



REPUBLIC OF KENYA



KENYA LAW
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**Sadik v Mburu (Environment & Land Case 113 of 2015)
[2025] KEELC 606 (KLR) (13 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 606 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 113 OF 2015
EK MAKORI, J
FEBRUARY 13, 2025**

BETWEEN

ABUBAKAR HUSSEIN SADIK PLAINTIFF

AND

CHRISTIAN MUCHIRI MBURU DEFENDANT

RULING

1. The Defendant/Applicant in the application dated 28th of October 2024 is seeking the following orders from this Court:
 - a. That the Applicant's current Advocates, Messrs. TLO Advocates LLP, be granted leave to come on record post-issuance of the dismissal order.
 - b. That this Honourable Court be pleased to vary, set aside, and vacate the Order issued on 5th October 2022 - Odeny J., which dismissed the suit for want of prosecution.
 - c. That this Honourable Court be pleased to reinstate the Defendant's Counterclaim dated 29th September 2015 for hearing and determination on merit.
 - d. That the costs of this application be provided for.
 - e. That this Honourable Court be pleased to make any other or further orders as the circumstances and interests of justice herein may require.
2. This Court (Odeny J.) dismissed the entire suit and the Applicant's counterclaim on the 5th day of October 2022 for want of prosecution in the presence of Counsel for the Defendant/Applicant.
3. As of 5th October 2022, the Defendant/Applicant was represented by the firm of Mwaure & Mwaure Waihiga Advocates. According to the current counsel for the Applicant, the Counsel who appeared in Court on the same day on behalf of the Defendant/Applicant omitted to inform the Court that there



was a Counterclaim seeking declaratory orders of ownership over the suit property known as Lamu/Lake Kenyatta II/363. This lack of information has put the Defendant at a significant disadvantage.

4. The Defendant/Applicant had lost communication with his previous Advocates on record and was not aware of the status of the matter until recently when he perused the Court file and discovered that the matter was dismissed in entirety for want of prosecution.
5. From the materials and submissions placed before me, the issues that fall for the determination of this Court are:
 - i. Should the Applicant's current Advocates, Messrs. TLO Advocates LLP, be granted leave to come on record after the issuance of the dismissal order?
 - ii. Whether this Court should vary, set aside, and vacate the Order issued on 5th October 2022 by Odeny J. Dismissing the suit for want of prosecution.
 - iii. Should this Court reinstate the Defendant's Counterclaim dated 29th September 2015 for hearing and determination on merit?
 - iv. The issue of costs.
6. Should the Applicant's current Advocates, Messrs. TLO Advocates LLP, be granted leave to come on record after the issuance of the dismissal order? As submitted by counsel Order 9 Rule 9 of the Civil Procedure Rules 2010, after judgment or dismissal of a suit, a change of advocates must be sanctioned by leave of the court. The Applicant has complied with the procedural requirements and seeks leave to regularize the current advocates' status. This is not a contested issue. In exercising its discretion under Order 9 Rule 9 of the Civil Procedure Code, the court allows the Applicant's current Advocates to come on record.
7. On whether the Counter-claim ought to be reinstated, counsel for the Applicant contends that the power to set aside dismissal orders is discretionary, as per Order 12 Rule 7 of the Civil Procedure Rules, which states:

“Where under this Order judgment has been entered, or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”
8. The Applicant submits that the dismissal order resulted from circumstances beyond their control, as outlined in the supporting affidavit. The failure to prosecute the matter was occasioned by the inadvertence and inaction of the Applicant's former advocates, Mwaure & Mwaure Waihiga Advocates, who failed to inform the court of the existence of the Counterclaim.
9. Counsel avers (which I agree with) that In *Sheikh t/a Hasa Hauliers v Highway Carriers Ltd* [1988] eKLR, the Court of Appeal citing with approval the case of *Shah v Mbogo & Another* [1967] EA 116, held that the discretion to set aside orders is intended to prevent injustice or hardship resulting from an accident, mistake, or inadvertence, and not to assist a party who deliberately seeks to obstruct justice. The Court held that:

“There are no limits or restrictions on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or errors but is not



designed to assist a person who has deliberately sought, whether by evasion or otherwise, to abstract or delay the cause of justice.”

10. Counsel proceeds to correctly state that, in *Belinda Murai & others v Amos Wainaina* [1978] eKLR, the Court of Appeal similarly emphasized that errors or lapses by counsel should not be visited on the litigant where such mistakes were neither willful nor intentional. The Court held that:

“The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.”

11. The Applicant submits that the dismissal was due to the previous advocate’s inadvertence, which should not bar the Applicant from accessing justice.

