Ruto (Suing as Legal Personal Representative of the Estate of Kibiwott Arap Mwolomet - Deceased) v Maina & another (Environment & Land Case 19 of 2018) [2023] KEELC 18229 (KLR) (20 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18229 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 19 OF 2018

FO NYAGAKA, J

JUNE 20, 2023

BETWEEN

JAPHETH KIBIWOTT RUTO (SUING AS LEGAL PERSONAL REPRESENTATIVE OF THE ESTATE OF KIBIWOTT ARAP MWOLOMET - DECEASED) ..... PLAINTIFF

AND

VIRGINIA NJERI MAINA ..... 1ST DEFENDANT

VINCENT RONGEI KOTOKOTO ..... 2ND DEFENDANT

RULING

1. The Plaintiff filed the instant Application dated 03/10/2022. He did so on October 5, 2022. He brought it under Section 3A, 63(e), (Order 12 Rule 7 of the *Civil Procedure Act*, cap 21) (sic). He sought the following prayers:-

    1. ...spent
    2. ...spent
    3. That at the inter partes the orders of this Honourable Court made on September 27, 2022 dismissing the Plaintiff's Application dated July 3, 2022 be set aside.
    4. That the application dated July 3, 2022 be reinstated and heard inter partes.
    5. That costs of the application be provided for.

2. The application was based on five grounds which are summarized hereinafter. One, the Applicant moved the Court vide an application dated July 3, 2022 in which he sought stay of execution and/or further execution of the decree herein. Two, the application was certified urgent and set for hearing

inter partes on September 27, 2022. Three, due to inadvertent failure on the part of learned counsel's gadget to connect from one virtual Court to another, being both the Environment and Land Court and the High Court of Kenya both at Kitale, which held sessions at the same time the application then in court was dismissed. Four, the non-attendance of learned counsel for the applicant was not intentional as the application was filed in good faith and in the interest of justice. Five, in the interest of justice the application dismissed should be reinstated to hearing.

3. The Application was supported by the Affidavit of learned counsel, one Lichuma M. M., which was sworn on October 4, 2022. In it learned counsel repeated the contents of the grounds of the Application but in deposition form. In addition, she deponed that she worked in the law firm of Ms. Katama Ngeywa & Co. Advocates and that on the material date she was tasked to appear before the Court and prosecute the Application dated July 3, 2022. Further, she deponed that the Plaintiff had been diligent in prosecuting the instant matter and stood to suffer irreparable loss if the dismissed application was not reinstated. She regretted the inconvenience to both the Court and the other parties in the matter and prayed that the instant application be allowed.

4. The Application was opposed very strongly through the Replying Affidavit of the 1st Respondent, one Virginia N. Maina. It was sworn on October 14, 2022. She deponed that the application was a mere afterthought. She called upon the Court to examine the conduct of the Applicant as borne by the record. She singled out a few actions as noted in the record. First, she deponed that on May 24, 2021 the 2nd Defendant applied to strike out the Plaint on the basis that the suit was statute barred. After the judge delivered his ruling on it on 50/08/2021 the applicant herein filed a Notice of Appeal thereto and requested for proceedings. He neither moved the Court nor applied for stay of proceedings. Thus, the Defendants filed their Bills of costs for taxation. On 07/12/2021 the Plaintiff appeared in Court and sought for time to file submissions thereto yet he had delayed to file his objections to the Bills. The Deputy Registrar delivered a ruling in one of the Bills, being the 2nd Defendants'. He left out the 1st Defendants'. Against, the applicant moved the Court to stay the execution of the decree. That was on 3/07/2022 which was a year after the decree had been made and was inordinate delay.

5. She deponed that the inordinate delay was being perpetuated through the instant application after failing to prosecute the application on 27/09/2022. She swore that bringing the application herein nine (9) days after dismissal was inordinate delay in itself. She deponed that the law aids the vigil (sic) and not the indolent and that the applicant had slept on his rights.

6. The Respondents filed also, on 28/10/2022, another replying Affidavit sworn by learned counsel on 24/10/2022. He gave the brief history of the Application dismissed on 27/09/2022. Then he deponed on the events of 27/09/2022. He swore that when the application came up for hearing on the said date, learned counsel for the applicant did not attend Court. That after placing the file aside the Court directed learned counsel for the 1st Respondent to call Mr. Ngeywa to inquire why he was not in court. He called Mr. Ngeywa several times through his cell phone number which he gave in the deposition. He stated further that Mr. Ngeywa did not respond or even send back a text.

7. He deponed that after the call-over the matter was once again called out and placed aside the second time, at which time the learned counsel informed the Court that he had called the Applicant's learned counsel but he did not answer. The 1st Respondent's counsel deponed further that although the Applicant had sought leave to file a supplementary Affidavit he did not file any and neither he nor his advocate attended court on the material date. He swore further that the advocate who deponed the supporting affidavit to the instant application did not disclose who between the client and the principal advocate had given her instructions to do so. He deponed that the applicant had not give good reason why he or his advocate were not in court. He urged the Court to dismiss the application.

