Maina & another v Kamau (Environment & Land Case 368 of 2017) [2023] KEELC 18387 (KLR) (29 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18387 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT & LAND CASE 368 OF 2017

CA OCHIENG, J

JUNE 29, 2023

BETWEEN

EDITH WANGUI MAINA ..... 1ST PLAINTIFF

JOSEPH GACHAGO KAMAU ..... 2ND PLAINTIFF

AND

DAVID KARANJA KAMAU ..... DEFENDANT

RULING

1. What is before Court for determination is the Plaintiffs Notice of Motion Application dated April 24, 2022 where they seek the following orders:

    1. Spent

    2. That the Order issued on November 10, 2021 by this Honourable Court dismissing the Plaintiffs' suit for want of prosecution be set aside and/or discharged and the suit reinstated for hearing on its merits.

    3. That the costs of this Application be in the cause.

2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Alfred Nyandieka. The Applicants explain that their advocate's failure to set down the matter for hearing is excusable. The deponent explains that between October 2021 and January 16, 2022, he was indisposed and his Assistant generated a request for mention for this matter and inadvertently sent the letter internally. He further explains that there was skeletal staff in his office during his absence culminating in the oversight in following up on a hearing date. The Applicants contend that neither their Advocates nor themselves were aware that this matter had been listed for dismissal for want of prosecution hence non-attendance on the dismissal date. Further, they have been at all times interested in prosecuting the suit. They claim that they have a meritorious and bona fide claim and pleadings having been closed,

the matter is ready for hearing and it is in the interest of justice that they are granted an opportunity to ventilate their case. They insist that the Defendant stands to suffer no prejudice by the setting aside and or discharging of the aforementioned order. They reiterate that the instant Application has been brought without unreasonable delay and it is in the interest of justice that the suit be heard on merit. They aver that after close of pleadings, the parties were engaged in negotiations in an attempt to amicably resolve the matter.

3. The Defendant filed a Replying Affidavit sworn by David Karanja Kamau where he explains when pleadings closed. He avers that he did not engage the Plaintiffs in any negotiations as alleged. He argues that the Plaintiffs ought to have taken steps to ensure this suit is heard and determined. Further, that the suit was properly dismissed for want of prosecution. He insists that the Plaintiffs' advocate's failure to prosecute their suit between July, 2018 and October, 2021 is inexcusable as no probable reason has been submitted to warrant the Honourable Court to disturb its orders dated November 10, 2021. He contends that the Plaintiffs have continued to occupy his land which is the subject of these proceedings and has been hugely benefitting therefrom. Further, that the instant Application is a delaying tactic and the Plaintiffs are using the court process to frustrate him.

4. The Plaintiffs filed a Further Affidavit where they reiterated their averments and insisted that the parties have been involved in negotiations as they are siblings. Further, that the suit land belongs to another of their siblings.

5. The Application was canvassed by way of written submissions.

Analysis and Determination

6. Upon consideration of the instant Notice of Motion Application including the respective affidavits and rivalling submissions, the only issue for determination is whether this suit should be reinstated for hearing and final determination.

7. The Plaintiffs in their submissions reiterates their averments as per their respective Affidavits and claim that setting aside ex parte orders is a discretion of the court. They contend that since the parties herein are family members, they have been involved in negotiations and their Counsel had been unwell, hence the delay to prosecute this matter can be deemed excusable. They aver that mistake to Counsel should not be visited upon them. Further, that failure to attend Court on the date the suit was dismissed was not deliberate. They state that they have a right to fair trial as enshrined in Article 50 of the *Constitution*. To support their arguments, they relied on the following decisions: *Mbogo V Shah* EALR 1908; *Ivita V Kyumbu* (1984) KLR 441; *Philip Chemwolo & Another V Augustine Kubende* (1982 – 88) 1 KAR 103; *Belinda Murai & Others Vs Amos Wainaina* (1978); *Pinnacle Projects Limited V Presbyterian Church of East Africa, Ngong Parish & Another* (2018) eKLR; *Mwangi S. Kimenyi V Attorney General* (2014) eKLR and *Joshua Chelelgo Kulei V Republic & 9 Others* (2014) eKLR.

8. The Defendant in his submissions reiterates his averments as per the Replying Affidavit and insists that the Court should not exercise its discretion to reinstate the Plaintiffs suit. To buttress his averments, he relied on the following decisions: *Museni & Another V Salim & 5 Others* (Environment & Land Case 287 of 2016) (2022) KEELC 3686 (KLR) (27 July 2022) and *Nambayi Multi-Purpose Co. Ltd V Agricultural Finance Corporation* (2013) eKLR.

9. On dismissal of a Plaintiff's suit for non-attendance and want of prosecution. Order 17 Rule 2 of the *Civil Procedure Rules* provide that:

> 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. (2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit."

10. The Defendant has opposed this Application insisting that the suit was properly dismissed for want of prosecution.

11. In *Ivita Vs Kyumbu* (1984) KLR 441 the court while dealing with an Application to reinstate a suit which had been dismissed for want of prosecution, stated that:

> The test applied by the courts in an application for the dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time. It is a matter in the discretion of the court."

12. In Shah v Mbogo and Another [1967] EA 116 it was held that:

> This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, 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."

13. Further, in the case of *Wachira Karani v Bildad Wachira* [2016] eKLR Mativo J held that:

> "Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause..."

14. While in the case of *CMC Holdings Limited -vs- Nzioki* [2004] 1 KLR 173 that:

> "In law, the discretion that a Court of law has, in deciding whether or not to set aside ex-parte order 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 not be proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error."

15. In the instant case, the Plaintiffs' Counsel explained that he was indisposed and there was a mistake in his office during his absence culminating in the failure to send the mention notice to court. As per the court proceedings on November 10, 2021, the court on its own motion dismissed the Plaintiffs' suit for want of prosecution. I note on April 5, 2019, the Counsel for the Plaintiff informed Court that parties were negotiating and sought for a date for pre-trial. On the said date, the Defendant was also absent. Further, on June 19, 2019 and September 25, 2019, the Defendant was absent from court. From the pleadings, the Defendant had also filed a Counter-claim and has not demonstrated why he failed to set down his Counter-claim for hearing. Insofar as the Plaintiffs' failed to set down this suit for hearing, it is trite that Article 50 of the *Constitution* grants a party a right to be heard and land matters being emotive, it will be in the interest of justice if this suit was reinstated to enable the court determine it, on its merits. Further, that mistake of the Plaintiffs' Counsel should not be visited upon them.

16. Based on the facts as presented while relying on the legal provisions I have cited above as well as associating myself with the decisions quoted, I will proceed to set aside the orders of the Court issued on November 10, 2021 and reinstate this suit for hearing and final determination. I further direct that the Plaintiff's suit be set down for hearing within the next sixty (60) days from the date hereof, failure of which it will stand dismissed for want of prosecution.

17. In the circumstances, I find the Notice of Motion Application dated April 24th April, 2022 merited and will allow it.

18. Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 29TH DAY OF JUNE, 2023

CHRISTINE OCHIENG

JUDGE