



**Mukonana (Suing as legal representative of the Estate of M'Itabari M'Eoru)  
v Ntonia & 2 others (Defending as legal representatives of the Estate of  
Jennifer Kanini M'Kaithuru) & 2 others (Environment and Land Appeal  
E063 of 2021) [2023] KEELC 42 (KLR) (18 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 42 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E063 OF 2021**

**CK YANO, J**

**JANUARY 18, 2023**

**BETWEEN**

**LUCY MUKONANA (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE  
OF M'TABARI M'EORU) ..... APPELLANT**

**AND**

**JACOB MIRITI NTONIA, PATRICK KIMATHI NTONIA & BEATRICE  
KARAMBU KINYUA (DEFENDING AS LEGAL REPRESENTATIVES OF THE  
ESTATE OF JENNIFER KANINI M'KAITHURU) ..... 1<sup>ST</sup> RESPONDENT**

**DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER MERU  
NORTH ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the ruling of Hon. TITO GESORA (C.M)  
Delivered on 20/04/2021 in Maua civil case No. 129 of 2009)*

**RULING**

1. This is an appeal against the ruling of the lower court which dismissed the appellant's application dated November 26, 2020 which sought to set aside the order dismissing the suit for want of prosecution, have the suit reinstated for hearing on merit and for leave to substitute parties.
2. The brief facts are that in 2009, the appellant brought a claim for an order directing the 1<sup>st</sup> and 2<sup>nd</sup> respondent to transfer parcel No 3145 Amwathi/Maua to the appellant. On January 9, 2013, the appellant appointed the firm of Mbogo and Muriuki Advocates to act on her behalf. On October 4, 2013, the said firm of advocates filed a notice of withdrawal of suit dated October 3, 2013 in which it was stated that the appellant had elected to withdraw her entire suit against the respondents.



3. Thereafter, the appellant filed the said application dated November 26, 2020 which after hearing the parties the trial court found to be unmeritorious and by the ruling dated April 29, 2021 dismissed the same with costs precipitating this instant appeal.
4. In the memorandum of appeal, the appellant has raised the following grounds;
  1. The learned trial magistrate erred in law and fact in failing to review and set aside the orders of the subordinate court to dismiss the suit in August 2018.
  2. The learned trial magistrate erred in law and in fact in failing to set aside the orders of the subordinate court to dismiss the suit for want of prosecution and reinstate the suit to be heard on its merits.
  3. The Learned trial magistrate erred in law and fact in failing to appreciate that the order being reviewed was that of the court to dismiss the suit for want of prosecution where no defence had been mounted by the 1<sup>st</sup> defendant would visit grave injustice on the appeal.
  4. The learned trial magistrate erred in law and fact in failing to appreciate that it is the last action of the court which was being sought to no reviewed on not of any document issued by the court before the matters dismissal (sic).
  5. The learned trial magistrate misapprehended and misapplied the law as regarding the appellant's application to the subordinate court dated November 26, 2020 and making finding that the application had no merit.
  6. The learned trial magistrate erred in law and fact in failing to appreciate and exercise diligence of the presence of new confounding facts of evidence that were not in the knowledge of the appellant at the time of dismissing the suit.
  7. That the decision of the learned trial Magistrate was plainly wrong.
5. For those reasons, the appellant prayed that this court allows the appeal, sets aside the ruling and orders of the subordinate court delivered on April 29, 2021 and in its place an order dismissing the respondent's notice of motion dated 16<sup>th</sup> day of October, 2017 with costs to the appellant and for the respondent to pay the costs of the appeal.
6. The appeal was canvassed by way of written submissions which were duly filed by the parties. The appellant submitted inter alia, that at the time the court made its orders to dismiss the suit, the appellant did not have two crucial documents and that even if she had fixed the matter for hearing in the absence of the crucial documents her suit would definitely have failed. Counsel for the appellant cited the provisions of Section 80 of the *Civil Procedure Act*, Order 12 rule 7 and Order 45 of the *Civil Procedure Rules* and Sections 35, 60, 67, 68, 81, 83, 107 – 110 and 116 of the *Evidence Act*. The appellant also relied on the case of *Khalif Sheikh Adan v the Honourable Attorney General* (2019) eKLR, *Shah v Mbogo* (1969) EA 116, 123, *Elizabeth Kavere & another v Lilian Atho & another* (2020) eKLR.
7. Counsel for the appellant also cited the provisions of Order 17 of the *Civil Procedure Rules* and submitted that this court does allow for the re-opening of the suit to enable justice to be done. It was submitted that the decision of whether or not to dismiss a suit is discretionary and a court must exercise such discretion judiciously, adding that the lower court failed to factor in relevant facts such as the Advocates conduct and relevant points of law and submitted that the delay was excusable. The appellant relied on the case of *Argan Wekesa Okumu v Dima College Limited & 2 others* (2015) eKLR, *Ivita v Kyumba* (1984) KLR 441, *Thabitini Development Company Limited v Mombasa Water and*



