Republic v Uasin Gishu District Land Disputes Tribunal & another; Kemboi (Interested Party); Keino (Exparte Applicant) (Judicial Review Application 14 of 2009) [2024] KEHC 14960 (KLR) (29 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14960 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

JUDICIAL REVIEW APPLICATION 14 OF 2009

JRA WANANDA, J

NOVEMBER 29, 2024

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

REPUBLIC ..... APPLICANT

AND

UASIN GISHU DISTRICT LAND DISPUTES TRIBUNAL ..... 1ST RESPONDENT

CHIEF MAGISTRATE, ELDORET LAW COURTS ..... 2ND RESPONDENT

AND

KIPKOROM KEMBOI ..... INTERESTED PARTY

AND

HEZEKIAH KIPCHOGE KEINO ..... EXPARTE APPLICANT

RULING

1. The Application herein seeks reinstatement of this Judicial Review Cause which was dismissed for want of prosecution on 7/07/2015, 9 years ago.

2. The subject matter of the case is an old dispute between the ex parte Applicant and the Interested Party over ownership and/or division of the parcel of land known as Cheptiret/Cheplaskei Block 4 (Saruiyot)/45. The dispute seems to have its origin from a land sale transaction alleged to have been entered into around the year 1976 between the ex parte Applicant (as vendor) and the Interested Party (as purchaser). That dispute, or matters related thereto, has been through the High Court before, and moved to the Court of Appeal whose outcome seems to have been in favour of the ex parte Applicant.

However, offshoots of the dispute seem to have subsequently resurfaced at the Lands Dispute Tribunal which heard the matter and then gave an Award in the year 2007 dividing the parcel of land between the said parties. The ex parte was aggrieved by the Award but the same was nevertheless, later adopted by the Chief Magistrate's Court in the same year 2007 as a Court order.

3. It is the said Award of the Land Disputes Tribunal which the ex parte Applicant sought to challenge by instituting this Judicial Review Cause. Needless to state, this matter was filed before the High Court because at the time that it was filed, in the year 2007, the Environment & Land Court (ELC) which is presently the Court clothed with the jurisdiction to determine disputes relating to or arising from land use, ownership or possession, had not yet been created.

4. This Cause has itself had a chequered history. It was commenced in Nairobi on 3/09/2007 when the ex parte Applicant filed Nairobi High Court Miscellaneous Civil Application No. 983 of 2007 whereof he sought and obtained leave to institute Judicial Review proceedings, which he then filed. The matter was later in March 2009 transferred to this High Court at Eldoret and assigned the present case number, namely, Eldoret High Court Miscellaneous Civil Application No. 14 of 2009. The Interested Party however died on 19/04/2010 and was substituted by his widow as his Legal Representative. Around this time, Messrs Chemwok & Co. Advocates came on record for the Interested Party.

5. The matter however went silent with no action for a long time. For this reason, it was subsequently, 5 years later, on 7/07/2015, dismissed for want of prosecution vide the orders made by Hon. Justice Mativo (as he then was).

6. It is in reaction to the said dismissal of the suit that the ex parte Applicant, on 28/04/2021, 6 years after the dismissal, through his then Advocates, Messrs Ochieng, Onyango, Kibet & Ohaga & Co. filed the instant Application dated 20/04/2021 whereof he sought reinstatement of the Cause. Specifically, the orders sought are as follows:

    i. [Spent]

    ii. [Spent

    iii. The Court be pleased to set aside the orders issued by the Honourable Justice J. Mativo on 7th July 2015 by which he dismissed this Judicial Review Cause for want of prosecution.

    iv. Consequent upon the grant of prayer Number 3 above, the Court be pleased to issue such other and/or further directions for the expeditious hearing of this Judicial Review Cause, including the substitution of the interested party to these proceedings, on its merits.

    v. The costs of this Application be in the main Cause.

7. The Application is supported by the Affidavit sworn by Elias Masika, the ex-parte Applicant's Counsel then having conduct of the matter.

