



**Muturi v Kenya National Highways Authority & another (Environment and Land Appeal E015 of 2022) [2024] KEELC 13714 (KLR) (6 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13714 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT AND LAND APPEAL E015 OF 2022  
MAO ODENY, J  
DECEMBER 6, 2024**

**BETWEEN**

**NATHANIEL MUTURI ..... APPLICANT**

**AND**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**FATHER WILIAM MUCHAI KAMBO (SUED ON BEHALF OF ST. LWANGA CATHOLIC PARISH) ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of a Notice of Motion dated 29<sup>th</sup> July, 2024 by the Appellant/Applicant seeking the following orders:
  - a. Spent
  - b. This Honourable court be pleased to reinstate this matter to pave way for the Appellant to be heard on merit and justice be served to him.
  - c. This Honourable Court be pleased to give directions as to an early hearing date for the Appellant's suit.
  - d. Costs of this Application be provided for.
2. The application was supported by the affidavit of Nathaniel Muturi, the Appellant/Applicant sworn on 29<sup>th</sup> July, 2024 where he deponed that on 22<sup>nd</sup> July 2024, this matter was listed for mention before the Honourable Judge but his advocate failed to appear necessitating dismissal of the same for want of prosecution. The Appellant further deponed that he immediately appointed the firm of Nyamwaro & Company Advocates to take over from his previous advocates and reinstate the suit.



3. The 1<sup>st</sup> Respondent filed a Replying Affidavit sworn by James Okwaro, its surveyor sworn on 1<sup>st</sup> October, 2024 and deponed that the Appeal was filed in 2020 and the 1<sup>st</sup> Respondent has never been served with the record of Appeal or notices and there is no evidence that the Appeal has been admitted for hearing. He deponed that the Appellant has neither explained the inordinate delay in prosecuting the appeal nor why they did not attend court.
4. The 1<sup>st</sup> Respondent's surveyor also deponed that the Notice of Change of Advocates and application dated 29<sup>th</sup> July, 2024 have been filed without leave of court or with the consent of the previous advocates and the same is incompetent and should be struck out for not complying with provisions of Order 9 Rule 9 (a) and (b) and Rule 10 of the *Civil Procedure Rules*, 2010.
5. Raphael Ng'ang'a Njange filed a Replying affidavit dated 11<sup>th</sup> October, 2024 and deponed that he is the Chairperson of St. Lwanga Catholic Church and a member of the Parish council hence competent to swear the affidavit. It was his evidence that the Appellant never took any step on the matter to set it down for hearing until the court issued a notice to show cause why the appeal should not be dismissed for want of prosecution. It was his deposition that the appeal has been overtaken by events hence the application should be dismissed with costs to the 2<sup>nd</sup> Respondent.

### **Appellant's/Applicant's Submissions**

6. Counsel for the Appellant filed submissions dated 22<sup>nd</sup> October, 2024 and identified the issues for determination as:
  - a. Whether the Appellant has advanced sufficient reasons to warrant reinstatement of the suit?
  - b. Whether the Respondents will suffer prejudice if this suit is reinstated?
7. Counsel submitted that the mistakes of an advocate should not be meted on the innocent client and that the Appellant has ensured that a record of appeal is filed and served and the instant suit was ready for hearing. Counsel relied on the case of *Martha Wangari Karua v IEBC* Nyeri Civil Appeal No 1 of 2017 and urged the court to allow the Appellant to prosecute his appeal as the application has been filed without delay.
8. Counsel relied on the cases of *Catherine Kigasia Kivai v Ernest Ogesi Kivai & 4 others* [2021] eKLR, *HAM v SOS* [2021] eKLR and *Bank of Africa Kenya Limited v Put Sarajevo General Engineering Co. Ltd & 2 others* [2018] eKLR and urged the court to allow the application as prayed.

### **2<sup>nd</sup> Respondent's Submissions**

9. Mr. Ndungu, counsel for the 2<sup>nd</sup> Respondent filed submissions dated 22<sup>nd</sup> October, 2024 and identified the following issues for determination:
  - a. Whether the appeal should be reinstate and
  - b. Who should bear the costs of the suit?
10. Counsel submitted that the court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel for failing to attend court and relied on Order 17 Rule 2 of the *Civil Procedure Rules* and the cases of *Stanely Kiprono Mutai v Kipsigis Tugen Farm and Mwangi Kinuthia* Nakuru H.C Civil Appeal No 98 of 2000.



11. Counsel submitted that the Applicant has not shown any efforts to ensure the Appeal was set down for hearing as he has been indolent and cited the cases of *Boniface Kamau Njoroge v John Waweru Wanjobi* [2021] eKLR, *Harrison Meme v Romano Maroo* Civil Appeal No E024 of 2020.
12. It was counsel's submission that in an application for contempt of court dated 29<sup>th</sup> April, 2024, the Appellant admitted that the car wash business he had illegally established in the said public road reserve was demolished by Nakuru County Government hence the application has no merit and should be dismissed with costs to the 2<sup>nd</sup> Respondent.

### **Analysis and Determination**

13. The issue for determination is whether this court should reinstate the Appellant's Appeal. The test for consideration for reinstatement of a suit that has been dismissed for want of prosecution is whether the delay is prolonged and inexcusable; whether justice can still be done despite the delay; and whether the Plaintiff or the Defendant will be prejudiced by reinstatement of the suit.
14. The Applicant blames counsel for not attending court when the matter was slated for a Notice to show cause why the Appeal should not be dismissed for want of prosecution. It is on record that the Appellant never took any steps to move the court to set the appeal down for hearing. The court therefore took the initiative to dismiss it for him as it seems that the Appellant had lost interest in prosecuting the Appeal
15. It is further on record that the subject matter of the Appeal had ceased to exist as admitted in a replying affidavit that the same had been demolished by the Nakuru County government
16. The Appellant stated that after the dismissal of the Appeal on 22<sup>nd</sup> July 2024, he appointed the firm of Nyamwaro & Company Advocates to take over from his previous advocates and have the suit reinstated. He further stated that he has since filed and served a record of Appeal of which the Respondent states that they have not been served with the same.
17. In the case of *Savings and Loans Limited v Susan Wanjiru Muritu* Nairobi HCCC 397/2002, the court held that:

“Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocates failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case.

The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case.

In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal.”

18. The Applicant advanced the ground that he was let down by counsel who never attended court on the date slated for the dismissal of the Appeal for want of prosecution. He has not given any other tangible reason why he did not follow up on the processing of the appeal. Did not take any steps including filing a record of Appeal to set the ball rolling for the hearing of the Appeal.
19. The delay has not been sufficiently explained by the Applicant and noting that the decision to reinstate the dismissed appeal for want of prosecution is discretionary which must be exercised judiciously. The



court finds that the Application has no merit and is therefore dismissed with each party bearing their costs.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 6<sup>TH</sup> DAY OF DECEMBER 2024.**

**M. A. ODENY**

**JUDGE**

