Ruchu Gacharage Farmers Co-operative Society v Mugo (Environment & Land Case 22 of 2020) [2023] KEELC 19063 (KLR) (27 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19063 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ENVIRONMENT & LAND CASE 22 OF 2020

LN GACHERU, J

JULY 27, 2023

BETWEEN

RUCHU GACHARAGE FARMERS CO-OPERATIVE SOCIETY ..... APPLICANT

AND

SAMUEL MICHAEL WAGOI MUGO ..... DEFENDANT

RULING

1 Vide a Notice of Motion Application dated June 17, 2022, and filed on July 14, 2022, the applicant sought for the following order; -

1. That thishonourable court be pleased to set aside the orders made on May 18, 2022, dismissing the Originating Summons dated September 7, 2020and the said Originating Summons be reinstated for hearing to be heard and determined on merit.

2 This Application is based on the grounds set thereon and on the supporting affidavit of Mbiyu Kamau Advocate, Counsel for the applicant. He averred that the applicant conducted its Annual General Meeting on February 11, 2022, which resulted in the change of its Board of Management including the positions of treasurer and secretary. He further averred that during the transition period, the outgoing officials, who instituted the suit through the Originating Summons datedSeptember 7, 2020, misplaced the Applicant's documents including the Hearing Notice and failed to inform the newly appointed officials of the hearing scheduled for May 18, 2022. Their absence resulted in the dismissal of the suit for want of prosecution due to non-attendance on the part of the applicant.

3 Lastly, the deponent averred that the non-attendance was not intentional and that the plaintiff/ applicant is still desirous of prosecuting the Originating Summons dated September 7, 2020, which has merit.

4 The defendant/respondent opposed the application through the replying affidavit datedMarch 6, 2023sworn by Elizabeth Waigwa, Advocate for the respondent, who reiterated that the applicant was

absent on May 28, 2022, when the matter came up for hearing the. She further averred that the plaintiff/applicant's AGM of February 11, 2022, was held before the hearing date was taken onMarch 23, 2022, and the hearing notice served on March 29, 2022, meaning the new officials had already taken office at the time the hearing date was taken. Lastly, the deponent averred that it was not true that the plaintiff/applicant lost documentation or failed to pass the information to the new officials.

5 Further that there were minor changes to the office bearers namely Pius Mwangi, who was replaced by Samuel Kamau Muhuri, while the rest of the office bearers namely Margaret Waringa Karaka and Josphat Kinyanjui Ngure, remained the same. The deponent further averred that the change of officials was not hostile, and mostly affected the positions of the office bearers and not the officers themselves and therefore disorganization should not be expected.

6 It was also averred that the present application was made two months after court orders were issued dismissing the suit, which indicated that the applicant was not desirous to prosecute the suit, as they would have made the present application immediately. Further, the deponent averred that theplaintiff/applicant was not vigilant, and that therespondent stood to suffer prejudice as the applicant remains on the respondent's land against a full judgement of the court ordering the plaintiff/applicant to vacate the premises.

7 The Application was canvassed by way of written submissions.

8 The applicant through the Law Firm of Mbiyu Kamau & Co. Advocates, filed their submissions in support of the application dated March 24, 2023. It was submitted that the decision as to whether to reinstate a suit is discretionary, and depends on the facts of the case. It was further submitted that theapplicant experienced a change of officials which resulted in a change of leadership and during the transition period, documents were misplaced and there was a communication breakdown. The applicant relied on the case of *Wachira Karani v Bildad Wachira* Civil Suit No. 101 of 2011 (2016) eKLR, where the court held;

Courts exist to serve substantive justice for all parties to a dispute before it. Both parties deserve justice and their legitimate expectation is that they will each be allowed a proper opportunity to advance their respective cases upon merits of the matter. This is the fundamental principle of natural justice."

9 Further, the applicant submitted that the court in order to exercise its discretion, must be satisfied that there is sufficient cause for it to set aside the order of dismissal and reinstate the suit. To define sufficient cause, the applicant relied on the Supreme Court of India case of *Parimal v Veena*, which was cited in *Wachira Karani v Bildad Wachira* (2016) eKLR as follows:

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 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 viewpoint 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" "remaining inactive." However, the facts or 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".

10 The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away

with the illegality perpetuated on the basis of the judgment impugned before it. The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. 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."

11 To conclude, the applicant submitted that they have provided sufficient cause in the circumstances and that it is in the interest of justice that the application be allowed.

