



**Sang v Sang (Environment & Land Case 97 of 2017)  
[2023] KEELC 18477 (KLR) (29 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18477 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT & LAND CASE 97 OF 2017**

**MC OUNDO, J**

**JUNE 29, 2023**

**BETWEEN**

**JOHN KIPNGENO ARAP SANG ..... PLAINTIFF**

**AND**

**JOSEPH KIPKORIR SANG ..... DEFENDANT**

**RULING**

1. Before me for determination is an Application by way of Notice of Motion dated the August 3, 2022, brought pursuant to the provisions of Section 1, 1A, 1B & 3 of the *Civil Procedure Act*, Order 12 Rule 7 and Order 51 of the *Civil Procedure Rules*, Article 159 of the *Constitution* and all enabling provisions of the law where the Applicant herein seeks orders to set aside the court's orders dismissing his suit, he also seeks to stay execution of the Bill of Costs the consequential orders and all proceedings arising from the Deputy Registrar's ruling on taxation dated July 12, 2022.
2. The said Application was supported by the grounds on its face and the Supporting Affidavit, sworn by John Kipngeno Arap Sang the Applicant herein, on the August 3, 2022.
3. The Application was opposed by the Respondent's Replying Affidavit sworn on the October 6, 2022 to the effect that it lacked merit, and was a waste of the court's time as the Applicant's suit had been dismissed procedurally by the honorable court.
4. The application was canvassed by way of written submissions to which the Applicant filed submissions dated December 5, 2022 wherein he gave a brief background to the matter in question to the effect that it involved two siblings who had been having land disputes over Kericho/Chemoiben/2139 and Kericho/Chemoiben 2141, both parcels which had formerly comprised Kericho/Chemoiben/1483 registered to their father Paul Kipsang Munai (deceased).
5. That the matter had been filed in court on the August 23, 2017 by the Applicant wherein subsequently the Respondent had filed an application to have the matter dismissed for want of prosecution.



The application was heard on May 23, 2022 and allowed wherein the suit had been dismissed and consequently the Respondent had filed Party and Party Bill of Costs dated June 7, 2022 which he allegedly served on the Applicant vide 'whatsApp' on June 17, 2022 despite knowledge that the Applicant had representation by the firm of EK Korir & Company Advocates. Hence these are the facts that had formed the basis of his application.

6. The Applicant framed his issues for determination as follows;
  - i. Whether there was inordinate delay in prosecuting this matter.
  - ii. Whether the Defendant acted within the law in effecting service of his application to dismiss the suit and taxation of the Bill of Costs.
  - iii. Can the court exercise its discretion and set aside its orders in this matter?
  - iv. Whether the Plaintiff under the law is entitled to have his matter heard and determined in a just and fair manner.
7. On the first issue for determination, the Applicant asked the Court to take notice of the dates in which the matter was listed and when the Applicant attended court in person and through his Advocates. That he had been represented by the firm of EK Korir & Company Advocates, wherein the instructions to act for him were alive and therefore it begged the question as to why the Respondent chose to serve him in person in Nairobi with the application to dismiss this matter for want of prosecution and also with the taxation of the Bill of Costs.
8. That the delay to prosecute that matter was occasioned by factors beyond him and which factors had also affected the courts in Kenya, in that between the year 2019 and 2021 the Corona Pandemic had made all the sectors of the Kenyan economy to come to a standstill. That for the Court therefore to allow the Respondent to plead inordinate delay and dismiss the matter for want of prosecution was unjust and unfair to the Applicant /Plaintiff. That the court should take judicial notice of the effects of the corona pandemic and have the orders dismissing this matter set aside in the interest of justice.
9. On the second issue for determination as to whether the Defendant acted within the law in effecting service of his applications to dismiss the suit and for taxation of the Bill of Costs, it was the Applicant's submission that the Respondent had not tendered any evidence to show and/or demonstrate that indeed his application to dismiss the suit was served upon the Applicant /Plaintiff as required under Order 5 of the Civil Procedure Rules, after which the Applicant had failed to attend court knowingly. That the omission to serve the Applicant's Advocates with the Application for dismissal and the taxation of the Bill of Costs had a hideous intent which came to pass when the Court relied on the return of service which had been filed earlier than the date it was drawn and commissioned, (that is, it had been dated the June 27, 2022 yet filed in court on June 23, 2022).
10. The Applicant submitted that he was entitled to a fair hearing as guaranteed under Article 50(1) of the [Constitution](#) and therefore the orders of the Court be set aside and the matter be allowed to proceed to full hearing. Reliance was placed on the decision in [Sangram Singh vs Election Tribunal Kotah AIR 1955 SC 664 at 711](#) as was quoted in the case of *Gerita Nasi: ondi Bukun a & 2 others vs Attorne General 2019 eKLR*. That the Respondent ought to have adhered to the judicial procedure to ensure proper service as was held in the case of [Mureithi Charles & Another vs Jacob Atina Nyagesuka \[2022\] eKLR](#) which was cited with approval in the holding in [Haile Selassie Avenue Development Co Limited vs Josephat Muriithi & 10 others \[2004\] eKLR](#).
11. On the third issue for determination as to whether the Court should exercise its discretion and have the orders dated May 23, 2022 set aside, the Applicant submitted that the Court had unfettered discretion



