



Mibei & another v Kenya Electricity Transmission Company Limited & 2 others (Environment & Land Case 141 of 2019) [2024] KEELC 7210 (KLR) (31 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7210 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 141 OF 2019
A OMBWAYO, J
OCTOBER 31, 2024**

BETWEEN

KENNETH KIPKIRUI MIBEI 1ST APPLICANT

KENNETH KIPKIRUI MIBEI 2ND APPLICANT

AND

KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED 1ST RESPONDENT

NATIONAL LAND COMMISSION & ANOTHER & ANOTHER & ANOTHER & ANOTHER 2ND RESPONDENT

RULING

The applicants application

1. The Board of Management Workers High School has come to court vide application dated 2nd May 2024 seeking orders that orders issued on 24th April 2024 during the appeal for want of prosecution be set aside and the appeal be reinstated and be heard. The application is based on grounds that there is a valid order made on 24th April 2024, dismissing the Appellant's/Applicants appeal for want of prosecution.
2. The delay prosecuting the appeal was inadvertence as the lower court file serialized as CMELC 372 of 2018 Symon Njuguna Warui v Joseph Karanja & 2 Others is still active and therefore a delay in getting typed proceedings, The delay has also been exacerbated by the fact that the Judicial Officer handling the matter is on suspension, The next mention date is on 5th June, 2024 possibly for reallocation.
3. Although the notice to show cause was received, the Advocate in conduct inadvertently logged in into Deputy Registrar's ELC court link and by the time they logged into the correct link the matter had



already been mentioned and dismissal orders given. Mistake of counsel should not be meted on the litigant.

4. The appeal is not frivolous, it raises serious issues on the exercise of the trial Magistrate's discretion in refusing to set aside ex-parte proceedings and the consequent judgment dated 11th March, 2022 ex-parte and the appellant is still interested in prosecuting
5. This application has been brought promptly and in good faith. This honorable court has the power to grant the orders sought and it is just and expedient that the same be granted in the interest of justice.

Respondents response

6. The respondent's response is that the honorable court did dismiss the applicants appeal on the 24th April 2024 after a notice was duly served on the applicant's counsel and after failure to attend court.
7. The judgment in the lower court was delivered on the 24th April 2024. A decree was extracted on 21st March 2022. Execution proceedings commenced and upon proclamation by the auctioneers the applicant sought a stay of execution in an application dated 21st July 2022. A memorandum of appeal was filed on 9th November 2022 and since the appeal was filed no record of appeal has ever been filed. The applicant has not shown any due diligence that they made to ensure the proceedings are typed. There is not a single letter written to court showing or indicating the applicant was making any follow-ups in following the proceedings in court. The court has not also been served with any receipt showing the proceedings were ever paid for by the applicant. The fact that one respondent filed an application on 6th September 2023 shows clearly that the applicant had not paid for proceedings and that's why the file was still lying in the registry and was not in the typing pool. The applicants are guilty of laches as they filed an appeal never paid for proceedings and are now crying foul after the court justly dismissed the appeal for lack of prosecution.
8. The applicants were aware the case was coming up for dismissal and in paragraph 7 admit they knew the notice to show cause but never filed any response to it thus the court justly dismissed the case. The argument that counsel logged in a wrong court cannot be true as the notice was issued by the High court were clear as to where the matter would be mentioned. Counsel is an agent of the party and a party is bound by his counsel's mistakes. It is trite law that litigation has to come to an end and the maxim should apply in the current case. No good reason has been given as to why the appeal should be reinstated while it's clear the applicant slept on its right, have never paid for proceedings over one and a half years after filing the appeal. The application has no merit but a gimmick to continue denying the 1st respondent from enjoying and developing his property despite having a legitimate title deed from the year 2013 upto date.

Determination by Court

9. I have considered the application and do find that the applicant has not explained the delay in prosecution of the appeal though the explanation given by counsel for the appellant's failure to attend court is sufficient.
10. The factors taken into account or consideration for the purpose of reinstatement of suits are numerous, and were addressed in *Ivita vs. Kyumbu* [1984] KLR 441 (Chesoni J), 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." 6. *Ivita vs. Kyumbu* [1984] KLR 441 (Chesoni J) was followed in *Jim Rodgers Gitonga Njeru vs. AlHusnain Motors Limited & 2 others* [2018] eKLR (Muchemi J), where the court said:

"It is my view that such would be valid considerations in an application for dismissal of suit for want of prosecution, which in this case has already been done; and it is manifest from the record that the reason why the suit was dismissed in the first place was that the Court was satisfied there was inordinate delay of 3 years for which there was no explanation."

11. In *James Mwangi Gathara & another vs. Officer Commanding Station Loitoktok & 2 others* [2018] eKLR (Nyakundi J), the court said:

"Before I conclude this matter, I need to bring to the attention of the plaintiff the manner in which he is pursuing his rights. In my view the proceedings in this claim seems to be focusing on interlocutory applications without addressing the main dispute which brought the parties to court in the first instance. It is time the plaintiff decides categorically whether he has a claim to be heard on the merits or continuous slumbering only to rise up when he has been stripped of certain rights during the adjudication processes. In my assessment and based on the history of this case the plaintiff is guilty of laches. I think I have said enough on this point."

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 *Bilha Ngonyo Isaac vs. Kembu Farm Ltd & another & another* [2018] eKLR ((JN. Mulwa J), 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." One of the issues that usually confront the courts with respect to dismissal of suits for delays and the subsequent applications for reinstatement, is the need for expeditious conclusion of suits. In *Mobile Kitale Service Station vs. Mobil Oil Kenya Limited & another* [2004] eKLR (Warsame J) 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.”

12. Other than filing a memorandum of appeal, the applicant has not demonstrated that he took any action to enable the appeal be heard. The applicant has not demonstrated that he applied for the proceedings of the lower court to enable him prepare the record of appeal and therefore I conclude that the applicant has not demonstrated a desire to prosecute the appeal. I do dismiss the application as it lacks merit.

SIGNED BY: HON. JUSTICE ANTONY O. OMBWAYO