12 The respondent through the Law Firm of Njoroge Kugwa & Company Advocates, filed their written submissions dated April 12, 2023, and opposed the application. It was submitted that no good reason was given for the applicant's non-attendance. The respondent further submitted that the election of new office holders by the applicant was misleading as the new officers were already in office following the hearing notice for May 18, 2022. The respondent further submitted that "equity aids the vigilant and not the indolent" and that theapplicant exhibited that it had no interest in the matter. Therespondent relied on the case of *Elosy Murugi Nyaga v Tharaka Nithi County Government & another* (2020) eKLR, wherein the court held;

All these questions remain unanswered and lead to the inevitable conclusion that the claimant is being economical with the truth. If there was a falling out with her advocate, where is proof"' What is there to show she made efforts to ascertain the status of her case." None is availed and it is clear the blame she is trying to place on her former advocates is meant to hoodwink the court that she was a diligent litigant keen to have her matter heard and determined while in fact she is the epitome of indolence. In the circumstances of this case, it is the respondents who were prejudiced by the applicant's failure to prosecute the case without unreasonable delay. Pendency of a case in court when it is obvious that the claimant is not interested to prosecute it costs time and money to the defendants not to mention mental anguish of having a burden of the case over their shoulders for an unnecessary period of time. I am mindful of the fact that dismissal of cases in summary procedure such as done here may be draconian but when the occasion calls for such action, the court should not shy away from taking such measures. The motion before me is devoid of merit and is accordingly dismissed with costs to the respondents."

13 The above being the pleadings of the parties and their submissions, authorities cited and the relevant provisions of law, the court has considered the same and finds the issue for determination is; -

1. Whether the present application is merited?

14 For the court to properly determine this matter, it must first set out the facts as presented. The applicant herein filed an Originating Summons dated September 7, 2020, and therespondent entered appearance through the Law Firm of Njoroge Kugwa & Co. Advocates on September 18, 2020. A hearing notice was issued on March 28, 2022 and thereafter served on theapplicant on March 29, 2022for the hearing scheduled for May 18, 2022. Despite service being effected, the applicant failed to attend the hearing.

15 The applicant excused its non-attendance down to an AGM it conducted on February 11, 2022, where a change of officials to its board of management occurred and during the transition period, documents such as the hearing notice were misplaced and there was miscommunication between the outgoing and incoming elected officials which resulted in the applicant's failure to attend to the hearing and the subsequent dismissal of the suit on May 18, 2022. It is these facts that led the applicant to file the present application to set aside the orders for the dismissal of the suit and prayed that the suit be reinstated and be determined on merit.

16 The respondent opposed the application on the grounds that the applicant failed to provide sufficient reasons for its non-attendance on the day of the hearing. It was the respondent's contention that the incoming officials were already in office when the hearing notice was served on March 29, 2022. This is indeed true as the applicant's AGM was conducted earlier on February 11, 2022.

17 Having presented a background, the court will now determine the merits of the application. This suit was dismissed for non-attendance of the plaintiff/applicant when it came up for hearing on May 18, 2022. Thus, the relevant law governing setting aside judgment or dismissal is Order 12 Rule 7 of the *Civil Procedure Rules*. It 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."

18 Clearly from the above provision, the decision whether or not to set aside judgement or an order for dismissal of a suit due to non-attendance of a plaintiff is within the discretion of the court. This discretion has to be exercised judiciously, as was stated the case of *Shah v Mbogo* (1979) EA 116, which was quoted with approval in the case of *John Mukuha Mburu v Charles Mwenga Mburu* [2019] eKLR, as follows:

Discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice."

19 For the court to exercise its discretion in favour of the applicant, the said applicant must satisfy the court that there was sufficient cause or reasons to warrant it to be put into use in setting aside the order of dismissal and subsequently reinstate the suit. Sufficient Cause was defined in the case of *Wachira Karani v Bildad Wachira* [2016] eKLR as cited by the applicant.

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 viewpoint 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.

20 The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgment impugned before it. The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. 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."

21 It is on this premise that this courtwill determine the present application.

22 The applicant conducted an Annual General Meeting on February 11, 2022. Thecourt has perused the minutes of the meeting, which state that the incoming Management Board Members were: Josphat Kinyanjui Ngure as Chairman, Hillary Thuku Njoroge as Vice-Chairman, Margret Waringa Karaka as Treasurer, Stephen Waira Njuguna as Hon-Secretary, and Samuel Kamau Muhuri as Committee Member. The outgoing members from the same minutes were as follows: Josphat Kinyanjui as Chairman, Stephen Njuguna as Vice-Chairman, Pius Muigai as Treasurer, Margret W. Karaka as Hon. Secretary and Hillary Thuku Njoroge as committee member.