to set aside its own orders and thereafter order that the matter be heard and determined to avoid injustice and hardship resulting from the excusable mistake of the Defendant who had deliberately failed and/or chose to selectively terminate this matter at his convenience by not effecting proper service of the application to dismiss the suit for want of prosecution and the Application for the taxation of the matter. Reliance was placed on the case of *Shah vs Mbogo & Another* 1967 EA 116.

12. On whether the Applicant /Plaintiff was entitled under the law to have his matter heard and determined, it was his submission that the primary duty of the court was to do justice and that the duty could not be fettered by procedural technicalities as is provided for under Order 51 Rule 10 Civil Procedure Rules, Article 159 (2) (d) of the Constitution, the inherent powers of the court as provided for in Section 3A of the Civil Procedure Act and the overriding objectives as is stipulated in Sections 1A & 1B of the Civil Procedure Act. That the dismissal of the Applicant's case barred him from being heard on merit.
13. That under Order 12 of the Civil Procedure Rules, the court will dismiss an application where a party fails to attend court with full notice of the hearing date. Where a party demonstrates that it was not aware of the hearing date through no fault of its own, the court ought to exercise its discretion in favour of the party. That the Applicant was within the precincts of Order 12 Rule 7 of the Civil Procedure Rules.
14. The Applicant submitted that he should not suffer from the trickery of the Respondent and sought that the orders of the court dated May 23, 2022 and subsequent taxation orders dated July 12, 2022 be set aside and the matter be heard and determined on merit so that it could be determined on merit, justice and fairness.