8. Before the Application could be heard however, the Interested Party, through his Advocates, Messrs Kenei & Associates, filed Grounds of Opposition, together with a Notice of Preliminary Objection premised as follows:

> " This Honourable Court lacks the requisite subject matter jurisdiction to hear and determine the Motion and or take any further proceedings in the matter.

9. The basis of the Preliminary Objection was that the dispute herein being one relating to ownership of land, the forum with jurisdiction to hear and determine it is the Environment & Land Court. Being a challenge on jurisdiction, the Preliminary Objection was heard first. By my Ruling delivered on

23/06/2023, I dismissed the Objection and directed that the Application proceeds for hearing. This therefore is the long background preceding this Ruling.

10. Back to the Application, in his said Affidavit, Mr. Masika Advocate, deponed that upon filing the substantive Motion, and obtaining leave to file this Judicial Review Cause, the Court directed the parties to file their respective skeletal submissions and the matter was thereafter transferred to Eldoret for hearing and final disposal, that the ex parte Applicant complied with the directions and filed his Submissions on 24/7/2008, that as the Court proceedings show, ever since the institution of the case, only the ex parte Applicant has complied with the orders for filing of submissions, that none of the other parties has filed any pleadings and that the matter has, for all practical purposes, been pending only the Court's decision.

11. He deponed further that several factors have contributed to the delay in concluding the matter, among them the following critical matters: by the Notice of Motion filed on 30/4/2012, one Rodah Kemboi, the widow to the Interested Party, sought to be joined to the proceedings following the death of the Interested Party who died on 19/4/2010. He deponed that although the substitution was not sought within 1 year of the death, the ex parte Applicant conceded to the substitution by consent in the interests of justice, that the matter was then set down for Mention on 9/6/2012 to confirm filing of pleadings by the Interested Party but the same was never filed and the position remains so to date. He contended further that the ex parte Applicant subsequently learnt of the passing of the said Rodah Kemboi before the filing of her pleadings and the matter could not therefore be listed for hearing until there was an order substituting her with another party, and that the ex parte Applicant was not therefore in a position to proceed with the hearing of the matter with the Interested Party deceased.

12. He then deponed that further attempts by the ex parte Applicant to cause the matter to be listed for taking of directions were unsuccessful because the Court file could not be traced, that the ex parte Applicant has a justiciable cause of action which is based on a long-standing land dispute on which he has resided with his family for over 3 decades and that it is therefore in the interests of justice that he be afforded an opportunity to fully ventilate his claims. He urged further that the delay was further perpetuated by the onset of the Covid-19 pandemic which adversely affected operations of the Court Registry and efforts by the ex parte Applicant to trace the Court file and that in or about the month about April 2021 while pursuing the tracing of the file for purposes of setting it down for mention for directions, he learnt of the dismissal order made on 7/7/2015. According to him, the ex parte Applicant was never given any notice in writing by the Court prior to the dismissal, and consequently, he was not afforded an opportunity to show cause why the suit should not be dismissed and was, in effect, condemned unheard contrary to the rules of natural justice.

13. He urged that he filed the Application immediately upon learning of the dismissal from one Mr. Delmas Mwinamo Advocate, and submitted that rules of procedure require that an application of this nature be lodged and determined expeditiously, that that this is a proper case for the Court to uphold the principles of fair trial and the administration of justice without undue regard to procedural technicalities as provided in *the Constitution*, that besides, as the Court record shows, the ex parte Applicant filed his submissions in this matter a long time ago and all that remains is for the Court to deliver a Judgment. He urged further that the subject matter of these proceedings is the issue of occupation and ownership of land which was purchased by the ex parte Applicant over 30 years ago and which land his family has been occupying since then.

Response to the Application

14. The Application is opposed vide the Replying Affidavit sworn by one Noah Cheruiyot Kemboi who described himself as the Interested Party's duly appointed Administrator. The same was filed on 17/1/2021 through Messrs Kenei & Associates Advocates, the Interested Paty's current Advocates.