23 The court notes that majority of the members remained in the office, resulting in a round of "musical chairs" between the elected officials who merely changed positions with only one new member Samuel Kamau Muhuri being newly elected to the Board.

24 Does the election of members of the applicant's Board of Management provide sufficient cause to warrant the orders sought?

25 Following an AGM, parties will be required to effect the changes of officials of their Boards with the relevant authority and possibly change signatories for documents and bank accounts. This is what the court presumes the applicant refers to as a transition period. Despite the officials in the Applicant's Board exchanging positions on the surface, the individual positions still require the new officials to familiarize themselves with their new positions regardless of whether they were previously on the Board of Management.

26 Further this court will consider the time between the ruling sought to be set aside and the present application. The suit was dismissed for non-attendance on May 18, 2022, while the present application was filed on July 14, 2022. This is a period of 1 month and 26 days which the respondent averred is inordinate delay.

27 In *Nilesh Premchand Mulji Shah & another t/a Ketan Emporium v M D Popat and others & another* [2016] eKLR, the court stated as follows with regard to delay:

> Nonetheless, article 159 of the *Constitution* and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay. This is what the case of *Ivita v Kyumba* [1984] KLR 441 espoused that:
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> "The test applied by the courts in the application for 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 time. It is a matter of and in the discretion of the court."

28 Considering the above, this court finds that the delay on the part of the plaintiff/applicant was sufficiently explained and was not inordinate as it was occasioned by the change of officials of the applicant, which in this instance was occasioned by the election of Board Members, which is a requirement undersection 27(5)(e) of the *Co-operative Societies Act* which provides for the election a Co-operative Society's office bearers for the ensuing year. Further section 28(3)(b) of the *Co-operative Societies Act* provides as follows:

The Committee shall be the governing body of the society and shall, subject to any direction from a general meeting or the by-laws of the co-operative society, direct the affairs of the co-operative society with powers to institute and defend suits and other legal proceedings brought in the name of or against the co-operative society."

29 Considering the that a Co-operative Society is an artificial body, this court will consider the case of *East African Portland Cement Ltd v Capital Markets Authority & 4 others* [2014] eKLR, where Justice Mumbi Ngugi concurred with the reasoning held in *Affordable Homes Africa Limited v Ian Henderson & 2 others* HCCC No 524 of 2004 eKLR as follows-

That as an artificial body, a company can take decisions only through the agency of its organs, the Board of Directors and the shareholders; and that where a company's powers of management are, by the articles, vested in the Board of Directors, the general meeting cannot interfere in the exercise of those powers...The upshot of these considerations is that in the absence of a board resolution sanctioning the commencement of this action by the company, the company is not before the court at all."

30 Considering the above, and in light of articles 48 and 50 of *the Constitution*, which guarantees every Kenya right of access to justice and fair hearing. Sections 3, 4 and 13 of the *Environment and Land Court Act* as read together with section 1A, 1B and 3A of the *Civil Procedure Act* expects the court to strive towards substantive justice as was held in the case of *Lochab Bros Ltd v Peter Karuma T/A Lumumba, Lumumba Advocates* [2003] eKLR).

31 It is this court's considered view that the plaintiff/applicant has met the threshold for the setting aside of the orders dated May 18, 2022and reinstatement of the Originating Summons dated September 7, 2020, taking into account that theplaintiff/applicant would be greatly prejudiced if denied a chance to prosecute their application.

32 Having carefully considered the available evidence and the submissions, the court findsthat the Notice of Motion Application dated June 17, 2022, is merited and the same is allowed entirely with costs to the Defendant/Respondent.

33 The plaintiff/applicant to prosecute this Originating Summons expeditiously within the next 90 days from the date hereof. Failure of which the orders granted will be vacated and the suit will stand dismissed.

34 It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 27TH DAY OF JULY, 2023.

L. GACHERU

JUDGE

Delivered online in the presence of; -

M/s Njoroge H/B Mbiyu Kamau for Plaintiff/Applicant

M/s Waigwa for the Defendant/Respondent

Joel Njonjo - Court Assistant

L. GACHERU

JUDGE

27/7/23