#### **Respondent's submissions**

15. The Respondent's submission in opposition to the application was that the same was based on the allegations that firm of M/S Mutai Kipkemoi Advocates proceeded and moved the court to dismiss the main suit without proper service of the mention date upon the Plaintiff's Advocate on record and that allegedly after the said dismissal, the said firm, acting for the Defendant, proceeded to file a Party & Party Bill of Costs which was taxed and a certificate of costs to that effect issued without the Plaintiff or the Plaintiff's Advocate on record being involved.
16. That the correct position was that the Plaintiff filed suit on August 23, 2017 and after dispensing with an interim application, the matter had been mentioned on November 7, 2017 where the Plaintiff's Counsel had not fully complied and sought for more time to enable him comply with Order 11 of the Civil Procedure Rules. On December 14, 2017 the Plaintiff had not yet fully complied and prayed for 14 days to comply. On February 26, 2018 the matter was again mentioned wherein both parties had confirmed full compliance and the hearing of the matter was fixed for May 9, 2018, on which day, the Plaintiff's Counsel requested for a survey to be conducted and the report to be filed in court. This delayed the matter all through the year 2018 before the survey was filed and hearing date taken ex-parte by the defence due to the non-attendance by the Plaintiff's Counsel. The matter had subsequently been fixed for hearing for the May 22, 2019, wherein the Plaintiff's Counsel was not ready to proceed with the hearing. The matter, by consent, had then been fixed for hearing for the October 8, 2019 wherein on that day the Plaintiff's Counsel sought an adjournment on allegation that he was unable to reach his client. The matter had been fixed for hearing for the December 9, 2019 when the court did not sit and dates were taken in the registry for mention for the February 27, 2020 wherein by consent a hearing date was taken for the May 13, 2020 on which day there was no appearance and another hearing day for the November 18, 2020 was fixed.



17. When there was no appearance again despite service, it necessitated the Respondent's Counsel to file an application under Order 17 Rule 2(1), 2(3), (3) of the Civil Procedure Rules and Section 1A, 1B and 3A of the *Civil Procedure Act*, dated the 27<sup>th</sup> October seeking the dismissal of the suit for want of Prosecution. The application had been allowed on the May 23, 2021 wherein the matter had been dismissed with costs.
18. That the Respondent had then filed and served a Party & Party Bill of Costs dated June 7, 2022 which was taxed and allowed at Kshs 568,700/= and a certificate of costs dated July 25, 2022 issued to that effect. The Plaintiff had been served with the same wherein although he had acknowledged receiving the same, he had protested leading to the filing of the current frivolous application seeking for the suit to be reinstated.
19. That from the analysis of the facts herein, it could be seen that this matter had dragged in court for 5 years due to the actions and inactions of the Plaintiff/Applicant and his Advocate on record.
20. That since it had been the Plaintiff/Applicant who had filed suit, it had been upon him to prosecute the same and have the matter heard and determined expeditiously. He could therefore not blame his Advocates on record given that he himself never set foot in court at any one time since instituting the same.
21. That service to the Plaintiff directly was intentional since it was common knowledge and/or sense that cases do not belong to Advocates but to the litigant themselves. Reliance was placed in the decision in the case of *Ruga Distributors Limited vs. Nairobi Bottlers Limited [2015] eKLR* and the provisions of Order 17 Rule 2(1)(3) of the Civil Procedure Rules to submit that a suit qualified to be dismissed for want of prosecution, if no application was made or no step was taken to prosecute the same by either party for at least one year preceding the presentation of the application seeking dismissal of the suit.
22. That the matter which had commenced in the year 2017 had taken a long journey and the blame for its delay ought to be laid straight on the Plaintiff's laps as the same emanated from his indolence which was clearly disclosed in the analysis of the record of proceedings. That the Plaintiff/Applicant was casual, disinterested and laid back in the prosecution of the matter.
23. That both the Plaintiff and his Advocate had demonstrated inexcusable laxity in prosecuting this case. That it had been their role to ensure that the case proceeded for hearing without wasting precious court time. Reliance was placed on the decision in the case of *Utalii Transport Co Ltd & 3 Others vs NIC Bank & Another [2014] eKLR*.
24. Lastly, the Respondent submitted that the provision of Section 27 of the *Civil Procedure Act* was clear on the issue as to costs, which issue was at the discretion of the Court and was used to compensate the successful party for the trouble taken in prosecuting or defending a case and not to penalize the losing party. That the discretion ought to be exercised judiciously and courts should not deprive a Plaintiff/Defendant of his/her costs unless it can be shown that they acted unreasonably.
25. The Respondent sought for the Applicant's Application to be dismissed with cost with a proviso that should the court allow the Plaintiff/Applicant's application, he be compelled to deposit Kshs 568,700/= being the decretal amount as per the certificate of costs dated July 25, 2022.

