



**Maina & 2 others (Suing as the Chairman, Secretary and Treasurer of Kamahuha Nyati Plot Owners Association) v County Government of Muranga & 2 others (Environment & Land Petition E004 of 2022) [2024] KEELC 5523 (KLR) (18 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5523 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANGA**

**ENVIRONMENT & LAND PETITION E004 OF 2022**

**LN GACHERU, J**

**JULY 18, 2024**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS**

**AND**

**FREEDOM UNDER ARTICLES 2, 19, 20,21 22 23**

**40 AND 60 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF LAND ADJUDICATION ACT CAP 284 OF LAWS OF KENYA**

**BETWEEN**

**MICHUKI MAINA ..... 1<sup>ST</sup> PETITIONER**

**SAMUEL MARUBU KARANJA ..... 2<sup>ND</sup> PETITIONER**

**JULIUS KAMANDE GITAU ..... 3<sup>RD</sup> PETITIONER**

**SUING AS THE CHAIRMAN, SECRETARY AND TREASURER OF**

**KAMAHUHA NYATI PLOT OWNERS ASSOCIATION**

**AND**

**COUNTY GOVERNMENT OF MURANGA ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**CABINET SECRETARY, MINISTRY OF LANDS ..... 3<sup>RD</sup> RESPONDENT**



## RULING

1. The Petitioner/ Applicant brought this Notice of Motion Application dated 8<sup>th</sup> December 2023, brought under Section 3A of the Civil Procedure Act, Order 12 Rule 7 of the civil procedure rules, and Order 51 Rule 1 of the Civil Procedure Rules, and sought for the following orders:
  - a. That the court be pleased to set aside and vary its orders for dismissing the Petitioner's/ Applicant's Petition dated 1<sup>st</sup> July 2022, and order reinstatement of the suit for hearing and disposal.
  - b. That the costs of the Application be in the cause.
2. This application is premised on the grounds set out on the face of the application and on the Supporting Affidavit of Jerusha Kabata, Advocate: These grounds are;
  - a. That the Petitioner/applicant counsel failure to be in court when the matter was called and dismissed for non-attendance was not intentional and/or in any way inadvertent,
  - b. That the Petitioner/Applicant has always been ready and willing to prosecute the matter and had not in any way delayed or refused to prosecute the same,
  - c. That the Applicant is willing to comply with any terms that the court may impose,
  - d. That any setting aside of the orders and reinstatement of the suit and setting it down for hearing will not be prejudicial to the Respondent interest whatsoever as it will be in the interest of justice,
  - e. That therein statement of the suit would meet the overriding objective of the constitution and the Civil Procedure Act and Rules;
  - f. That it is fair and just that the suit be reinstated and be determined on merits.
3. In her supporting Affidavit, the Deponent Jerusha Kabata, Advocate on record for the Petitioner/ Applicant, averred that on the material day, 5<sup>th</sup> December 2023, when the matter was listed for hearing of the Notice to Show Cause, why the suit should not be dismissed, she had challenges joining the court through the teams platform.
4. She averred that at the time she managed to join, the matter had already been called, and after the court was done with the cause list, she inquired about the matter, and the court informed her that the matter was already dealt with and orders issued, and that she should follow up with the registry.
5. It was her allegations that when she perused the file on 7<sup>th</sup> December 2023, she found that the Petition had been dismissed for want of prosecution, as none of the parties attended court to address the Notice to Show Cause.
6. It was her contention that her non-attendance of the court when the matter was called out was not intentional and or in any way inadvertent, as she had challenges joining the virtual court.
7. She contended that by setting aside the orders of dismissal and reinstating the suit, and setting it down for hearing, will not prejudice the Respondent, but will serve the interests of justice, and would meet the overriding objective of the constitution and the Civil Procedure Act.