15. He deponed that the Application does not meet the threshold for reinstating a suit dismissed for want of prosecution, that the Applicant filed the instant suit in the year 2007 but did not progress it to hearing for a period of 8 years before the dismissal, which is an inordinate delay, and that the suit was dismissed after ascertaining that there was an inordinate delay in prosecuting it. He urged that the order for dismissal clearly indicates that the Applicant was issued with a Notice to Show Cause (NTSC) hence any assertion of non-service and being condemned unheard is false, that the Judge could not wrongfully indicate that the Applicant had been issued with a NTSC without being satisfied of the evidence of service, and that the Applicant deliberately delayed the matter actuated by a malicious intention to have the matter only proceed for hearing after the deponents' parents had died in order to give him an undue advantage. He contended further that his father, the Interested Party, died on 19/4/2010, before the matter could be progressed for hearing and that his mother, Rodah Kemboi, who had substituted their father as the Interested Party also died on 24/10/2015, after the suit had been dismissed, hence the insinuation to the contrary by the Applicant is false.

16. He further deponed that a period of more than 12 months has since lapsed after the Interested Party died and substitution has never been done hence the suit has effectively abated, and that the Applicant has not proffered any explanation for the failure to seek substitution of the Interested Party within the statutory timelines. He deponed further that the Application was filed more than 5 years after the dismissal which is an inordinate and inexcusable delay, that the Applicant has not proffered sufficient explanation for the delay and the reasons given are not merited, that the COVID-19 pandemic only arose in the year 2020 which is more than 4 years after the dismissal of the matter hence it could not have been an impediment to the filing of the Application. He contended further that the Applicant has also not produced any correspondence/evidence of communication with the Court to confirm that indeed there was a challenge on availability of the Court file.

17. He deponed further that the suit has been overtaken by events by dint of execution of the Decree issued by the Magistrate's Court hence reinstatement thereof will serve no purpose, and that the County Land Registrar and the County Surveyor have already carried out the implementation of the Decree the subject of these proceedings and reinstatement will not therefore serve the purpose of reversing the subdivisions process that has already been undertaken. He also contended that their parents were in a better position to defend the matter being the persons who had personal information with respect to the facts under contest hence reinstating the suit after their death will be prejudicial to their beneficiaries, that crucial witnesses have since died and this Court will no longer be in a position to consider their evidence hence reinstating the suit will grant an undue advantage to the Applicant. He also urged that there should be an end to litigation hence reinstatement of a suit more than 5 years down the line and after it has been overtaken by events will only result to unnecessary disruptions and prejudice to the parties.

Ex Parte Applicant's Further Affidavit

18. In a re-joinder, the ex parte Applicant, Hezekiah Kipchoge Keino, this time personally swore the Supplementary Affidavit filed on 2/2/2024. He reiterated that he was never given notice by the Court prior to the dismissal of the suit and neither were the other parties, that a perusal of the Court record has clearly confirmed that there is no NTSC to confirm that he was invited to show cause why the

suit should not be dismissed for want of prosecution and that in effect, he was condemned unheard contrary to the rules of natural justice, which anomaly this Court has the unfettered power to correct by allowing the Application.

19. He deponed further that upon the demise of the Interested Party, by the consent of the parties, the Interested Party was substituted by Rodah Kemboi vide the consent dated 28/5/2012, that the matter was then stood over generally on 16/10/2012 to give the Interested Party time file her response which however has never filed to date, that as at the time of dismissal of the suit on 7/7/2015, the said Rodah Komen was still alive thus the assertion that the suit had abated does not hold water. He deponed further that the Interested Party died on 24/10/2015, that at the time of filing this instant Application, the said Noah Cheruiyot Kemboi had already obtained Limited Grant of Letters of Administration ad litem on 23/7/2020 thus he had the full capacity to represent the estate of the Interested Party. According to him, the delay in prosecuting the matter was not only occasioned by the ex parte Applicant, but in equal measure by the Interested Party since the matter was on 16/10/2012 stood over generally to give the Interested Party time to file her response which he has never done. He contended that it will be in the interest of justice and fair play that the Application be allowed and the matter heard on merit rather than the same being prematurely determined on technicalities, that justice will be served if the suit is reinstated since land is an emotive issue, that all parties will have a chance to ventilate their grievances and that he has a triable case with a high chance of success.