- Sewerage Company and another, Rose Makokha Mteka v Oserian Development Co. Limited* (2022) eKLR.
8. The Advocates for the appellant further submitted that this suit was dismissed on a technicality and not on triable issues and or merits of the matters in issue. That the resultant circumstances are being visited upon the appellant due to the negligence, impropriety and mistakes of her then advocates when the matter was dismissed. They relied on the case of *Barnabas Maritim v Manywele Korgoren & another* (2016) eKLR, *Cosmas Mrombo Moka v Co-operative Bank of Kenya Limited and another* (2018) eKLR and urged the court to allow the appeal with costs.
  9. The 1<sup>st</sup> respondent submitted inter alia, that this being a first appeal, the court should consider both the law, facts and the evidence on record for a just and equitable determination. Counsel for the 1<sup>st</sup> respondent relied on the case of *Abok James Odera T/a A. J. Odera & Associates v John Patrick Machira T/a Machira & co. advocates* (2013) eKLR.
  10. It is the 1<sup>st</sup> respondent's submission that the appellant's application was and/or is incompetent and devoid of merit and not deserving of review, and cited the provisions of Section 80 of the *Civil Procedure Rules*, Order 45 1(1) (2) & (3), Section 22 of the *Civil Procedure Act*, Article 27 of *the Constitution of Kenya 2010*. The 1<sup>st</sup> respondent also relied on the case of *Skool Enterprises Limited v Housing Finance Company of Kenya & 3 others* (2017) eKLR, *Reuben Indiatsi Nasibi v Alfred Machayo & another* (2020) eKLR. It was further submitted that the learned magistrate did not err in law and fact by dismissing the appellant's application and failing to set aside the orders and reinstate the suit. The 1<sup>st</sup> respondent cited the provisions of order 12 rule 7, Order 10 Rule 11 and argued *inter alia* that it is unfair to blame the delay on the outbreak of covid 19 and mistake of advocates (Messrs Mbogo & Muriuki Advocates). The advocates for the 1<sup>st</sup> respondent relied on the case of *Elosy Murugi Nyaga v Tharaka Nithi County Government & another* (2020) eKLR, *Tirth construction Limited, v Orion Hotels Limited* (2020) eKLR, *Janeffer Irumbi Nyagab V John Njoka Ngiri & another* (2019) eKLR and submitted that there was no any justifiable reasons given to the trial court for it to exercise its jurisdiction and powers as required under order 12 Rule 7 of the Civil Procedure Rules to set aside its orders and/ or reinstate the suit. That a delay of more than seven (7) years post the lawful withdrawal of the suit and two post-dismissal of the suit and failure to prosecute the suit for more than eleven (11) years demonstrates a lack of interest on the part of the appellant in the suit, and that the appellant cannot escape from the natural consequences of her inaction. The 1<sup>st</sup> respondent submitted that litigation must come to an end.
  11. The 1<sup>st</sup> respondent submitted that the appellant has moved this court through an appeal with unclean hands and does not merit the orders sought from this court. The 1<sup>st</sup> respondent relied on the case of *Lagoon Development Limited v Beijing Industrial Designing and Research Institute* (2015) eKLR. The 1<sup>st</sup> respondent further submitted that the appellant's application was devoid of merit and was rightly dismissed by the trial court. The 1<sup>st</sup> respondent relied on the case of *Kestem Company Ltd v Ndala Shop Limited & 2 others* (2018) eKLR, *Ivita v Kyumbu* (1975) eKLR, *Teachers Service Commission v Simon P. Kamau & 19 others* (2015) eKLR.
  12. It was further submitted that the appellant is estopped from denying the actions of her agent (the then advocates on record) who undertook procedural withdrawal of the entire suit. The 1<sup>st</sup> respondent cited Section 120 of the *Evidence Act* and relied on the case of *Titus Muiruri Doge v Kenya Cannery Ltd* (1988) Eklr, *Washumbu (DA) Company Limited V City Building Limited & another* (2019) eKLR. It is the 1<sup>st</sup> respondent's submissions that the decision of the trial court that the suit was legally withdrawn was correct. The 1<sup>st</sup> respondent further submitted that they would suffer irreparable prejudice since



