



REPUBLIC OF KENYA



Gitau & 2 others v Waichere & 3 others (Environment & Land Case 26 of 2017) [2023] KEELC 16500 (KLR) (23 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16500 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 26 OF 2017**

**LN GACHERU, J
MARCH 23, 2023**

BETWEEN

**WANJIKU GITAU 1ST PLAINTIFF
MWANGI GITAU 2ND PLAINTIFF
BERNARD GITAU 3RD PLAINTIFF**

AND

**SAMUEL MWANGI WAICHERE 1ST DEFENDANT
JAMES KINUTHIA WAICHERE 2ND DEFENDANT
JOHN KAMENDE WAICHERE 3RD DEFENDANT
FRANCIS MUKONO WAICHERE 4TH DEFENDANT**

RULING

- 1 The plaintiffs/applicants moved this court *vide* a notice of motion application dated October 7, 2022, and filed on the October 11, 2022, for orders:
1. That the honourable court be pleased to exercise its discretion in favour of the plaintiffs/applicants to set aside its dismissal order and reinstate the plaintiffs/applicants amended originating summons dated July 20, 2018, which was dismissed for want of prosecution and/or non-attendance and hear the same on merit inter-parties;
 2. That the honourable court be pleased to grant a temporary stay of execution of the defendants/respondents' certificate of costs taxed against the plaintiffs/applicants in the sum of Kshs 129,620/=, pending hearing and determination of the summons;



3. That the honourable court be pleased to stay proceedings in Muranga Chief Magistrate's ELC case No E067 of 2022, pending hearing and determination of the plaintiffs/applicants originating summons;
 4. That the honourable court do make any such further orders and issue any other relief it may deem as just to grant, in the interests of justice;
 5. That the costs of the application be in the cause.
- 2 The application is supported by the supporting affidavit of Mwangi Gitau, the 2nd plaintiff/applicant herein, sworn on the October 7, 2022. It is his disposition that on or about September 2022, the plaintiffs/applicants were served with a Plaint in relation to Muranga Chief Magistrates ELC Case No E067 of 2022, seeking their eviction from the suit land. Then they approached Muranga Court Registry, and upon perusal of this suit, they realised that the same had been dismissed with costs for want of prosecution and/or non- attendance.
- 3 He further contended that when this suit came up for hearing, their advocates on record, Mwangi Kamau & Co Advocates, failed to attend court and their suit was dismissed for non-attendance, and the said advocate never advised them about the said dismissal; That upon learning the above, they immediately instructed the law firm of M/S Mosoti & Co Advocates, to file the instant application dated the October 7, 2022, seeking to set aside the orders dismissing the originating summons among other prayers.
- 4 He depones that the plaintiffs/applicants have been in occupation of the suit land since 1968, over 54 years, and they have nowhere else to move to, hence they are likely to be rendered destitutes as a result of the eviction order sought in Muranga Chief Magistrates ELC Case No E067 of 2022; That if they are not allowed a reinstatement of this suit, they will be shut out from hearing of their case on merit.
- 5 It is his further disposition that they should not be punished for a mistake that is not of their doing. Further, that it would be unfair to dismiss their suit while they would wish to prosecute the said case on merit. That no prejudice will be suffered by the defendants/respondents since they will have a chance to defend the suit.
- 6 The application is opposed *vide* the replying affidavit of the defendants/respondents advocate on record, James Mwangi Ben, sworn on the November 28, 2022. It is his averments that this is a concluded matter and a final judgement has been issued, and hence the change of advocate dated the October 7, 2022, is void and incompetent, and all documents filed by said advocate should be struck out or expunged.
- 7 It was his contention that the plaintiffs/applicants had filed this suit in the year 2017, and after exhibiting lack of interest and laxity in the matter, the honourable court issued a final order for dismissal of the suit. That the instant application is belatedly brought to court as an afterthought. Additionally, that the issues raised and the orders sought in the application are res-judicata, and the only recourse available for the applicants is to appeal the orders of the court.
- 8 It was his further averments that the entire object and purpose of the originating summons has been overtaken by events since there is a court order touching on the same suit property being land parcel No Loc.7/Ichagaki/240. That there is a suit for eviction pending before the court being Murang'a Chief Magistrate's Court; ELC Case No 067 of 2022. That the costs of the suit as regarding the originating summons was taxed by the court with participation of the then plaintiff/applicant's advocates.
- 9 The matter was dispensed with by way of written submissions. The plaintiffs/applicants filed their written submissions on the January 26, 2023, wherein they submitted that the suit herein relates to