Submissions

20. The Application was canvassed by way of written Submissions. The ex parte Applicant filed his Submissions on 22/8/2023 while the Interested Party filed on 18/1/2024. The 1st and 2nd Respondents, apart from not filing any responses to the Application, did not also file any Submissions.

Ex parte Applicant's Submissions

21. In support of the Application, Counsel cited the cases of Ivita vs Kyumbu [1984] KLR 441, the case of Eastern Produce Kenya Ltd v Rongai Workshop & Transporters Ltd & Another [2014] eKLR, and the case of Robert Kimani v Kenya Deposit Insurance Corporation (being sued as the Receiver Manager of Chase Bank Limited (in Receivership) [2022] eKLR. He then reiterated that at the time of the dismissal, the ex parte Applicant had fully complied with Court directions including filing its final Submissions and List of Authorities and that all that remained was for the Court to render its Judgment.

22. Counsel reiterated that the orders for dismissal should be set aside for the reason that no notice of the intended dismissal was served as required under Order 17 Rule 2 of the Civil Procedure Rules, and that dismissal of this Judicial Review Cause under Order 42 Rule 35(1) was a wrongful exercise of jurisdiction as the said provisions deal with dismissal of Appeals for want of prosecution. Counsel then repeated the history and background of the case as already set out hereinabove and submitted that neither the Interested Party nor the Respondents have to date, filed any pleadings and that as it stands now, the case is unopposed He pointed out that it is also clear from the body of the Order dismissing suit on 7/7/2015 that the dismissal was predicated upon "no satisfactory response" by the parties upon being given a NTSC and submitted that the same therefore recognized the importance of a notice prior to dismissal. In respect of his argument that the suit was wrongly dismissed under the provisions of Order 42, Rule 35(2) without service of notice, he cited the case of Cosmas Ndirangu Ngae v Attorney General [2017] eKLR.

23. Counsel then argued that the coram on the face of the Order shows that no party attended Court on the said 7/7/2015 when the case was scheduled for NTSC, that the order of dismissal should therefore

be set aside ex debito justititia and that the ex parte Applicant filed this Application immediately upon learning of the dismissal, and that the dismissal is therefore against the principles of fairness and natural justice. He submitted further that the Court should utilize the "virile and viable doctrine of judicial discretion" to draw from its reserve its residual source of powers, to do justice. According to him therefore, the Application meets the test to be applied in an application of the nature herein.

Interested Party's Submissions

24. Counsel for the Interested Party submitted that the Award and Decree challenged by the ex parte Applicant in this suit were directing for sub-division of the suit parcel of land between the ex parte Applicant and the Interested Party, that the Interested Party died on 19/04/2010 which is approximately 3 years after the filing of this suit and he died before the Applicant could progress the matter for hearing and that this is the first mark-up of the unfairness in the delay in prosecuting the matter. He submitted further that the Interested Party was substituted by his widow in the year 2012 but the widow also died in the year 2015, again, before the case could be progressed to hearing and after a period of approximately 3 years had lapsed from the time that she was brought into the suit, that in fact, she died after the suit had been dismissed and that this is the second mark of unfairness occasioned by the delay in prosecuting the matter.

25. Counsel submitted that the delay in prosecuting the case led to the Court commencing the process of the dismissal, that the Court issued NTSC but which the Applicant did not respond to thus leading to the dismissal for want of prosecution on 7/07/2015. He contended that the ex parte Applicant continued with his slumber until the year 2021 when the Interested Party commenced execution of the Decree and that the Application was filed 6 years after the dismissal. On the issue of delay, he cited the case of *Simon Wachira Nyaga Vs. Patrick Wamwirwa, Kerugoya Civil Appeal No. 211 of 2013*(2018) eKLR and the case of Geoffrey Kipyegon Moi V Linet Minagi Mshamba (2022) eKLR which, he submitted, referred to the Court of Appeal case of Cecilia Wanja Waweru v Jackson Wainanina Muiruri & Another [2014] eKLR. He then submitted that the Applicant has not proffered sufficient explanation for the delay in filing the Application and that the reasons given are not merited.

26. He pointed out that in the order for dismissal, Hon. Mativo J clearly indicated that the Applicant was served with the NTSC hence the assertion that he was not served and that he learnt of the dismissal from Advocate Mwinamo is false, that in any case, the Court is not required to serve notice, but to give notice which can be done through its official website or Cause List. He cited the case of Kestem Co. Ltd vs Ndala Shop Ltd & 2 Others [2018] eKLR and also the case of Fran Investments Limited vs. G4S Security Services Limited [2015] eKLR. He argued that the Applicant cannot be allowed to use COVID19 as a scapegoat as the pandemic only arose in the year 2020 which is 5 years after the dismissal hence that could not have been an impediment to filing of the instant Application and that even with the pandemic, litigants were still able to file and serve documents virtually and also attend Court virtually. He cited the case of George Peter Mutiso-V-Jimack Engineering Workshop Nairobi ELRC cause No.726 of 2011 (2017) eKLR. He also urged that the excuse that the file was missing is weak and baseless given that the Applicant has failed to tender evidence or produce any correspondence/ evidence of communication with the Court to demonstrate that allegation. He then cited the locus classicus case of Shah v Mbogo [1967] EA 116.

27. Counsel submitted that justice calls upon the Court to look into the circumstances of all parties to the suit before arriving at a determination, that the Interested Party's estate will suffer great prejudice if the suit is to be reinstated since a lot has gone on for the last 9 years after the suit was dismissed, and that the persons who would have defended the matter effectively are all deceased hence disenfranchising the Interested Party's case. He submitted further that the dismissal brought this suit to an end hence giving

the parties closure on the dispute, that it would be prejudicial to the parties to be taken back to the treacherous journey of dealing with a dispute which was already considered a bygone and that it is it not fair to re-open wounds that have taken years to heal and that reinstating the suit would take parties back to a period close to 10 years and they would then be forced to wait for a long time for justice. He cited the case of Sixon Kenya Limited v Mureti & Another (Cause 15 of 2017) [2023] KEELRC 1530 (KLR) and the case of Mobile Kitale Service Station vs. Mobil Oil Kenya Limited & another [2004] eKLR and submitted that the drafters of *the Constitution* had a clear intention and desire to expeditiously and effectively dispose of matters so that injustices caused by delay would be a thing of the past, and that Article 159 recognizes that "justice delayed is justice denied", and which means that justice is to all the parties, and not the Applicant only.

28. Counsel submitted further that in any event, while the Applicant is seeking for reinstatement of a suit challenging a Decree issued by the Magistrate's Court, the suit has now been overtaken by events by dint of execution of the Decree, that the Court should consider the principle that equity does not aid the indolent, but the vigilant. He cited the case of Selestica Limited v Gold Rock Development Ltd [2015] eKLR and urged the Court to find that reinstatement of the suit will not serve any utilitarian purpose, and will be acting in vain since the Land Registrar and Country Surveyor have already carried out the implementation of the decree.

Determination

29. The issue that arises for determination in this matter is "whether the dismissal of this Judicial Review Cause in the year 2015 for want of prosecution should be set aside and the suit reinstated".

30. In respect to dismissal of an action for want of prosecution, Order 17 Rule 2 of the Civil Procedure Rules provides as follows:

> "(1) 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."

31. It is not in doubt that where the Court has invoked the above provision and dismissed a suit for want of prosecution, it still possesses a wide discretion in deciding whether to allow an application for setting aside such order of dismissal. This discretion must however be exercised judiciously as was well-stated in the case of Shah vs Mbogo (1979) EA 116 as follows:

> "..... this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice."

32. When dealing with Applications for dismissal of suits for want of prosecution and/or for reinstatement of suits dismissed for want of prosecution, one of the factors that the Courts inevitably considers is the need for expeditious conclusion of cases. In regard thereto, Warsame J (as he then was), in the case of Mobile Kitale Service Station vs. Mobil Oil Kenya Limited & another [2004] eKLR (Warsame J) stated as follows:

> "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."