8. She claimed that it was fair and just that this Petition be reinstated and be determined on merits. She urged the court to allow the Application.
9. The 1<sup>st</sup> Respondent filed the grounds of opposition and averred that;
  - a. That the instant Application is incurably defective and does not lie;
  - b. That the Applicant has failed to demonstrate a crucial fact to save the Petition as that absence of the Petitioner on the date of NTSC needed to be explained;
  - c. That the applicant failed to establish why the matter had been listed for a NTSC, and why the Petitioner had not fixed the matter for hearing, and whether the Petitioner had list interest in the matter;
  - d. That the court acted justly and no evidence has been shown to the contrary the Petitioner has exhibited indolence and lack of interest in the matter.
10. The Application was canvassed by way of written submissions. The Applicants filed their submissions dated 19<sup>th</sup> March 2024, through the Law Firm of Njoroge Kugwa & Co Advocates, and submitted that the failure of the counsel to log in the virtual court has been explained. Further, that the delay in prosecuting the Petition was caused by the passing on of one of the Petitioner, the Chairman of Kamahuha Nyati T. Plot Owners, on 4<sup>th</sup> November 2022, and an application for substitution had been filed on 20<sup>th</sup> November 2023. Therefore, the Petitioners are ready and willing to prosecute the Petition.
11. Reliance was placed on Section 3A of the *Civil Procedure Act*, which gives the court inherent powers to make such orders that are necessary for the end of justice to be met. He also relied on Order 12 rule 7 of the Civil Procedure Rules, which donates powers to the courts to set aside or vary judgement of dismissal of a suit. further, they relied on Order 51 Rule 15 of the Civil Procedure Rules, to reinforce the said position.
12. The Applicants also relied on the case of Mutinda Musila Malua vs Ngunga Yatta Deputy County Commissioner, Kitui West Sub County & 2 Others (2021) eklr: where the court held;

“Considering that the session under which the matter was dismissed for want of prosecution was concluded virtually, and in view of the fact that the Petitioner advocate was unable to access the court due to the failure of internet connectivity, she cannot be blamed for logging in late. Indeed, having addressed the court albert after the Petition had been dismissed, it shows the efforts she made to address the court”
13. With the above submissions, the Plaintiff/ Applicants urged the court to allow their instant Application.
14. The 1<sup>st</sup> Respondent on its part filed the written submissions dated 11<sup>th</sup> April 2024, through the Law Firm of Kimwere Josphat & Co. Advocates and urged the court to dismiss the Applicants Application with costs. It was submitted that there were no sufficient reasons given for the inordinate delay in prosecuting the matter. It was further submitted that the Petitioners had lost interest in the matter, and they have not demonstrated any interest in pursuing the matter, nor has the Applicants given sufficient reasons for non- attendance in court.
15. The 1<sup>st</sup> Respondent insisted that the instant Application should be dismissed with costs.
16. The court has carefully considered the instant Notice of Motion, the rival written submissions and the whole of the court record. This Petition was filed on 7<sup>th</sup> July 2022, against the Respondents, and the



- Petitioners sought for various orders. Given that a Petition is supposed to be concluded with a period of 360 days, the instant Petition ought to have been concluded by 12<sup>th</sup> July 2023.
17. After the Petition was filed, only the 1<sup>st</sup> Respondent filed a Response to it, through a reply to the Petition filed by Kimwere Josphat Co Advocates, and filed on 5<sup>th</sup> October 2022.
  18. However, after this response, the Petitioner did not take any other action, nor set the matter down for hearing. Consequently, the court on its own motion issued a NOTICE TO SHOW CAUSE, dated 5<sup>th</sup> October 2023. The said NTSC was served on all the parties as can be confirmed from the Affidavit of Service sworn by Charity Wairimu Maina, dated 12<sup>th</sup> October 2023.
  19. The Petitioner/ Applicant did not respond to the NTSC, but instead filed an Application dated 20<sup>th</sup> November 2023, seeking to substituted Michuki Maina, the Chairman of the Association, with on Moses Mwangi Mungai. It was alleged that Michuki Maina died on 4<sup>th</sup> November 2022. A death certificate was attached to the said Application.
  20. The Notice to Show Cause was set to be heard on 5<sup>th</sup> December 2023, and the said Notice had indicated that; failure to attend court, the matter shall proceed your absence notwithstanding.
  21. On 5<sup>th</sup> December 2023, all the parties were absent, and the court observed; there is no response; the NTSC, is not addressed, and explained; the Petition is hereby dismissed for want of prosecution”
  22. Consequently, the Petitioners/ Applicant filed the instant Notice of Motion dated 8<sup>th</sup> December 2023, seeking to have the suit reinstated. The Petitioners/ Applicants counsel one Jerusha Kabata, explained that she had difficulties logging unto the virtual court.
  23. The NTSC, was issued under Order 17 Rule 2 of the Civil Procedure Rules, which states that;  