#### **Determination .**

26. Having considered the Application herein seeking to set aside the court's order of May 23, 2022 wherein the Applicant's suit had been dismissed for want of prosecution after which a Party and Party Bill of cost was taxed for Kshs 568,700/=. The Applicant now seeks to stay execution of the Bill of



Costs, the consequential orders and all proceedings arising from the Deputy Registrar's ruling on the taxation dated July 12, 2022. I have also considered the Respondent's response thereto opposing the said application, as well as the subsequent written submissions for and against allowing the said application, the law and the authorities herein cited. I find the issues arising for my determination as follows.

- i. Whether there has been raised sufficient ground to set aside the dismissal order and if so;
  - ii. Whether there should be stay of execution of the taxed Bill of Costs.
  - iii. Who should bear the cost.
27. The law applicable for setting aside judgment or dismissal is Order 12 Rule 7 of the Civil Procedure Rules which provide 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.'
28. Setting aside a judgment or order for dismissal is a matter of the discretion of the court, as was held in the case of *Esther Wamaittha Njibia & 2 others vs. Safaricom Ltd [2014] eKLR* where the court citing relevant cases on the issue held inter alia:-
- 'The discretion is free and the main concern of the courts is to do justice to the parties before it (see *Patel vs EA Cargo Handling Services Ltd.*) the 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 deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see *Shah vs Mbogo*). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the Plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See *Sebei District Administration vs Gasyali*. It also goes without saying that the reason for failure to attend should be considered.'
29. The Court of Appeal for Eastern Africa in the case of *Mbogo vs Shah [1968] EA 93*, held that for the court to set aside a judgment/order, it must be satisfied about one of the two things namely:-
- a. Either that the Defendant was not properly served with summons; or
  - b. That the Defendant failed to appear in court at the hearing due to sufficient cause.
30. I have considered the reasons as presented by the Applicant in his quest to set aside the order of May 23, 2022 to wit that although he was represented by Counsel, in the firm of EK Korir & Company Advocates, wherein the instructions to act for him were alive, the Respondent had chosen to serve him in person with the application to dismiss this suit for want of prosecution and for the taxation of the Bill of Costs. He also submitted that the delay to prosecute the suit was occasioned by factors beyond him being the corona pandemic which had affected courts in Kenya between the year 2019 and 2021.
31. The Respondent opposed the Applicant's application for reasons that from the proceedings in court, it could be seen that this matter had dragged in court for 5 years due to the actions and inactions of the Plaintiff/Applicant and his Advocates on record. That since the Plaintiff/Applicant had filed this suit in the year 2017, it had been upon him to prosecute the same to have it heard and determined expeditiously, but he had never set foot in court at any one time despite service of Notice. That the delay in prosecuting the matter ought therefore to be laid straight on the Applicant's laps as the same emanated from his indolence, casual, and disinterested and inexcusable laxity towards the prosecution of the matter.