33. For the Court to exercise its discretion in favour of an Applicant seeking the setting aside of orders of dismissal of a suit for want of prosecution, the Court must be satisfied that there is "sufficient cause" or reason to warrant reinstatement. The term "sufficient cause" was defined by the Supreme Court of India in the case of Parimal vs Veena in the following terms:

> " sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously"

34. That above statement has been interpreted on many occasions, to mean that a Court, while deciding whether there is a "sufficient cause", must bear in mind the object of applying substantial justice to all the parties and that technicalities of the law should not prevent such application of substantial justice. The passage above has also been interpreted to mean that the test to be applied is whether the Applicant "honestly and sincerely intended to remain present when the suit was called for hearing" and that "sufficient cause" is thus the cause for which the Applicant could not be blamed for his absence. It is therefore is a question of fact, and there is no a straight-jacket formula of universal application.

35. Similarly, in the case of The Hon. *Attorney General vs the Law Society of Kenya & Another, Civil Appeal (Application) No. 133 of 2011* (UR), Musinga, JA explained that:

> "
>
> " 28. . "Sufficient cause" or "good cause" in law means:
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> "..... the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused". See BLACK'S LAW DICTIONARY, 9th Edition, page 251.
>
> Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events."

36. A common fallback ground for many litigants when articulating Applications for reinstatement after dismissal for want of prosecution, and even for Courts when allowing such Applications, is to attribute blame for the delay, laxity or inaction to the Counsel under the principle that "a party should not be punished for the mistakes of his Advocate". However, in the case of Savings and Loans Limited

vs. Susan Wanjiru Muritu Nairobi (Milimani) HCCC No. 397 of 2002, Kimaru, J (as he then was) cautioned as follows:

> " Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate's 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. For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgement that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant."

37. Another ground commonly resorted to in excusing such delay, laxity or inaction is to invoke the principle that "to err is human" and that therefore not all mistakes ought to be punished by the draconian step of dismissal of suits. This is what Apalo, J.A. (as he then was) appreciated in the case of Philip Chemowolo & Another v Augustine Kubede, [1982-88] KAR 103 at 1040 Apalo, J.A. (as he then was), when he held as follows:

> " Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline."

38. Another common ground is that the right to be heard is a constitutional guarantee that must never be curtailed. For this argument, I cite the Court of Appeal case of Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others [2013] eKLR, where the following was stated:

> " 22]. The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality."

39. The Court of Appeal, again, in the case of CMC Holdings Ltd vs James Mumo Nzioka (2004) KLR 173, guided as follows:

> " The discretion that a court of law has, in deciding whether or not to set aside ex parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a

proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error."

40. Lastly, in the case of Belinda Murai & 9 Others -Vs- Amos Wainaina [1982] KLR 38, the indefatigable C.B. Madan, JA (as he then was) pronounced himself in the following manner:

> "A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel the court may feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to have known better. The court may not forgive or condone it but it ought to certainly do whatever is necessary to rectify it if the interests of justice so dictate. The courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometime overrule."

41. The question that needs to be answered in this case is whether reinstating this suit would be a case of equity aiding the indolent and thus prejudicial to the interest of the Interested Party. In answering this question, I must state that the Court's responsibility is to administer justice between parties to a dispute brought before it. It is for this reason that Section 1B of the *Civil Procedure Act* requires that decisions must be made fairly, cases must be handled quickly and efficiently, and Court time and resources must be used efficiently. For this reason, Courts routinely set aside time and resources to identify and set down for dismissal, lawsuits that have been left dormant without activity from the parties for long period. This is because while such cases remain in the system as pending suits and thus adding to the backlog of cases within the judiciary leading to bad publicity and diminishing of public confidence in the efficiency of the judiciary, the parties may have long settled the matters out of Court, or the cases may have, for one reason or another, been overtaken by events, or the parties may have lost interest. In practice, notices are then issued to the concerned parties to show cause why such suits should not be dismissed and therefore removed from the list of pending cases.

42. As it oft happens however, sometimes such notices may not always reach the parties, or may not reach them in good time and the suits then end up being dismissed in their absence. As aforesaid, even where the Courts have dismissed matters in such manner for want of prosecution, parties remain at liberty to return to Court and ask for reinstatement. Where good reasons are presented for the delay to prosecute, the Courts will have no reason to decline an Application for reinstatement.

43. Applying the principles of law cited above to the facts of this case, as already recounted, this is an old matter. It was commenced on 3/09/2007 as Nairobi High Court Miscellaneous Civil Application No. 983 of 2007 before it was subsequently transferred to this High Court at Eldoret where it stayed dormant for a long time until it was dismissed for want of prosecution on 7/07/2015, more than 9 years ago. As further stated, the dispute itself begun way back in 1976 or thereabouts and has been through the High Court and the Court of Appeal before resurfacing, perhaps in a different face, at the Land Disputes Tribunal from where it moved to the Magistrate's Court and subsequently again found its way at the High Court.

44. In urging for reinstatement, the ex parte Applicant alleges that he only learnt of the dismissal of the suit in April 2021 as he was never given any notice prior to the dismissal and that therefore, he was not afforded an opportunity to show Cause why the suit should not be dismissed. According to him, he was in effect condemned unheard contrary to the rules of natural justice, that he has a justiciable cause

of action which is based on a long-standing land dispute and that several factors contributed to the delay in prosecution of the Cause.

45. Instead of striving to determine whether or not the ex parte Applicant was served with notice of the intended dismissal, my focus would be more on why, despite the matter being filed in 2007, by 2015 when it was dismissed, 8 years later, the ex parte Applicant had not yet prosecuted it. I say so because even assuming that notice was not issued as alleged, the ex parte Applicant is now before the Court and has now been availed the opportunity to explain and/or show cause why the suit should not have been dismissed. What then are the explanations given by the ex parte Appellant and are they convincing?

46. First, the Applicant claims that the Court file was missing. He has not however produced any evidence to support the allegation. No correspondence or communication of any kind has been produced to demonstrate that at any time the ex parte Applicant sought for the Court file and failed to access it. He also does not disclose the period of time when the file was allegedly "missing" noting that the matter has been at this Eldoret Court since 2009 when it was transferred here from the High Court at Nairobi, until 2015 when the suit was dismissed. For these reasons, the argument that the file was "missing" does not impress me and I reject it.

47. The ex parte Applicant has also alleged that the emergence of the COVID-19 pandemic also interfered with prosecution of the case. This allegation cannot also be correct since the pandemic only affected Court operations around the year 2020 and even so, for a short period. In any case, it did not paralyze Court operations. The effect was that most judicial activities were conducted through online media. A party seeking a hearing or a Mention date cannot therefore honestly claim that COVID-19 stopped him from moving the Court for such services. In any event, it is also not lost on me that the suit having been dismissed in 2015, by the time that COVID-19 reached these side of the world around 2020, the suit had already been dismissed 5 years before.

48. The ex parte Applicant also contends that the dismissal was made under Order 42 Rule 35(2) of the Civil Procedure Rules which was the wrong provision of the law because it deals with dismissal of Appeals to the High Court, yet the proceedings herein are of judicial review brought under Order 53 of the Civil Procedure Rules. I find this argument to be trivial and misconceived. The allegation that the suit was dismissed under Order 42 Rule 35(2) obviously stems from the fact that the Form that was filled and signed by the Judge refers to that provision. This cannot by any stretch of imagination be cited as an irregularity. It clearly does not affect the substance of the order and it is not an argument that I need to belabour. I do not want to believe that Counsel for the ex parte Applicant seriously wished to dwell on this line of argument in respect to an Application as serious as the one in contention here.

49. The other factor alleged by the ex parte as having contributed to the delay in prosecuting the case is that the Interested Party died and had to substituted with his widow. This cannot also be a serious argument since the ex parte Applicant admits that such substitution was agreed upon by consent and therefore cannot have taken much time. In any event, I observe that the Interested Party died on 19/04/2010, the Application for substitution filed on 30/03/2012 and the substitution concluded vide the consent dated 28/5/2012. This being about 3 years before the dismissal, attributing the delay to the issue of substitution cannot be a valid argument.