Submissions

8. The application was argued by way of written submissions. The Applicant filed his dated 3/01/2023 the same date. The Respondent filed hers dated 17/01/2023 on 02/05/2023. The applicant began by summarizing the application and the prayers sought. He set out three issues for determination, being whether the Plaintiff's suit (sic) should be reinstated, whether the delay was prolonged and inexcusable, and whether the Defendants would be prejudiced if the application was reinstated.

9. Regarding the first issue, he submitted that Sections 3A and 63(e) of the *Civil Procedure Act* and Order 12 Rule 7 of the *Civil Procedure Act* cap 21 (sic) were the basis of the application. He relied on the case of *Ivita v. Kyumbu* (1984) KLR in which he submitted that the Court held the test was whether the delay was prolonged and inexcusable and whether justice could be done irrespective of the delay. He relied on the case of *John Nahashon Mwangi v. Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR. In the latter decision from which he cited a long paragraph, the Court stated that courts should sparingly dismiss suits for want of prosecution since it is a draconian act which drives the Plaintiffs in an arbitrary manner from the seat of judgment.

10. After that he submitted that the court was not powerless as not to grant such a relief for the ends of justice and where equity demands it because the powers of the Court were very wide in the circumstances. He stated that Section 3A of the *Civil Procedure Act* donated the power and Order 17 Rule 2(1) of the *Civil Procedure Rules* provided for dismissal of a suit for want of prosecution where a step was not taken to prosecute it within one (1) year, and even when doing so the court should give notice to the delaying party to show cause why the dismissal should not be made.

11. He submitted that the contrary was the case on September 27, 2022 because failure to prosecute the application was due to inadvertence as a result of failing to connect from one virtual platform to another. He submitted that he had shown continuous willingness to pursue and resolve his claim by making the instant application promptly. He stated that dismissal of the suit (sic) without notice was prejudicial to him. He relied on the case of *Associated Warehouse Co. Ltd & Others v. Trust Bank Ltd* HCCC No. 1266 of 1999 (unreported) where the learned judge expressed himself on dismissal of a suit under Order 17 of the *Civil Procedure Rules*. Then he argued that he had a valid claim disclosed in the application and was willing to prosecute it.

12. About the second issue, which was about delay, he submitted that to shut out a party from being heard was a serious matter which undermines or obstructs the course of justice. He contended that he was no indolent but that his attendance in the virtual session was thwarted by a technical problem which he could not foresee. He likened it to a "force majeure" situation. Further, he stated that it was his advocate's mistake which should not be visited on him. On this point he relied on the decision of *Capt. Philp Ongom v. Catherine Nyero Owotta*, SCCA 14/2001 [2003] KLR.

13. Also, he submitted on the principle of natural justice that no party should be condemned unheard, and Article 159(2)(d) of *the Constitution* and Sections 1A and 1B of the *Civil Procedure Act* which he stated speak to courts determining matters in a just manner. He also called to his aid Article 50 of *the Constitution* on the right of every person to be heard before a Court of law. He relied on the case of *Wanendeya v. Gaboi* [2002] EA 662 where the court stated that disputes ought to be determined on merits and that lapses should not necessarily debar a litigant from having his rights pursued.

14. Further, he relied on the decision of the Supreme Court of India in *Sangram Singh v. Election Tribunal, Kotech*, AIR 1955 SC 664, at 711 wherein the court stated that laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard or that

decisions be reached behind their backs or proceedings conducted in absence of people who are affected.

15. Lastly, he submitted that no prejudice would be suffered by the respondents should the application be reinstated. He prayed for the discretion of the Court to be exercised to grant the application.

16. On their part, the Respondents submitted that their opposition to the application was based on the two affidavits referred to above. In the submissions learned counsel repeated the events on the material date. He stated that he was directed by the Court to look for the applicant's learned counsel so as to prosecute the application and he did call him severally on his mobile phone. His calls went unanswered. He then stated that the non-attendance was intentional. Lastly, he submitted that the applicant had not given reasons that would be convincing as to why they did not attend Court and rather that the failure to connect to the court was a flimsy one. He prayed for dismissal of the application.

Issues, Analysis and Determination

17. Having considered the application, the opposition thereto, the law, the submissions by the rival parties and the circumstances of the case. I am of the view that three issues lie before me for determination. These are, whether the reasons given for failure to attend court is merited, whether the application was made without undue delay, and who to bear the costs of the application.

