Wafula v Wepukhulu & 5 others (Civil Suit 55 of 2010)
[2025] KEELC 1421 (KLR) (20 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1421 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

CIVIL SUIT 55 OF 2010

EC CHERONO, J

MARCH 20, 2025

BETWEEN

BATHOLOMEW JUMA WAFULA ..... PLAINTIFF

AND

DAVID WAFULA WEPUKHULU ..... 1ST DEFENDANT

MOSES WANAMBISI WEPUKHULU ..... 2ND DEFENDANT

WANAMBISI JUMA ..... 3RD DEFENDANT

SINDANI SIMIYU ..... 4TH DEFENDANT

WANJALA BALE ..... 5TH DEFENDANT

TOM MALISHA ..... 6TH DEFENDANT

RULING

1. This ruling is in respect to the Applicant's Notice of Motion dated 25/05/2024 brought under Article 10, 22(1), 40(2) & 159(2)(e) of *the Constitution*; Section 1A, 1B, 3 & 3A of the *Civil Procedure Act*, Cap. 21 Laws of Kenya; Order 40 Rules, 1, 4 and 10 of the Civil Procedure Rules, 2010 and all other enabling provisions of the Law. In the said application, the Applicant seeks the following orders;

    a. Spent.

    b. The honourable court be pleased to set aside its order of 06/12/2022 which dismissed/ terminated and closed the suit.

    c. That the honourable court be pleased to reinstate the suit.

2. The application is premised on the grounds set forth in the said Notice of Motion and the Supporting Affidavit of the Applicant herein sworn on the 08/07/2024. The gist of the said affidavit is that on

12/10/2022, this court issued a mention date for 02/11/2022 in the absence of the Applicant and on the mention date, the Court fixed the matter for hearing on 06/12/2022. when the matter came up for hearing on the said 06/07/2022, the Court marked the suit as terminated/struck out/dismissed/ case closed. That all these dates were not communicated to the Applicant. That issues involving the subject matter i.e. E.Bukusu/N.Sang'alo/1703 and 1705 have not been fully exhausted. That this suit had been stood over pending the outcome of proceedings before the Court of Appeal i.e E177 OF 2021 and that it should not have been dismissed. It was averred that the Applicant was denied his right to be hear under Article 50 of *the Constitution*. That it is only fair and just that the suit be reinstated as the Applicant stands to suffer irreparable loss and damage as the orders adversely affect him. That he has an arguable case with high chances of success and should be determined on merit.

3. In response to the application, the 1st Defendant/Respondent filed a replying affidavit sworn on 28/01/2025 where he deposed that the application has been 17months after the impugned orders were issued and the period is therefore inordinate and unexplained. That the suit was dismissed for want of prosecution and non-attendance on the part of the Applicant. That no good reason has been advanced by the Applicant for failure to attend court during the hearing despite the presence of their Advocate when the hearing date was taken. That the suit property being land parcel no. E.Bukusu/ N.Sangalo/1703 and 1705 are resultant subdivisions from land parcel no. E.Bukusu/N.Sangalo/661 pursuant to a decree/vesting order in Bungoma SRMCC 193 of 1988 which was subsequently set aside by the judgment in Kakamega HCCA No. 133 of 1989.

4. That by a consent order in Kakamega HCC Succession Cause no. 124 of 1986 dated 25/04/2012, this suit was stayed. That the Applicant unsuccessfully sought to set aside the said orders by filing Kisumu CoA Civil Appeal no. 22 of 2014. That the Applicants claim was determined by the court in Kakamega HC Succession Cause No. 124 of 1986 in its judgment of 26/06/2020 and ruling of 18/06/2021after a certificate of grant dated 25/06/2022 was confirmed and it was determined that the only asset of the estate of Wephukulu Wanambisi Maundende is the restoration of land parcel no. E.Bukusu/N.Sangalo/661.That the determination in Kakamega HC Succession Cause No. 124 of 1986 as stated above has never been challenged and the suit is therefore as good as closed. He sought to have the application dismissed with costs.

5. When the application came for directions, the parties agreed to have the same canvassed by way of written submission. The Applicant filed submissions dated 26/09/2024.

Legal Analysis And Decision.

6. I have considered the application before me, the response by the 1st Respondent, the rival submissions by the parties and the court record in general. From the pleadings and submissions by the parties, only one issue commends itself for determination before me, which is whether the Applicant has established sufficient grounds to set aside the dismissal orders and have the suit reinstated.

7. Reinstatement of suit is a discretionary power. However, such discretion ought to be exercised judicially. In the case of Shah v Mbogo & another [1967] EA 1116, the court stated as follows on the issue of discretion:

> " 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 deliberatively sought whether by evasion or otherwise to obstruct or delay the course of justice."

8. The grounds for consideration therefore are whether there are reasonable grounds to reinstate the suit and whether there will be prejudice that will be occasioned to the Respondent if the suit is reinstated. The court has to consider also the prejudice to be occasioned to the applicants if the dismissal order is not set aside and the suit reinstated.