50. The ex parte Applicant has also contended that the said widow of the Interested Party also later died and that the matter could not therefore be listed for hearing until there was an order substituting her with another party. The Applicant does not however disclose why he could not, at least, fix a Mention date before the Judge for purposes of seeking directions on the way forward and setting of timelines as is the normal practice in such circumstances.

51. The biggest vindication of the ex parte Applicant's laxity in this matter is however the fact that while this suit was dismissed on 7/072015, he says that he only learnt of the dismissal in April 2021, 6 years later, and upon which he filed the Application for reinstatement on 28/04/2021. To me this is the most overwhelming justification why the Application for reinstatement must fail. The fact that 6 years after the suit was dismissed, the ex parte Applicant was still not aware of the dismissal means that the he simply filed the suit for the sake of it. He immediately forgot about it and "abandoned" it, never bothering to find out its progress and never bothering to prosecute it. The allegation that the ex parte Applicant had already complied with Court directions and filed his Submissions does not change the obvious and shocking laxity shown by the ex parte Applicant. If by any chance the delay to prosecute was deliberate, and perhaps used as a tactic to forestall or frustrate the implementation of the Land Disputes Tribunal Award issued in the year 2007, then such tactic has woefully backfired. The lack of vigilance by the ex parte Applicant in respect to his own case is, in my view, inexcusable.

52. It is not in dispute that the Interested Party died on 19/04/2010, 3 years after the suit was filed, at the age of 80 years. His widow, who was then substituted in his place as his legal representative, too, later died on 24/10/2015, 8 years after the suit was filed, aged 87 years old. It is now the son who has been appointed as the legal representative. The ex parte Applicant had all the time to conclude the litigation when the now deceased parties were still alive but due to his laxity and delay, passage of time took its toll and natural attrition has now taken place. Under these circumstances, would it really be fair to reinstate the suit, 9 years after it had been dismissed for want of prosecution and thereby restart the suit afresh after the main protagonists are no longer alive? My unhesitant answer is no, it will not. On the contrary, reinstatement after all these years will greatly be prejudicial to the remaining members of the family of the Interested Party as they are unlikely to possess sufficient knowledge or information about the matter to enable them adequately defend the case whose genesis are matters that arose when they were either still toddlers or had not perhaps, not even been born.

53. In the same way that the ex parte Applicant has argued that Article 50(1) of *the Constitution* recognizes his right to be heard, the same Constitution also in Article 47(1) provides that "every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair." The two constitutional rights have to therefore be balanced since neither supersedes the other.

54. In this case, my finding is that no good reasons have been presented to justify an order for reinstatement of the suit.

55. I also take note of the contention by the Interested Party's side that the Decree of the Magistrate's Court issued in the year 2007 and which adopted the Award of the Land Disputes Tribunal has already been implemented as the sub-division exercise has long been concluded. I observe that the ex parte Applicant has not controverted this contention. If the alleged allegation is correct, then the dispute may as well be overtaken by events thus rendering any attempt to reinstate the suit to amount to a futile effort.

56. Before I pen off, I may just reiterate that this matter was filed at the High Court because at the time that it was filed, in the year 2007, the Environment & Lands Court which is presently the Court clothed with the jurisdiction to determine disputes relating to or arising from land use, ownership or possession had not yet been created. The matters in dispute herein being matters clearly under the jurisdiction of the Environment & Lands Court, had I allowed the instant Application and reinstated the suit, then I would have transferred the file to the Environment & Land Court for hearing and determination. Be that as it may, in view of my findings above, this issue is now merely academic.

Final orders

57. In the end, I rule and order as follows:

i. The ex parte Applicant's Notice of Motion dated 20/04/2021 is hereby dismissed.

ii As costs follow the event, I award costs of the Application to the Interested Party.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 29TH DAY OF NOVEMBER 2024

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

N/A for ex parte Applicant

N/A for Respondents

N/A for Interested Party

Court Assistant: Brian Kimathi