18. I begin with considering the issue about delay. It was argued by the applicant that he moved the court without undue delay, and was diligent or not indolent in prosecuting the instant application. On their part, the Respondents were of the view that he was not. They submitted that the conduct of the applicant should be looked at from the totality of the analysis in how the applicant conducted the instant suit from the time it was filed. They called on the court to look at the record which they summarized especially from when the Plaintiff's suit was dismissed up to the time of the instant application. They submitted that the application was not brought in time and was yet another of the applicant's delaying tactics given that even by the date of 27/09/2022 when the application dated 03/07/2022 was dismissed the applicant had not filed a supplementary affidavit as had been directed by the court when leave was granted to do so.

19. It is my humble view that as much as the antecedent conduct of the applicant may be demonstrative of a party who was not serious with prosecuting his suit, the relevant period whose conduct I need to consider in determining the instant application is between when the dismissal of the application dated 03/07/2022 was made and when the applicant moved this Court. I have computed the period and find that from 27/09/2022 to 05/10/2022 it was only eight (8) days. Is the period of 8 days undue delay?

20. This Court must restate law regarding the time of making applications of the nature as the instant one. In *Lucas Chagwony & 6 Others v Stanley Chebiator* [2019] eKLR, the learned judge of appeal was of the view that a delay of 4 days in seeking extension of time was not inordinate. In *Safaricom Limited v Josenga Company Limited & 4 others* [2021] eKLR the court was of the view that a delay of three months in moving the court to reopen the case for recall of witnesses was not inordinate given that the applicant had to look for another advocate to represent him. In *Veronica Gathoni Mwangi & another v Samuel Kagwi Ngure & Another* [2016] eKLR the court was of the view that 50 or 51 days of delay in filing an appeal was not inordinate once it was sufficiently explained.

21. On the contrary, there are a number of decisions which have held that delays of much less period than the ones I have cited as inordinate. The basis for doing so was that the underlying principle was and is that there is no hard and fast rule as to what may constitute inordinate delay that may apply to all cases. Delay must remain to be termed as such, and it will always have a bearing on how the discretion of a court is exercised in favour of an applicant. Delay of even of a day cannot be overlooked and may be

inordinate depending on the circumstances of the case. For instance, where the timelines are stated to be of extreme importance or have been directed to be of strict application it is imperative that delay of any kind will impact the discretion of the court, unless it is explained to the satisfaction of the Court. The circumstances of each case will determine the delay which the court will consider as impactful. What is important to note is that delay however small must be explained to the satisfaction of the Court. The explanation will lead the Court to qualify the exercise of its discretion or not.

22. Therefore, in *Ecobank Ghana Limited vs. Triton Petroleum Co Limited & 5 others* [2018] eKLR, the court observed:

> "...it is well settled that in considering whether to dismiss a suit for want of prosecution the courts will consider the following guiding principles; whether the delay is inordinate, and if it is, whether the delay can be excused and lastly, whether either party is likely to be prejudiced as a result of the delay or that a fair trial is not possible as a result of the delay."

23. While the authority is in regard to what the court should take into account before dismissing a matter for want of prosecution, the issue of delay and how the court is to handle it is applicable. Additionally, in *Cecilia Wanja Waweru -V- Jackson Wainaina Muiruri & another* (2014) eKLR the Court of Appeal held:-

> "There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case. We are of the considered view that the learned judge in considering the application, should have looked at the appellant's conduct from the time the appeal was field up to the date the application for reinstatement was filed..."

24. From the analysis above and guided by the authorities I have quoted, I am of the view that the delay of eight (8) days herein was not inordinate.

25. About the second issue, being whether the reason given by the applicant is merited or not, the starting point is to examine the record pertaining to the material date. The date on which the dismissal of the application sought to be reinstated took place was 27/09/2022. The record of that date shows that the hearing date was taken on 13/07/2022 in the presence of both learned counsel for the applicant, whose cell phone line the 1st Respondent's learned counsel would call severally in vain on the material date, and that of the 1st Respondent but in absence of the one representing the 2nd Respondent.

26. When the Application dated 03/07/2022 was called out on the virtual Platform, Microsoft Teams, only learned counsel for the 1st Respondent was online for the matter. The Court placed the matter aside and urged the 1st Respondent's advocate to reach the applicant's advocate to attend court and proceed with the application. Up to the end of the online session the applicant's learned counsel did not attend court. Rather than dismissing the application the court decided to wait further for the applicant's advocates. It therefore moved the file to the open court to be handled there.