- ownership of land, which is an emotive issue, and therefore, in the best interest of justice, the suit should be reinstated, even if on some conditions would be imposed. That the plaintiffs/applicants are likely to be forever banished from the corridors of justice, and would suffer the risk of being rendered destitutes, unless the suit is reinstated and heard on merit.
- 10 It was further submitted by the plaintiffs/applicants that they are quite inexperienced in both legal matters and technological advances and could not possibly have comprehended the court proceedings, and therefore, they would be exposed to unnecessary hardships and legal liability in a matter that they did not have a chance to state their case. Further that the inadvertent error and/or mistake occasioned by their previous advocates on record, should not be visited on them since they are laymen and were wholly dependent on their previous advocates on record.
 - 11 The applicants further submitted that the dismissed suit is arguable, has merit and raises pertinent and triable issues of law and fact, with high chances of success. That the defendants/respondents will not suffer any prejudice if the suit is reinstated. Further, that the overriding objective of the constitutional and statutory framework on civil procedure is to achieve substantive justice for the litigants, as informed by article 50 of the [Constitution of Kenya](#) , which secures the right to a hearing before the court.
 - 12 Further that the applicants have never been given any notices, served with court documents, summoned as witnesses, nor were they privy to proceedings in ELC Case No 349 of 2017, and therefore it cannot be said that they are bound by any judgement or orders emanating from that suit; Again that any inconveniences that might be suffered by the respondents herein as a result of reinstatement of the suit can be adequately remedied through an award of costs.
 - 13 The applicants relied on the case of [Mohammed Ali Issak v Garissa Maize Millers](#) (2021) eKLR, where the court in determining whether the orders of striking out the suit for want of prosecution should be set aside, considered the provisions of order 17 rule 2 of the [Civil Procedure Rules](#) and opined that the demise of the plaintiff's former advocate countered by the inexperience of the plaintiff in both legal and technological advances are credible reasons afforded for his non-attendance.
 - 14 The applicants also relied on the case of [Gold Lida Limited v NIC Bank Limited & 2 others](#) (2018) eKLR, where the court while reinstating the suit that had been dismissed for failure to take steps to prepare the suit for hearing, opined that article 50 of the [Constitution](#) secures the right to a fair hearing before any court , which right, the court is obligated to safeguard and further that inconveniences suffered by the defendants as a result of reinstatement of the suit can be adequately remedied through an award of costs.
 - 15 The defendants/respondents on their part submitted that the dismissal orders having been issued on the January 28, 2020, then the present application is a belated afterthought and if the applicants are dissatisfied by the orders of the court, they ought to have filed an appeal to challenge the orders of this court, since the court has now become functus officio.
 - 16 It was the defendants/respondents further submissions that there is already a judgement of this court in ELC case number 349 of 2017, which judgement is a legal and final dealing with the same subject matter Loc 7/Ichagaki/240, and the plaintiffs/applicants are mischievously moving the court to review that judgement; and further that the present application is overtaken by events and the issues raised in the application are res judicata.
 - 17 It was also submitted that the present advocates M/S Mosoti & Co Advocates, are illegally on record and cannot purport to file any pleadings on behalf of the plaintiffs/applicants, since this matter has a final judgement and that no leave of court was sought allowing them to come on record to substitute



the law firm of M/S Mwangi Kamau & Co Advocates. Further that the application herein should be expunged for being incompetent.

18 The respondents relied on the following cases:

Elosy Murugi Nyaga v Tharaka Nithi County Government & another (2020) eKLR; where the court while dismissing the claimant's application to set aside an order dismissing the applicant's suit for non-attendance, held that dismissal of cases in summary procedure may be draconian, but when the occasion calls for such action, the court should not shy away from taking such measures.

Virginia Muchandi Muthengi v Elisha K Njagi (2021) eKLR; and *Rayat Trading Co Limited versus Bank of Baroda & Tetezi House Ltd* (2018) eKLR;

19 This court has perused the pleadings, submissions and authorities cited by the parties herein, and has noted that the plaintiffs/applicants *vide* an amended originating summons in ELC 26 of 2017, dated the July 20, 2018, sought for orders of adverse possession of half of the suit property Loc.7/Ichagaki/240, measuring 0.8 acres from the defendants by virtue of allegedly being in a continuous and uninterrupted occupation of the said parcel of land since the year 1968.

20 The matter was dismissed by the court on the January 28, 2020, for want of prosecution/non-attendance of the parties. The bill of costs was taxed on the December 17, 2021, and the plaintiffs/applicants were condemned to pay the sum of Kshs 129, 620/=.

21 The plaintiffs/applicants have moved this court *vide* the instant notice of motion seeking the orders enumerated herein above.

22 The issues for determination are:-

- i. Whether the application by the plaintiffs/applicants raises issues that are res judicata;
- ii. Whether this court should set aside its dismissal order and reinstate the plaintiffs/applicants amended originating summons dated the July 20, 2018;
- iii. Whether this court should grant the applicants a temporary stay of execution of the respondents' certificate of costs taxed against the applicants in the sum of Kshs 129, 620/=; and
- iv. Whether this court should stay proceedings in Muranga Chief Magistrate's ELC case No E067 of 2022, pending the hearing and determination of the applicants originating summons.

i. Whether The Application By The Plaintiffs/applicants Raises Issues That Are Res Judicata;

23 On whether the application raises issues that are res judicata, the defendants/respondents submitted that there is already a judgement of this court in ELC Case number 349 of 2017, which judgement is a final judgment touching on the suit parcel of land known as Loc.7/Ichagaki/240, and the applicants are by the instant application, seeking to move this court to review that said judgement. Further that the instant application has been overtaken by events and raises issues that are *res judicata*.

24 The doctrine of *res judicata* is found in section 7 of the *Civil Procedure Act*, which provides; -

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court .”



25 The Court of Appeal in the case of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* (2017) eKLR, held as follows: -

“Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in distinctive but conjunctive terms:

- a) The suit or issue was directly and subsequently in issue in the former suit.
- b) The former suit was between the same parties or parties under whom they or any of them claim.
- c) Those parties were litigating under the same title.
- d) The issue was heard and finally determined in the former suit.
- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

26 Although the defendants/respondents claim that the application raises issues that are *res judicata*, they have not demonstrated that the issues in this application were directly and subsequently in issue in ELC No 349 of 2017. That the former suit was between the same parties as the present application, and that the parties in the former suit were litigating under the same title.

27 A careful examination of the court records reveals that ELC Case No 349 of 2017, was for the dissolution of a trust and subdivision of the suit property being land Loc.7/Ichagaki/240 amongst the defendants thereon. The present application deals with the issue of reinstatement of a suit, which suit had sought claim of adverse possession. The plaintiffs/applicants in this suit were also not parties to ELC No 349 of 2017, since the said suit involved the defendants herein, with the 2nd, 3rd and 4th defendants being the plaintiffs in that suit. The respondents assertions that the application herein raises issues that are *res judicata* cannot therefore stand and should be dismissed.

ii. Whether this Court should set aside its dismissal order and reinstate the applicants amended Originating Summons dated the July 20, 2018

28 The plaintiffs/applicants herein, have stated in their supporting affidavit and submissions that their failure to prosecute the matter was not due to any fault of their own, but was rather a failure of their former advocate, who did not attend court when the matter came up for hearing. Further that the said advocate did not inform them nor guide them through the court process; and they only got to know about the dismissal orders on or about September 2022, after they were served with a plaint and summons to enter appearance in Muranga ELC case No E067 of 2022.