32. Since the Applicant's argument for seeking to set aside the order dismissing his suit was based on the reason that the effects of the corona pandemic had affected the court's operation between the year 2019 and 2021 and further that there had been no service of the application to dismiss effected on him or his advocate, I have taken the liberty to peruse through the court record to satisfy myself as to the genuineness of his argument so as to satisfy myself as to whether the dismissal of the suit was as a result of an accident, inadvertence, excusable mistake, an error or otherwise and so as to determine whether the Applicant had established sufficient cause to have the order set aside.
33. It is on record that the suit herein had been filed on the August 23, 2017, by the Applicant/Plaintiff vide a Plaint of an equal date. Alongside it had been an application seeking interim orders, which application had been heard and determined in a ruling dated the September 27, 2017, whereby parties had been directed to maintain the status quo until the suit was heard and determined. Thereafter parties were to comply with pretrial directions.
34. On the November 7, 2017, the Plaintiff's Counsel had not fully complied with pre-trial directions wherein he had sought for more time to enable him comply. The matter was re-scheduled for mention for the December 14, 2017 on which day there had still been no compliance an Counsel had sought for 14 days wherein the matter had been slated for mention for the February 26, 2018 on which day both parties had confirmed compliance and the hearing of the matter had been fixed for the May 9, 2018. On the said day the Plaintiff's Counsel had requested for a survey to be conducted on the suit lands so as to confirm their position on the ground. He then sought for a mention date which was given for the May 21, 2018 whereby on the said day by consent parties agreed to have the surveyor visit the suit parcels of land and thereafter file his report in court. A mention was then slated for the July 26, 2018 wherein Counsel had informed the court that there had been an error on the previous order in relation to the Reference number of the suit land wherein they had sought for its amendment. The matter was subsequently slated for mention for the November 1, 2018, on which day it was mentioned in the registry and slated for mention in open court for the January 29, 2019.
35. On the January 29, 2019, Counsel for the Applicant/Plaintiff sought to be furnished with a copy of the surveyor's report to enable him peruse it and advice his client. He then sought for a further mention date which was granted for the March 11, 2019 on which day he had sought for a hearing date which was given for the May 22, 2019.
36. Come the hearing day, the Plaintiff's Counsel informed the court that they were not ready to proceed as they had been unable to reach their client. He then sought for another hearing date to which the court obliged and gave the October 8, 2019 as the date for hearing but again there had been another application for adjournment for reason that the Plaintiff herein could not be reached. Another hearing date had been given for the December 9, 2019 wherein on that date, the matter had been mentioned in the registry and fixed for mention for the February 27, 2020 whereby it had been fixed for hearing for the May 13, 2020. On the said date, there were no proceedings up to the July 15, 2020 when the matter was fixed for hearing for the November 11, 2020. The matter remained dormant until February 16, 2022 when the Deputy Registrar listed the same for mention before the judge on the May 23, 2022 on which day there had been no appearance for the Applicant /Plaintiff and that was when the Respondent's Counsel sought for the matter to be dismissed for want of prosecution. Pursuant to the provisions of Order 17 Rule 2(5) of the Civil Procedure Rules, the court had dismissed the same with costs. The provision of the law under which the matter was dismissed is clear to the effect that a suit stands dismissed after two years where no step has been undertaken. The wording of this provision of the law has the effect that there need not be Notice effected or an application made to dismiss a matter where for two years no steps have been taken to prosecute the same.



37. Secondly, unlike what the Applicant wants us to believe that the matter was inactive due to the effect of the Covid- 19 pandemic between the years 2019 and 2021, it can be seen from the proceedings that not only was he inactive before the pandemic but that the said pandemic did not stop the wheels of justice because as soon as Kenya confirmed its first Coronavirus patient mid-March 2020, the Judiciary took measures to ensure delivery of justice for all countrywide continued despite the pandemic. The National Council for the Administration of Justice ('NCAJ') had on the March 15, 2020 published an Administrative and Contingency Management Plan ('the Plan') to mitigate COVID-19 ('Coronavirus') in the Kenyan Justice sector. This was followed by the gazettment of the Electronic Case Management Practice Directions, 2020 ('the new Electronic Practice Directions') on March 20, 2020.
38. From the chronology of events herein above stated, it cannot be said that the Applicant had no notice of the proceedings in court, because it is clear that from when the matter had been instituted up to the time the impugned order was issued, not only had he been represented by Counsel, but that there had been numerous adjournments sought by his Counsel for various reasons ranging from non-compliance to having lost contact with his client.
39. The Supreme Court of India in the case of [\*Parimal vs Veena 2011 3 SCC 545\*](#) attempted to describe what sufficient cause constituted when it observed that:-
- ' 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.'
40. I have asked myself whether the failure to prosecute the suit constituted sufficient cause or whether it was meant to deliberately delay the cause of justice and I find that the turn of events as herein submitted did not constitute sufficient cause to warrant exercise of the court's discretion.
41. The test to be applied was whether the Applicant had honestly and sincerely intended to prosecute the matter. Sufficient cause is thus the cause for which the Applicant could not be blamed for his inaction. 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, the Applicant did not demonstrate sufficient cause why he never prosecuted his case despite indulgence by the court.
42. From the record, it comes out clearly that despite parties having complied with the provisions of Order 11 of the Civil Procedure Rules, the Applicant's conduct was indicative that he was not willing to participate in the suit. It is clear that even after the dismissal of his suit on the May 23, 2022, and the service of the Bill of Costs dated June 7, 2022 on the June 17, 2022, he took no steps such that upon service of the taxed Bill of Costs, his response was; 'For what in a dormant case???!!!!' Could this kind of response then constitute an accident, inadvertence or excusable mistake or error? To me the answer is in the negative. I find that the said response it clearly demonstrated 'a don't care' attitude, negligence



