



**Kiboi v Waboi & another (Environment and Land Appeal  
19 of 2019) [2023] KEELC 765 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 765 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT AND LAND APPEAL 19 OF 2019  
JO OLOLA, J  
FEBRUARY 16, 2023**

**BETWEEN**

**JOHN GITONGA KIBOI ..... APPELLANT**

**AND**

**DANIEL MUNDIA WABOI ..... 1<sup>ST</sup> RESPONDENT**

**JAMES GATHUA NDIRITU ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By the notice of motion dated May 18, 2022, John Gitonga Kiboi (the appellant/applicant) prays for an order reinstating the appeal which was dismissed on April 19, 2022.
2. The application which is supported by an affidavit sworn by the appellant is premised on the grounds:
  - (a) That the appellant was never served with a hearing notice and the matter was heard via microsoft teams/video link in which he never participated.
  - (b) That the appellant could not access the court registry due to the Covid-19 pandemic and only came to learn recently that the appeal was dismissed for want of prosecution; and
  - (c) That if the appeal is not reinstated, the respondents might forcibly confiscate the appellant's land thereby rendering him destitute.
3. Daniel Mundia Waboi (the 1<sup>st</sup> respondent) is not opposed to the application. In his replying affidavit sworn and filed herein on July 18, 2022 the 1<sup>st</sup> respondent avers that the suit land is family land and that the same should be heard and disposed of on merit.
4. The 2<sup>nd</sup> respondent – James Gathua Ndiritu is however opposed to the reinstatement of the appeal. In his replying affidavit sworn and filed herein on June 22, 2022, the 2<sup>nd</sup> respondent avers that the



- application is frivolous, vexatious and an abuse of the court process as the same is solely aimed at denying him the fruits of his judgment.
5. The 2<sup>nd</sup> respondents further avers that the applicant is guilty of laches having brought the application after an unreasonably delay and merely as an afterthought.
  6. The 2<sup>nd</sup> respondent further accuses the applicant of misleading the court in that as at the time when the matter was dismissed on December 26, 2021 the normal operations of the court had resumed.
  7. The 2<sup>nd</sup> respondents asserts that he had all along been in occupation of the suit land and that there is nothing to confiscate from the applicant. He accuses the applicant of filing the appeal in 2019 and failing to explain why the same was not prosecuted for more than 2 years.
  8. I have carefully perused and considered the application as well as the response thereto. I have similarly perused and considered the submissions filed herein by the appellant.
  9. By this present application, the appellant herein urges the court to reinstate his appeal which was dismissed for want of prosecution on April 19, 2021 and to have the same heard and determined on merit.
  10. The appellant avers that he was never served with a hearing notice and that he came to learn that the matter was heard via the microsoft teams/video link to which he had no access. It is further his case that due to the Covid-19 pandemic, he was unable to access the court registry and only came to learn recently that the appeal was dismissed for want of prosecution.
  11. As was stated in [John Nabashon Mwangi vs Kenya Finance Bank Limited \(in Liquidation\)](#) (2015) eKLR:

“The fundamental principles of justice are enshrined in the entire constitution and specifically in article 159 of the [Constitution](#). article 50 coupled with article 159 of the [Constitution](#) on the right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such a matter of reinstatement of a suit which has been dismissed by the court. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that the courts should sparingly dismiss suits for want of prosecution, for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment...”
  12. In the matter before me, the appellant avers that he did not receive a hearing notice to be available in court on the date when his appeal was dismissed. Rather than demonstrate when and how if at all the appellant was served, the 2<sup>nd</sup> respondent opposes the application on the grounds *inter alia* that it is frivolous and aimed at denying him the fruits of his judgment.
  13. I have looked at the record herein and it is apparent that this matter came up for mention before the court on July 30, 2020, on February 8, 2021, on March 10, 2021 and on April 19, 2021 when it was dismissed for want of prosecution. In all those instances, the 2<sup>nd</sup> respondent was represented in court and always undertook to serve notice upon the appellant.
  14. Regrettably I am unable to find on the record any single affidavit of service that was filed by the respondent indicating service of a hearing notice upon the appellant.
  15. It follows that I am persuaded that there was no service of the hearing notice on the date this matter was dismissed and that I find merit in the application.



16. Accordingly i allow the motion dated May 18, 2022 and reinstate the appeal filed herein for hearing and determination on merit.

17. The costs of the application shall be in the appeal.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI  
THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2023.**

In the presence of:

Mr. John Gitonga Kiboi – Appellant

No appearance for the 1<sup>st</sup> Respondent

Mr. Mshila for the 2<sup>nd</sup> Respondent

Court assistant - Kendi

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**J. O. OLOLA**

**JUDGE**

