



**Mbago v Obel & another (Environment & Land Case
E003 of 2023) [2024] KEELC 4163 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4163 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE E003 OF 2023**

**AY KOROSS, J
MAY 23, 2024**

BETWEEN

JACOB APEL MBAGO APPELLANT

AND

FRANCIS OOKO MWANZIA OBEL 1ST RESPONDENT

ISAYA OMONDI OBEL 2ND RESPONDENT

RULING

Appellant's case

1. By a notice of motion dated 1/11/2023 that was filed by the appellant, he sought the following reliefs: -
 - a. Spent.
 - b. The court be pleased to set aside orders made on 23/10/2023 dismissing the entire appeal.
 - c. The court be pleased to reinstate the appeal and the appellant be allowed to file his appeal record within 14 days.
 - d. Costs of the motion be provided for.
 - e. The court be pleased to make such further or other orders as it may deem fit and just to grant.
2. The motion was supported by several grounds on the face thereof and materially, the appellant stated that on 23/10/2023, this court dismissed his appeal for non-compliance with court directions and non-attendance. However, the non-attendance and non-compliance occurred because of circumstances beyond his control- he was notified of the availability of lower court proceedings late in the day, and on the mention date, his counsel fell ill.



3. He further averred he was keen to prosecute the appeal and that the orders sought should be granted. In addition, the appellant's counsel on record Mr. Austine Arnold Omondi deposed a supporting affidavit on 1/11/2023 in which counsel rehashed averments contained in the grounds and availed a medical report showing he fell ill on the mention date and he had been away on sick leave.

Respondents' case

4. The respondents' counsel on record Ms. Gloria Kwamboka in her replying affidavit sworn on 20/11/2023 strenuously opposed the motion. Counsel averred that on the mention date, neither did the appellant's counsel attend court nor had the appellant complied with court directions.
5. Further, counsel stated that there was no evidence of a certificate of delay thus the alleged delayed proceedings from the lower court could not suffice and counsel averred the motion was a delay tactic and discretion should not be exercised in the appellant's favour and the motion should be dismissed.

Appellant's submissions

6. As directed by the court, the appellant's counsel filed written submissions dated 25/01/2023 in which counsel identified a singular issue for determination; whether discretionary orders should be exercised in the appellant's favour.
7. To buttress his argument, counsel relied on Article 159 of the *Constitution* and Section 3A of the *Civil Procedure Act* and several authorities including the decision of *Catherine Kigasia Kivai v Ernest Ogesi Kivai & 4 Others* (2021) eKLR which cited with approval the decision of *Ivita v Kyumbu*. Unfortunately, none of the myriad of court decisions were remitted to this court, and on that basis, they will not be considered.

Respondents' submissions

8. Their counsel filed written submissions dated 19/02/2024 and they identified one issue for determination; whether the reliefs sought in the motion were merited.
9. Counsel submitted that though this court can re-admit the appeal, sufficient reasons had to be tendered. Nonetheless, counsel submitted the appellant's counsel had not demonstrated by way of evidence that he had made follow-ups in seeking the proceedings from the lower court.
10. Counsel submitted that the onus was on the appellant to prosecute his appeal and an appeal should not be entertained if it was filed in bad faith with no intention of prosecuting it and relied on several authorities including *Utalii Transport Co. Ltd & 3 Others v N.I.C Bank & Another* (2014) eKLR where the court held that the duty of taking steps towards prosecuting a case rests with a claimant. Counsel further submitted the appellant's conduct went against the spirit of Article 159 of the Constitution as he was guilty of delay.

Issues for determination, Analysis, and Determination

11. Having carefully given thought to the motion, its grounds, affidavits, rival submissions and authorities cited by the respondents' counsel, the issues for determination are whether the motion is merited and what about costs. These issues shall be addressed together.
12. Under the auspices of Order 42 Rule 20 of the *Civil Procedure Rules*, an appeal can be dismissed by this court for want of attendance whilst by Direction 43 of the ELC Practice Directions which is contained in Gazette Notice No. 5178, an appeal can be dismissed for want of compliance with court directions



and these are the circumstances the appellant found himself in on the 23/10/2023 when this court dismissed the appeal.