and want of bona fide on the part of the Plaintiff/Applicant' who did not thus deserve the court's discretion.

43. It had even taken him 3 months and 20 days after the dismissal of his suit for him to file the current application seeking to set aside the dismissal order and also stay execution of the taxed Bill of Costs.

44. The Court of Appeal in the case of *Richard Nchapi Leiyagu vs Independent Electoral & Boundaries Commission & 2 others [2014] eKLR* expressed itself as follows:-

' We agree with the noble principles which goes further to establish that the court's discretion to set aside ex parte Judgment or Order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.'

45. In the present suit, I find that the Applicant deliberately failed to prosecute his case by refusing to avail himself to the court process. Indeed it had been his primary duty to take steps to expeditiously progress his case since he had been the one who had dragged the Respondent/Defendant to court.

46. In the case of *Mobil Kitale Service Limited vs Mobil Oil Kenya Limited [2004] eKLR* the court had held that:

'The Plaintiff has been in deep slumber and continues to enjoy the fruits of the delay. The man has been too good for the Court and too smart for the Defendant for he has out maneuvered both the Court and the Defendant and I cannot allow him to be in that position anymore, the day of reckoning has come, as the Plaintiff has no possible excuse for the manner in which he handled this litigation. There is enough material to persuade me and I have been persuaded that the delay is not only inordinate but by all imagination inexcusable. Under such circumstances I have no discretion but a judicial duty to say that you do not deserve the eyes and ears of the Court. By any standard the action of the Plaintiff is not explainable of a likely happening and a court of justice cannot sustain a delay of 4 years and 10 months, such is not normal, such is not excusable, it is beyond redemption and a total abuse of the Court process.'

47. Suits do not belong to the Counsel or the court but to parties who should show interest by following proceedings in court and not laying back and waiting for a miracle to happen. I find the present Application is an afterthought, a waste of judicial time and an abuse of the court process and is also intended to vex the Respondent/Defendant and put him to expense. The Respondent is being gravely prejudiced by the Applicant and therefor there is need for the court to balance the rights of both parties and to exercise its discretion in dispensing justice for it is not powerless to grant relief, when the ends of justice and equity so demand. The application seeking to stay the orders of the court that had dismissed the Applicant's suit fails.

48. On the second issue for determination as to whether there should be an order for stay of execution of the taxed Bill of Costs, I find that the Applicant has not met the threshold set out under Order 42 of the Civil Procedure Rules to be granted the stay as he has not shown the kind of substantial loss he would suffer if the stay was not granted, secondly the application was brought after inordinate delay and no security has been furnished for due performance of such decree or order as may ultimately be binding on him which is a mandatory requirement as provided by the law.

49. In the end, I find that the Application dated August 3, 2022 has no merit and the same is dismissed with costs.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 29<sup>TH</sup> DAY OF JUNE 2023.**



**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