9. From the court record, the Applicant's counsel was present when this suit was fixed for hearing on 02/11/2022 but failed to attend court with the plaintiff and their witnesses on 06/12/2024. Consequently, the suit was dismissed for non-attendance and for want of prosecution. This is a date that was taken on 02/11/2022 in the presence of Mr. Shikhu Advocate who was holding brief for Mr.Kakhula for the plaintiff. This matter had initially been stayed at the behest of the Applicant who had intimated that there was a pending suit before the Court of Appeal being Kisumu CoA Civil Appeal no. 21 of 2021 which was likely to determine the issues in dispute in the current suit and had been mentioned on various dates for the purposes of updating the court on the outcome of the said appeal.

10. This suit was dismissed for want of prosecution and non-attendance of the plaintiff/Applicant when it came up for hearing. The relevant law governing the setting aside of ex-parte judgment or dismissal of suits is Order 12 Rule 7 of the Civil Procedure Rules which provides as follows:

> "Where under this order judgment has been entered or a suit dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just"

11. In Mwangi S. Kimenyi v Attorney General and Another Misc Civil Suit No. 720 of 2009, the court restated the test as follows:

> "When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.
>
> Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the defendant; and 5) what prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties."

12. In this case, the applicant alleged that they were not aware of the date when the suit was dismissed but as has been demonstrated above, the hearing date when the case was dismissed was taken in the presence of the plaintiff/Applicant's counsel. It is therefore erroneous for the Applicant to allege that he was denied his right to be heard. Further and from the proceedings on record, the Applicant referred to a Court of Appeal case being Kisumu Civil Appeal no. 21 of 2021 which is a different claim from what he now refers to in his application as Court of Appeal Civil Appeal no. E117 OF 2021. Whatever the case may be, the Applicant has not informed the court what the position of the relevant case is.

13. From my reading of the application and the supporting affidavit, the Applicant appears not to admit any mistake for the dismissal of his case. He does not also admit that his hitherto advocate was to blame

for what had befallen him. It is not in dispute that this suit was fixed for hearing in the presence of his Counsel on 02/11/2022. When the case was called out on the hearing date, neither the plaintiff nor his advocate were present. Mr. Otshiula, the hitherto advocate for the plaintiff/Applicant has not sworn an affidavit explaining why they did not attend court during the hearing date. The Court must get a satisfactory explanation why the plaintiff did not attend court when his Counsel was present when the hearing date was taken. The plaintiff/Applicant cannot be heard to say that his right to be heard under Article 50 of *the Constitution* was violated. His former Advocate failed him and he should lay blame where it belongs. This brings me to the question whether the mistake of an advocate should be visited on his client.

14. In the case of Tana And Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others[2015] eKLR, the Court of Appeal offered insight on the effect of mistakes by Counsel and stated thus;

'' From past decisions of this Court, it is without doubt that courts will readily excuse a mistake of Counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of Counsel should not be visited on a client, it should be remembered that Counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side.

.....

Under this duty, Counsel is unequivocally obliged to exercise candor and not aid a litigant in subversion of justice. Even though the determination of whether or not Counsel has failed in his obligation is dependent on the circumstances of a case, as a custodian of justice, the Court must always stay alive to the interests of both parties. This is of paramount importance.

Thus, there is a corollary to the hallowed maxim that mistakes of Counsel should not be visited on a client.''

In the case of Ketteman & Others v Hansel Properties Ltd, [1988] 1 ALL ER 38, an application was brought for belated amendment of the defence, an amendment which had been necessitated by mistake of Counsel and lord Griffith in his judgment observed as follows;

'' Legal business should be conducted efficiently.

We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of lawyers to fall on their own heads rather than allowing an amendment at a very late stage in the proceedings. Needless to say, the application to amend a defence on the basis of an inadvertent mistake by Counsel was disallowed. To our mind, this is the most proximate way to balance out the competing interests of both parties to the suit.''

The ratio decidendi to be gleaned from this decision is that parties should not have the errors of their advocates preclude them driving them out of the sit of justice, unless these errors are reasonable and not negligent and an effort has been made to correct them. Applying this to the facts in this case, I find that the hitherto Counsel for plaintiff/Applicant has not sworn an affidavit explaining why he did not attend court with his client during the hearing on 6/12/2022. I also note that the plaintiff has filed this application seventeen (17) months after the dismissal order was made. A period of 17 months without sufficient explanation in my view is unreasonable and inordinate. He did not make efforts to know the status of the case from his hitherto advocate. I find the indolence on the part of the applicant inexcusable

For all the reasons given hereinabove, I find the Notice of Motion application dated 25/05/2024 lacking in merit and the same is hereby dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 20TH DAY OF MARCH, 2025.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

M/S Masakkwe H/B for Fwaya for 1st & 2nd defendants.

Plaintiff/Advocate-absent.

Bett C/A.