“in any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit”
  24. From the court record, it is evident that after the 1<sup>st</sup> Respondent filed it Reply on 5<sup>th</sup> October, 2022, none of the parties took any action and on 5<sup>th</sup> October 2023, the court on its own motion issued a NTSC, as provided by Order B 17 Rule 2 of Civil Procedure Rules.
  25. Further, on the date of hearing the said NTSC, none of the parties were present. The NTSC, was not explained, and as provided by the law, the court had discretion to either dismiss the suit or give it another date. In the instant suit, the court dismissed the Petition for want of prosecution.
  26. Immediately after the dismissal, the Petitioners filed the instant Application under Order 12 Rule 7 of Civil Procedure Rules., which provides that:  

“where under this order judgement has been entered or the suit has been dismissed, the court on application may set aside or vary the judgement or order upon such terms as may be just.”
  27. The court dismissed the Petition herein, and thus the Petitioners/ Applicants are rightly in order to file this application for reinstatement. Further Section 3A of the [Civil Procedure Act](#) donates inherent powers to the court to issue such orders that are necessary for the end of justice to be met. Order 51 Rule 15 of the Civil Procedure Rules, allows the court to set aside orders made exparte. The dismissal of the Petition was done exparte, as none of the suit turned up.



28. With the above background, the court finds the issue for determination is whether the Petitioners/ Applicants are entitled to the orders sought?
29. There is no doubt that the Petition herein was dismissed entirely on 5<sup>th</sup> December 2023, for want of prosecution. This Application was filed on 8<sup>th</sup> December 2023, and thus there was no delay at all, and the application was filed within reasonable time.
30. It is evident that the Petitioners did not prosecute the Petition from the date of filing until when it was dismissed. After the NTSC, was served upon the Petitioners, they woke up from the deep slumber and filed an Application for substitution of Michuki Maina, the Chairman of the Association who is deceased. There is evidence to that effect, that indeed Michuki Maina, died on 4<sup>th</sup> November 2022.
31. Even without doubting that one of the Petitioners is deceased, the remaining Petitioners did not bother to inform the court, the position of the matter, and thus the NTSC. When the suit came for NTSC, the Petitioners were not in court to explain the NTSC, thus the reasons why the suit was dismissed. The Applicants/Petitioners counsel explained the reasons why she did not attend the virtual court. It was her allegations that she had challenges logging into the virtual court.
32. This court notes that indeed, the Petitioners counsel logged in after the matter had already been called out and dismissed. The counsel attended court, but after the suit had been called out and dismissed for want of prosecution. As was held by the court in the case of Mutinda Musila Malua( *supra*) this court finds that the Petitioners counsel informed the court that she had difficulties logging in , and she made efforts to join the court though late, and addressed the court.
33. This court is alive to the fact that it is the duty of every litigant to ensure that matters are prosecuted expeditiously, the court will also be alive to the provisions of Section 3A, which empowers the court to issue orders that are necessary for the end of justice.
34. In the case of Catherine Kigasia Kivai v Ernest Ogesi Kivai & 4 others [2021] eKLR, the Court held:

“It is the duty of the court, litigants, as well as advocates, to ensure that matters are concluded expeditiously without inexcusable delay. Sections 1A and IB, of the *Civil Procedure Act*, Cap 21, Laws of Kenya, are relevant, with regard to this and they state as follows:

“1A. Objective of Act

  1. The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
  2. The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
  3. A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

1B. Duty of Court



- (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
  - (a) the just determination of the proceedings;
  - (b) the efficient disposal of the business of the Court;
  - (c) the efficient use of the available judicial and administrative resources;

35. The factors that courts should take into consideration for the purpose of reinstatement of suits were addressed in the case of *Ivita vs. Kyumbu* [1984] KLR 441, where the court stated:

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff’s excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”

36. It is trite that the issue of reinstatement of a suit is at the discretion of the court, which discretion ought to be exercised in a just manner, as was held in the case of *Bilha Ngonyo Isaac vs. Kembu Farm Ltd & another & another* [2018] eKLR, which echoed the decision of the court in *Shah vs. Mbogo & Another* (1967) EA 116 (Harris J), where the court stated on the matter of discretion:

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

37. Even as the court is guided by Section 3A of the *Civil Procedure Act* and Order 12 Rule 7 of Civil Procedure Rules, it will emphasize the need to expedite this matter, as justice delayed, is justice denied. See the case of *Mobile Kitale Service Station vs. Mobil Oil Kenya Limited & another* [2004] eKLR, where it was held:

“I must say that the Courts are under a lot of pressure from backlogs and increased litigation, therefore it is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past. Justice would be better served if we dispose matters expeditiously. Therefore, I have no doubt the delay in the expeditious prosecution of this suit is due to the laxity, indifference and/ or negligence of the plaintiff. That negligence, indifference and/or laxity should not and cannot be placed at the doorsteps of the defendant. The consequences must be placed on their shoulders”.

38. Having considered the instant Notice of Motion Application, and the rival written submissions, this court finds the reasons given by the Petitioners/Applicants counsel on her failure to attend court for



NTSC is plausible. Mistakes of a counsel should not be visited on the client. See the case of CFC Stanbic Limited versus John Maina Githaiga & another [2013] eKLR where, the Court of Appeal held as follows; -

“On the issue of the mistake of counsel, it is not in dispute that the appellant gave instructions to its advocates in good time once it was served with the pleadings and summons to enter appearance. Therefore, the failure to enter appearance and file a defence is clearly attributable to its advocate who failed to enter appearance and file defence in good time. This being the mistake of counsel, the same ought not to be visited upon the appellant. This Court is guided by the case of LEE G Muthoga V Habib Zurich Finance (k) Ltd & Another, Civil Application No. NAI 236 OF 2009, where this Court held: "It's a widely accepted principle of law that a litigant should not suffer because of his advocate's oversight." In the instant appeal, we are of the view that the appellant should not suffer because of the mistakes of its counsel.”

39. For the above reasons, the court finds and holds that the instant Application is merited and consequently, this Notice of Motion Application dated 8<sup>th</sup> December 2023, is allowed entirely with costs being in the cause.
40. Further, the Petitioners/Applicants are directed to set this Petition for hearing with the next 60 days from the date hereof. Failure of which, the Petition will stand dismissed, unless otherwise directed by this court.

It is so ordered.

**DATED,SIGNED,AND DELIVERED VIRTUALLY AT MURANG'A THIS 18<sup>TH</sup> DAY OF JULY 2024.**

**L. GACHERU**

**JUDGE**

**18/7/2024**

Delivered online in the presence of

Joel Njonjo – Court Assistant

Ms Kabata for the Petitioners/Applicants

N/A for 1<sup>st</sup> Respondent

N/A for the other Respondents.

**L. GACHERU**

**JUDGE**

**18/7/2024**