12. Counsel for the Applicant further states that Article 50(1) of *the Constitution* guarantees the right to a fair hearing. By dismissing the suit and the Counterclaim without considering its merits, the Applicant has been denied the opportunity to present their case. Substantive justice should take precedence over procedural technicalities. In that regard, citing *Mwangi S. Kimenyi v Attorney General & Another* [2014] eKLR, counsel proceeds that the Court provided guidance on reinstating matters dismissed for want of prosecution, stating that the court should consider whether there is a reasonable explanation for the delay, whether the delay is prolonged and inexcusable and whether justice can still be served despite the delay. The Court held rightly so, in my view, that:

“Accordingly, I will discern the principles which the law has developed to guide the exercise of discretion by court in an application for dismissal of suit for want of prosecution. These principles are:

- 1) Whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;
- 2) Whether the delay is intentional, contumelious and, therefore, inexcusable;
- 3) Whether the delay is an abuse of the court process;
- 4) Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;
- 5) What prejudice will the dismissal occasion to the plaintiff?
- 6) Whether the plaintiff has offered a reasonable explanation for the delay;
- 7) Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the court?”

13. Counsel for the Applicant believes that the Applicant acted promptly upon learning of the dismissal, as evidenced by appointing new advocates and filing the instant application. There has been no inordinate delay, and reinstating the Counterclaim will not prejudice the Plaintiff. The Defendant’s Counterclaim seeks declaratory orders regarding ownership of the property known as Lamu/Lake Kenyatta II/363. The substantive ownership issue cannot be resolved without allowing the Defendant to present evidence and arguments.

14. Citing *Ivita v Kyumbu* [1984] KLR 441, counsel for the applicant concludes that a case should only be dismissed for want of prosecution if the delay is prolonged and inexcusable. Likely to prejudice the



- other party. In the present case, he believes that the delay was neither prolonged nor intentional, and the Plaintiff has not demonstrated any prejudice that would result from reinstating the Counterclaim.
15. Counsel further cited a passage from the decision in Philip Chemwolo & Another v Augustine Kubende [1986] eKLR, the Court of Appeal stated:

“Blunders will continue to be made from time to time, and it does not follow that because a mistake has been made, a party should suffer the penalty of not having their case heard on merit.”
 16. The Applicant submits that the failure to prosecute the Counterclaim was not deliberate and was entirely due to the omission of previous counsel. Allowing reinstatement of the Counterclaim will serve the ends of justice. Article 159(2)(d) of *the Constitution* enjoins courts to administer justice without undue regard to procedural technicalities. The dismissal of the Counterclaim denied the Applicant the opportunity to pursue their claim to ownership of the suit property. Reinstating the Counterclaim aligns with the constitutional imperative to promote substantive justice. In Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR, the Supreme Court underscored the importance of resolving disputes on their merits, emphasizing that procedural technicalities should not impede access to justice.
 17. Further, In the Board of Trustees National Social Security Fund v Michael Mwalo [2015] eKLR, the Court of Appeal held that where there is no demonstrable prejudice to the opposing party, a matter dismissed for want of prosecution should be reinstated. The Applicant’s Counterclaim raises weighty issues concerning ownership of the suit property, which can only be resolved through a substantive hearing.
 18. I agree with the submissions and authorities cited by the Applicants. Using the parameters laid by the cited precedents, the current suit was filed in 2015, and by the time this Court moved itself suo motto to dismiss it on 5th October 2022 – those were about 7 years. Since the dismissal, it took the Applicant another 2 years to file the current application. That is what is termed an inordinate delay. The Applicant has not been a vigilant court user from 2015 to October 2024, and the matter has been lying idle in our court system. The Applicant has not explained the steps he took to get the status of his matter from the erstwhile Advocate. A court action does not belong to an Advocate but the litigant, who should be vigilant to know the status of his matter. The Applicant seeks to reinstate the Counterclaim and leave behind the plaint. It will mean reinstating the whole suit.
 19. The judiciary's policy is to have active matters in court to check the issue of backlog and dead files whose pendency stifles matters that can genuinely proceed in Court.
 20. This is not one of those matters in which this Court will exercise discretion to reinstate – it is a stale claim. The application dated 28th October 2024 is hereby dismissed. Since the other side did not participate, there will be no order as to costs. The Applicant is at liberty to bring his own cause subject to limitation of actions.

It is so ordered.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 13TH DAY OF FEBRUARY 2025.

E. K. MAKORI

JUDGE

In the Presence of:



Mr. Oduol, for the Plaintiff/Applicant

Happy: Court Assistant