13. However, notwithstanding the dismissal, Order 42 Rule 21 of the [Civil Procedure Rules](#) allows the re-admission of a dismissed appeal on default by stating as follows: -

“Where an appeal is dismissed under rule 20, the appellant may apply to the court to which such appeal is preferred for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing, the court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.”

14. From this provision of law, it is evident that the orders sought are discretionary and the onus is on an applicant who seeks discretionary orders in his favour, to prove the circumstances that led to his non-attendance in court.

15. In exercise of judicious discretion this court must at all times, give effect to the overriding objective of the [Civil Procedure Act](#) as set out in Sections 1A and 1B thereof. This position was fortified by the decision of [John Nahashon Mwangi v Kenya Finance Bank Limited \(in Liquidation\)](#) [2015] eKLR where when faced with an application to reinstate a suit, the court stated: -

“The decision of the court is purely a matter of discretion which as it has been said time and again should be exercised judicially on defined principles of law. The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of the [Constitution](#). Article 50 coupled with article 159 of the [Constitution](#) on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the court.”

16. In determining whether to exercise discretion in the appellant’s favour, this court will be guided by the tests stated in the Court of Appeal decision of [Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others](#) [2013] eKLR, where the Court of Appeal stated:

“[18]. We agree with those noble principles which go further to establish that the court’s discretion to set aside an *ex parte* judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. We have considered the reasons that were offered by the appellant regarding their failure to attend court on the 10th June, 2013 with anxious minds. We have asked ourselves whether failure to attend court on 10th June, 2013, constituted an excusable mistake, an error of judgment regarding counsel’s failure to diarize the date properly or was it meant to deliberately delay the cause of justice. The appellant and his counsel failed to attend Court on 10th June, 2013; they, nonetheless, made it to court on 11th June, 2013, and promptly offered an apology and explanation and offered to proceed with the petition on the 11th June, 2013, which date was reserved for the appellant’s case.”

17. Turning to the circumstances of this case, the appellant’s counsel has availed a medical report which shows on the fateful date, he was taken ill and even given some days from work. Unquestionably, Illness can befall any human being and no one is infallible from disease. I do not doubt in my mind that this barred him from attending court on the fateful date. This motion was filed barely 2 weeks after the dismissal and there was no delay.



18. As to non-compliance with court directions, the court in admitting the appeal, gave the appellant 30 days to comply. Even though this court agrees with the respondents' counsel that the appellant has not satisfactorily explained by way of written evidence such as correspondence between him and the registry that he sought certified copies of proceedings, this court is alive that the dismissal of the appeal is draconian and is reluctant to shut the appellant from the seat of justice.
19. In my humble view, the non-reinstatement of the appeal will be highly prejudicial to the appellant who will be denied his day in court. The right to a hearing has always been well-protected in Article 50 of the Constitution and is also the cornerstone of the rule of law while any inconvenience caused to the respondents for the delay caused by the appellant's counsel's failure to comply or attend court on 23/10/2023 can be compensated with costs.
20. There is no evidence the motion is an abuse of court process or an afterthought and in the premises, I find the motion is merited and it is hereby allowed. Since costs follow the event, I award the respondents costs of the motion and ultimately issue the following disposal orders: -
- a. The order issued on 23/10/2023 dismissing the appeal is hereby set aside.
 - b. The appeal is hereby reinstated for hearing on merits.
 - c. The appellant to file and serve the record of appeal within 14 days hereof.
 - d. Costs of the motion are awarded to the respondents.
 - e. Matter to be mentioned for directions before the Deputy Registrar of this court on 24/07/2024

DELIVERED AND DATED AT SIAYA THIS 23RD DAY OF MAY 2024.

HON. A. Y. KOROSS

JUDGE

23/5/2024

Ruling delivered virtually through Microsoft Teams Video

Conferencing Platform in the Presence of:

Mr. Omondi Were for the appellant

Miss Kwamboka h/b for Mr. Sagana for the respondent

Court assistant: Ishmael Orwa

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