- there would be less or no evidence on their part to defend the suit. The 1<sup>st</sup> respondent submitted that the appeal is mala fides and devoid of merit and should be dismissed with costs to the 1<sup>st</sup> respondent.
13. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents cited Article 159 (2) (c) of *the constitution* and submitted inter alia, that the appellant has not demonstrated her efforts to exhaust the Alternative Dispute Resolution mechanisms established under the *Land Adjudication Act* and the *Land Consolidation Act* and that the consent of the Land Adjudication Officer as tendered by the appellant could not confer jurisdiction on the trial court where none existed. They relied on the case of *Stephen Kungatia & 2 others and Speaker of the National Assembly v James Njenga Karume* (1992) eKLR.
  14. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that the trial Magistrate exercised his discretion judiciously in dismissing the appellant's application for review and relied on the case of *Mbogo & another v Shab* (1968) EA 93, *Matiba v Moi & 2 others* (2008) KLR 670, *Josephat Oginda Sasia v Wycliffe Wabwile Kiiya* (2022) eKLR, and *Edney Adaka Ismail v Equity Bank Limited* (2014) eKLR, arguing that the appellant never followed up her matter for over ten (10) years. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents supported the decision reached by the learned trial magistrate and submitted that the appeal is a brazen abuse of the court process, vexatious and frivolous in law.
  15. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents prayed for costs of the appeal and relied on the case of *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co Ltd* (1967) EA 287 and *Joseph Kiruja Maingi v Rose Nambura & 2 others* (2021) eKLR.

#### **Analysis and determination**

16. I have perused and considered the record of appeal, the grounds of appeal and the submissions by the parties as well as the authorities relied on. This being a first appeal, I am conscious of the court's duty and obligation to evaluate, re-assess and re-analyze the evidence on record to determine whether the conclusion reached by the learned Magistrate were justified on the basis of the evidence presented and the law. The sole issue for determination in this appeal as I can deduce from the grounds of appeal is whether the learned trial magistrate wrongly exercised his discretion in dismissing the appellant's application dated November 26, 2020.
17. The application dated November 26, 2020 mainly sought to review and set aside the order dismissing the appellant's suit for want of prosecution and have the suit reinstated for hearing on merits.
18. Order 17 Rule 2(1) of the *Civil Procedure Rules* which governs dismissal of suits for want of prosecution provides as follows;
 

“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,”
19. A reading of Order 17 Rule 2 is clear that a suit qualifies to be dismissed for want of prosecution if no application has been made or step taken in the suit by either party for at least one year preceding the notice to show cause given by the court or the presentation of an application seeking dismissal of the suit. The principles governing applications for review are now well settled. In the case of *Evan Bwire v Andrew Nginda*, Civil Appeal No 103 of 2000, Kisumu ( 2000) LLR 8340 the court held:
 

“An application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or the case afresh”



20. My perusal of the lower court proceedings and file discloses that the suit was withdrawn pursuant to a notice filed by the advocate then on record for the appellant. The appellant's application dated November 26, 2020 was seeking orders to set aside the order dismissing the suit for want of prosecution and for the suit to be reinstated. However, as rightly found by the learned trial magistrate, there was nothing to dismiss since the suit had already been withdrawn by the appellant herself through her own advocate then on record. It is not disputed that the firm of Mbogo & Muriuki Advocates had instructions to act for the appellant in the suit. The said firm filed a notice of withdrawal of suit on behalf of the appellant. Any decision taken or made by the appellant through her advocate would be binding on the appellant unless fraud or collusion has been shown. In this case, fraud or collusion has not been alleged or proved against the firm of Mbogo & Muriuki Advocates who were then on record for the appellant. The learned trial magistrate, in my view did not err in dismissing the appellant's application dated November 26, 2020. This is because at the time the application was filed on November 26, 2020, there was no suit pending, the same having already been withdrawn way back on October 4, 2013.
21. It is my view that based on the material on record, the learned magistrate was justified in arriving at the decision he made. The findings and holding by the learned magistrate were well founded and I find no basis to interfere with the same.
22. In the result, I find no merit in the appellant's appeal and the same is dismissed with costs to the respondents.

**DATED, SIGNED AND DELIVERED AT MERU THIS 18<sup>TH</sup> DAY OF JANUARY, 2023.**

**In presence of**

C.A Kibagendi

No appearance of appellant

No appearance for respondent

**C.K YANO**

**ELC JUDGE**

