



REPUBLIC OF KENYA



**Mohammed & another v Shimanyula & 3 others (Civil Case
1 of 2021) [2023] KEHC 2890 (KLR) (31 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2890 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL CASE 1 OF 2021
PJO OTIENO, J
MARCH 31, 2023**

BETWEEN

ZENAH MAKOKHA MOHAMMED 1ST PLAINTIFF

MARTHA ATIENO ONYANGO 2ND PLAINTIFF

AND

THOMAS SHIMANYULA LEVI 1ST DEFENDANT

JOYCE PACILISHA SHIMANYULA 2ND DEFENDANT

PAWABA AUCTIONEERS 3RD DEFENDANT

FAMILY BANK LIMITED 4TH DEFENDANT

RULING

1. By a Notice of Motion dated February 4, 2023, the Plaintiff/Applicant prays, in the main, that the dismissal orders of January 31, 2023 be set aside, the suit reinstated and an order of temporary injunction does issue to restrain the sale of the suit property, Butsotso/Shikoti/2866 pending determination of the suit.
2. The facts set out to found the application are that the failure to comply with the directions of the Court dated December 6, 2022 was due to ill health of the 2nd Plaintiff and absence of the 1st Plaintiff from Kenya. Those facts are reiterated in the Affidavit sworn by Counsel in support of the application which Affidavit then annexes documents to show sickness by the 2nd Plaintiff but there is nothing to show that the 1st is out of Kenya.
3. When served, the application was resisted by only the 3rd Defendant on the strength of the Replying Affidavit sworn by one Silvia Wambani, an employee of the 3rd Defendant who however does not disclose her position in the company. The Affidavit underscores the fact that the suit having been filed in 2021, to restrain in realization of the 3rd Defendant's security over the suit property, an interim order



was obtained which has occasioned further loss to the said Defendant yet the Plaintiffs have not been eager to have the matter prosecuted till the December 6, 2022 when the matter was mentioned and the Court gave directions towards hearing which obligated the Plaintiff to file compliance documents within a time frame and set down the matter for case conference on the January 25, 2023 but the Plaintiff still failed to file and serve list of witnesses and witness statements hence the suit was dismissed for that failure.

4. It was underscored that despite the proceedings having been conducted virtually and a mention date fixed in the presence of parties, neither the Advocate nor Client attended Court on the January 25, 2023 hence the dismissal. The Affidavit then delves into what is headed factual arguments which the Court considers to affront the provisions of Order 19 limiting contents of an Affidavit to factual information within the deponents own knowledge or where it is out of information the sources thereof and mitigating against arguments.
5. The Respondent additionally filed a Supplementary Affidavit whose gist was that after the dismissal, the 3rd Defendant had filed a bill of costs which had been scheduled for taxation hence the matter was wholly concluded and the 3rd Defendant became entitled to costs.
6. Parties equally filed submission which I have taken time to read and I have appreciated the position by both sides.

Analysis:

7. Even though the applications mainstay is the order for setting aside, whose principles are well settled and crystallised, the papers filed by both side besides lacking in elegance and precision in presentation, also lacks the accurate address of the issues for consideration and the applicable principles of law to be addressed.
8. Lack of elegance notwithstanding here is a case where the Applicant/Plaintiff prays for setting aside the orders by which the suit was dismissed.
9. On the December 6, 2022 the Court, as a means of case management, directed the Plaintiff to file list of documents and witness statements within thirty (30) days from that date, and in default the suit would stand dismissed. It was that order which the Court termed crystallised on the January 25, 2023.
10. In explaining the failure to comply, the Applicant says that while the 2nd Plaintiff was indisposed and hospitalized, the 1st had travelled outside Kenya hence the inability to comply with the Court orders.
11. It is the learning of this Court that where an order has issued against a party only on account of a default, the Court reserves the power to undo such an order to enable the dispute be heard on the merits. The only instances where a default Judgment would be left to stand is where the party in default has demonstrated evident design to delay or obstruct the cause and ends of justice or where there is no arguable case to be pursued once the default order is set aside.
12. In this matter, while the matter has been in Court since 2021, May, there is no evidence that the Plaintiffs/Applicants are deliberately delaying the matter to defeat or obstruct justice. To the contrary the Court takes the view that the suit by the Plaintiffs questions the propriety of the transaction between the 3rd Defendant and the 2nd Defendant on basis that their consent to charge, qua spouses, was never sought nor obtained.
13. The Court considers that a triable issue and notes that the 3rd Defendant pleads that it lacks knowledge of the marital status between the Plaintiff and the 2nd Defendant.



14. The Court exists for purposes of determining disputes as much as possible in the merits and by giving every citizen right to access justice and therefore it would be inimical to the very purpose of a Court to shut out a dispute that appears arguable on the face of it.
15. The Court finds that even though the conduct by the Plaintiffs is not beyond reproach and somehow indolent, there is an arguable case pleaded in the plaint that need not be shut out. I am reminded that even if I decline to set aside, the matter having not been heard on the merits, nothing stops the Plaintiffs from coming to Court afresh. That would expose both parties to double costs of litigations which is not the kindly of attribute the Court should cast of its process.
16. Lastly, the 3rd Defendant/Respondent has argued very forcefully that the matter is concluded and a bill of costs filed hence there is no recourse to setting aside. That assertion is not the correct exposition of the law. The law remains that the power to set aside an order by the Court, whenever a valid and justifiable reason exists, is available at any time.
17. In conclusion, the Motion dated February 14, 2023 is allowed in terms of prayer (b) in that the suit is reinstated to be heard in the merits but on condition that any documents the Plaintiffs wish to file to enable the matter proceed must be filed and served within seven (7) days from today. Once again time is of essence.
18. Having reinstated the suit and to preserve the substratum of the litigation and save parties costs of realization that may in the end be set aside, it is directed that the status quo be maintained in that the suit property be not sold pending further orders of the Court.
19. Parties shall attend Court on the May 15, 2023 for case conference and for hearing on the June 13, 2023.
20. Having necessitated the application, the Plaintiffs shall pay to the 3rd Defendant, who opposed the application, the costs of the application in all events.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 31ST DAY OF MARCH 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Mr. Mbetera for Namatsi for the Plaintiffs/Applicants

Ms. Ngui for Onsare for the 3rd Defendant/Respondent

Court Assistant: Polycap Mukabwa