29 The law on reinstatement of suits, is found in order 12 rule 7 of the *Civil Procedure Rules, 2010* which state as follows:

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.”

30 It is trite that reinstatement of suits is a matter of judicial discretion, which discretion ought to be exercised in a just and judicious manner. The court in *Bilha Ngunyo Isaac v Kembu Farm Ltd & another* (2018)eKLR, quoted with approval the decision of the court in *Shah v Mbogo & another* (1967) EA 116, where the court expressed itself on the matter of discretion as follows:



- 31 The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.
- 32 The court records show that when the matter was dismissed for want of prosecution and/or non-attendance, none of the parties nor their advocates were present in court on the date of the hearing, which was fixed by consent on the December 2, 2019. It can also be seen from the court records that before the suit was dismissed for non-attendance the parties had attended court severally but the plaintiffs/applicants were always having excuses to have the suit adjourned. It was indication at one time that the matter was being negotiated out of court.
- 33 The applicants filed this application for reinstatement in court on the October 11, 2022, after a period of over 2 years since the dismissal of the matter.
- 34 Is there a plausible explanation for the inordinate delay given? The applicants have not demonstrated the steps they took to follow up on the progress of their matter with their former advocate. If the applicants had taken such steps, they would have been present in court on the date of the hearing of their suit, and also they would have found out sooner that their suit had been dismissed for want of prosecution and/or non-attendance.
- 35 The Court of Appeal in *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR; stated as follows: -

It is not enough for a party in litigation to simply blame the advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

- 36 In *Rajesh Rughani v Fifty Investments Limited & another* [2016] eKLR; the Court of Appeal at Nairobi, held as follows: -

Our re-evaluation of the record leads us to conclude that no credible, satisfactory and sufficient explanation for delay has been given. It is insufficient to blame previous counsel on record without an explanation as to the action taken by the litigant to show he did not condone or collude in the delay. It is our considered view that the judge did not err in finding that the delay was not only inordinate but unexplained.”

- 37 This court has considered the reasons given by the applicants for non-attendance of the hearing of their suit on the January 28, 2020, and for the delay in filing the instant application, and there being no reasonable explanation on the part of the plaintiffs/applicants, this court has come to the conclusion that the applicants have been indolent and are deliberately delaying the course of justice. The application for reinstatement of the suit has no merit, since no plausible explanation for the inordinate delay has been given.

iii. Whether this Court should grant the applicants a temporary stay of execution of the Respondents’ certificate of costs taxed against the applicants in the sum of Kshs. 129, 620/=

- 38 Given that this court has dismissed the application for reinstatement of this suit, there is no need to deny the defendants the fruits of their judgement. This court declines to grant a temporary stay of execution of the respondents’ certificate of costs, on the grounds given. Since this was not reference against the bill of costs, and the court will not comment on the merit of the said bill of costs.



iv. Whether this Court should stay proceedings in Muranga Chief Magistrate's ELC case no. E067 of 2022, pending the hearing and determination of the applicants Originating Summons

39 This court having declined to reinstate the applicants' suit, it cannot therefore stay the proceedings in Murang'a Chief Magistrate's ELC Case No E067 of 2022. Let that suit be prosecuted and be determined on merit.

40 Having now carefully considered the instant notice of motion application dated October 7, 2022, the court finds it not merited and the said application is dismissed entirely with no orders as to costs.

It is so ordered.

Dated, signed and delivered virtually at Murang'a this 23rd day of March, 2023.

L. GACHERU

JUDGE

Delivered online in the presence of;

Lily Mwende - Court Assistant

Ms Mukuria for the Plaintiffs/Applicants

Defendant/Respondent - Absent

L. GACHERU

JUDGE

23/3/23

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