the present application was filed. I find that there is an inordinate delay in filing the application and the same is an after thought. Reasons advance (sic) for delay are not convincing. The applicant has been indolent and is guilty of inordinate delay.”

14. It can be discerned from the above that, the learned judge's reasons for dismissing the petition, were first, that the appellant's counsel had sought yet another adjournment, after having been granted a final adjournment on 25<sup>th</sup> September 2017. Second, the appellant's counsel failed to file written submissions despite the court having so ordered. And third, that there was an inordinate delay in filing the application for reinstatement.
15. Beginning with the request for an adjournment. The court had informed the parties that the adjournment sought on 25<sup>th</sup> September 2017 was a final adjournment. But after the appellant's



counsel failed to file submissions by 26<sup>th</sup> February 2018 he sought yet another adjournment. Besides informing the court that he had not filed submissions, the appellant's counsel gave no viable reason or sufficient cause for seeking the adjournment or failing to file the written submissions; and this was more particularly since the date was taken by consent of the parties.

16. The Supreme Court of Uganda in *Famous Cycle Agencies Ltd & 4 Others\_ vs Masukhalal Ramji Karia SCCA No. 16 of 1994 [1995] IV KALR 100* observed;

“...the discretion will be exercised in favour of the party applying for adjournment only if sufficient cause is shown. Sufficient cause refers to the acts or omissions of the applicant for adjournment. What is sufficient cause depends upon the circumstances of each case and generally speaking, where the necessity for the adjournment is not due to anything for which the party applying for it is responsible, or where there has been little or no negligence on his part...”

17. Despite the clear orders of the court, the appellant's counsel failed to file the written submissions. It is a worrying trend when counsel as officers of the court blatantly choose to disregard court orders of this nature that are intended to further the interests of justice by expediting court proceedings. Again, no reasons were advanced for this failure.
18. Turning to the appellant's application that sought to reinstate the Petition, the main reasons the appellant advanced were that, he was not aware that his counsel was to have filed written submissions, and further the mistakes of counsel should not be visited on him.
19. In its decision in the Council, *Jomo Kenyatta University of Agriculture and Technology vs Joseph Mutuura Mbeera & 3 Others [2015] eKLR*, this Court citing the case of *Bains Construction Co. Ltd. vs John Mzare Ogowe [2011] eKLR* had this to say;

“It is to some extent true to say mistakes of Counsel as is the present case should not be visited upon a party but it is equally true when Counsel as agent is vested with authority to perform some duties as principal and does not perform it, surely such principal should bear the consequences”. (Emphasis added)

20. Having regard to the circumstances of this case, we are not persuaded that the adjournment sought or the failure to file the written submissions was in any way explained. In addition, we take the view that the appellant cannot be absolved from the responsibility of ensuring that his counsel took the steps necessary to prosecute his case. As a consequence, we cannot fault the learned judge for declining to set aside the order dismissing the Petition.
21. Finally, with respect to the of delay in the filing of the application for reinstatement, the appellant's explanation was that he only learnt of the dismissal from the court registry on 21<sup>st</sup> May 2019 when he sought to establish the status of his case after failing to get any response from his advocate. This was nearly two years after the Petition was dismissed on 25<sup>th</sup> September 2017. As did the learned judge, we too find this delay to be inordinate, which delay we would construe to be a further indictment on the appellant, as it pointed to his continued indolence and lethargy in so far as the prosecution of his case is concerned. Furthermore, it cannot be overlooked that it was not in any way explained.
22. All told, we decline to interfere with the learned judge's exercise of discretion. The appeal is unmerited and is dismissed with costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF DECEMBER, 2021.**



HANNAH OKWENGU

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

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

*Signed*

DEPUTY REGISTRAR