27. When the Court made the call over again in the open Court, only the 1st Respondent's Advocate was present. That was at 9.55 am. The court once again called on the 1st Respondents' advocate to demonstrate that he had attempted to get hold of learned counsel for the adverse party to attend court. At this point the 1st Respondent's counsel informed the court that he has called the applicant's advocate severally on his cell phone number (0721 xxxx -details given) and his calls were unanswered. The Court once more insisted that learned counsel be called by the one who was present in court. The record shows that later somewhere past 11.00 am learned counsel for the 1st Respondent came back to court and reported that at 10.56 am he had called a number of times the other counsel's cell phone (whose

details he gave) and his calls were unanswered. It was upon that that the Court was satisfied that neither the applicant nor his learned counsel were keen on prosecuting the application dated 03/07/2022. It dismissed the same with costs to the Respondent.

28. Before I go deeper into the analysis and finding on this issue, it is vital to state that most of the submissions by the applicant regarding the merits of the application were a misapprehension of the law and facts. For instance, he submitted on setting aside of the order for dismissal of the suit. With due respect that was not the issue before this Court. Before me in the instant application was the prayer on setting aside the order of dismissal the application dated 03/07/2022. Again, he submitted on Order 17 Rule 2(1) of the *Civil Procedure Rules*. The provision was irrelevant in so far as the application was concerned because on 27/09/2022 the orders of the Court was not made as a result of the applicant's failure to prosecute the suit or application for over a year but due to non-attendance. It goes without saying that the authority of *Associated Warehouse* (*supra*) cited by the applicant in support of the contention was not also of any avail herein.

29. But regarding the case of *John Nahashon* (*supra*) about the need to for courts to be hesitant in dismissing suits or applications since the step is draconian I agree. I also do not find fault in the relevance of the case of *Ongom* (*supra*) on the need for a court not to attach an advocate's mistake to a client unless the client is privy to the error, and Wenendeya (*supra*) on determining matters on merit rather than by way of lapses, and *Sangram* (*supra*) on natural justice.

30. With that I now consider the merits of the application based on the reason learned counsel gave for failure to attend court on 27/09/2022. The simple explanation he gave was that the learned counsel failed to connect to the court's online platform because the High Court had a virtual session which she attended and the gadget she used could not navigate between the platforms. The explanation is very plausible up to this point. However, granted that the situation deponed to was the true position, learned counsel did not explain why, after failure to connect onto the Platform, they could not attend the physical or open court session which lasted for over one hour and thirty minutes when the Court kept sending learned counsel for the 1st Respondent to look for the applicant's. Learned counsel for the 1st Respondent deponed how he went into great lengths in calling the applicant's counsel to come and attend to the matter but his calls were unanswered. The Court record clearly shows how the Court was extremely hesitant, slow and cautious toward dismissing the application. It even directed learned counsel for the 1st Respondent to make as much effort as he could in order to get the applicant's to Court but in vain. Learned counsel for the applicant did not dispute both the information given by that of the 1st respondent to the court on the material date and by way of deposition in the Replying Affidavit sworn on 24/10/2022. In any event the applicant's counsel did not disclose which matters, if any, she handled in the High Court on the material date and how long that session lasted so as to satisfy this Court that indeed she was held up in the High Court and could not log into the court's virtual platform before dismissal of the application. Needless to say, that the Court did not dismiss the application during the virtual session but the physical court session and even then, after the Court had been patient enough to wait for the applicant in vain.

31. It leaves this Court to infer that the applicant's learned counsel was not candid enough in the instant application when she attempted to convince the Court that failure to connect to the virtual platform was the reason for the court's dismissal of the application sought to be reinstated. The applicant brought the instant application under Order 12 Rule 7 of the *Civil Procedure Rules*. The provision is on the Court's power to set aside a judgment entered or an order of dismissal of a suit made in absence of an adverse party.

32. The discretion of the Court is wide, in the circumstances but must be exercised judiciously. Again, the prayer being one that is granted based on discretion and that discretion is exercised on equitable principles, it should not be lost to any party who comes to a court for such an order that he should do so with clean hands. And to be before the court with clean hands it means and is obligatory on the party that he should never depart from the basic tenet of the principles of equity - the truth. In essence one of the silent equitable principles of equity that governs reliefs obtained therein is that equity will shy away from aiding he who departs from the truth.

33. In the instant case, the applicant, through the deponent of the supporting affidavit, failed to tell the Court the truth about the failure to attend to the prosecution of the application dated July 3, 2022. Equity cannot countenance that. For this reason, this Court cannot exercise its discretion in his favour. He may have to find it only where half-truths are told and relied on, or leave the matter to rest here as it is. I therefore find the reason for the instant application unmerited. I dismiss the application it sought to base.

34. Regarding the last issue, since the reason for the application is unmerited the application fails. From times of old, even before the enactment of Section 27 of the *Civil Procedure Act* the rule was that he who made a causeless move on anyone and by so doing made that other to incur costs had to refund him the expense. Thus, in line with the provisions of Section 27 of the *Civil Procedure Act*, I award the Respondents costs since they follow the event.

35. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 20TH DAY OF JUNE, 2023.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE