



Kaloki & 4 others v Makenzie & 2 others (Environment & Land Case 56 of 2017) [2023] KEELC 19064 (KLR) (26 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19064 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 56 OF 2017**

CA OCHIENG, J

JULY 26, 2023

BETWEEN

**FRANCIS KYENGO KALOKI 1ST PLAINTIFF
HARRISON MUTHOKA KALOKI 2ND PLAINTIFF
PHILOMENA KAMIA 3RD PLAINTIFF
FIDELIS NZOMO KALOKI 4TH PLAINTIFF
DAVID KALOKI 5TH PLAINTIFF**

AND

**CHRISTINE NZULA MAKENZIE 1ST DEFENDANT
TITUS NDILO KINGESI (BOTH SUED AS THE LEGAL REPRESENTATIVES
OF THE ESTATE OF THE LATE PETER MAKENZIE KALOKI-
DECEASED) 2ND DEFENDANT
HOMEWARD AGENCIES LIMITED 3RD DEFENDANT**

RULING

1. What is before Court for determination is the Plaintiff’s Notice of Motion Application dated March 27, 2023 brought pursuant to Order 12 Rule 7, Order 51 (1) and Order 45 of the *Civil Procedure Rules* as well as sections 1A, 1B and 3A of the *Civil Procedure Act*. The Plaintiffs seek the following orders:
 1. Spent
 2. That the Honourable Court be pleased to set aside the orders made on March 21, 2023 dismissing the Plaintiff’s suit and all other consequential orders thereto.
 3. That the Honourable Court be pleased to grant an order reinstating the suit herein.



4. 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 one of the Plaintiffs Francis Kyengo Kaloki where he deposes that this suit was dismissed for want of prosecution on March 21, 2023 when the matter had been set down for directions in respect to the application dated November 10, 2022. He explains that on February 2, 2023, the matter was fixed for mention for directions to the Applicants' Application dated November 10, 2022. Further, that on March 21, 2023, the matter was slated for mention to confirm filing of submissions to the said Application. He highlights the proceedings of March 21, 2023 and contends that this suit was dismissed in its entirety pending the hearing and determination of the aforementioned Application before court. He states that he is willing and ready to prosecute this matter and did not intentionally fail to proceed with it. He argues that mistake to Counsel should not be visited upon the client. Further, that no mistake came about due to his advocates as the Court can confirm the anomaly when the call dropped during the virtual session on June 29, 2022 and immediately they wrote a letter to court raising concerns. He reiterates that the Plaintiffs will suffer irreparable harm if the orders sought are not granted. He avers that the reasons for dismissal were due to the court and not the Applicants doing, as on April 20, 2022 the Court was not sitting and the next date was on June 29, 2022 wherein the sixty (60) days had lapsed. Further, that the Court diary and dates are controlled by the Court and as such they could not get a hearing date in court but rather a mention before the Deputy Registrar so as to be given a hearing date.
3. The 2nd Defendant opposed the instant Application by filing a Replying Affidavit sworn by one Andrew Mbaluto Musila where he deposes that the same is bereft of merit, misconceived, an afterthought, misleading and violates Article 50 of the Constitution. He insists that the Court was categorical in its Ruling pronounced on March 21, 2022 that if the Applicants failed to set down the matter for hearing in sixty (60) days, the same stood dismissed. He argues that instead of adhering to the aforementioned Order of the Court, the Applicant started procrastinating and failed to set down the suit for hearing. He contends that on March 21, 2023, Mr Ngolya invited Court's attention to the fact that the Application filed by Messrs B M Mung'ata Advocates seeking dismissal of the suit was absolutely unwarranted and inconsequential since the Court's Ruling of March 21, 2022 was clear that the suit would stand dismissed upon lapse of sixty (60) days if the Plaintiffs failed to fix it for hearing. He contends that the Plaintiffs' conduct vis a vis the dismissed suit was that of an indolent litigant whose main objective was to see the matter remain unprosecuted without caring about the rights of the 2nd Respondent. He reiterates that the Court did not err in its orders made on March 21, 2023 dismissing the Plaintiffs suit. Further, that it is the 2nd Respondent who had continued to move the Court and the Plaintiffs only rose from their deep slumber whenever adverse orders were made against them. He explains that the 2nd Respondent is registered proprietor of land parcel numbers Mavoko Town Block 2/143 and Mavoko Town Block 2/12 and has been denied the enjoyment of his rights contrary to section 24(a) of the Land Registration Act.
4. The Interested Parties opposed the instant Application by filing a Replying Affidavit sworn by Mutava T Musyoki, their Advocate where he deposes that the Applicants have been indolent to prosecute this matter for over fourteen (14) years and the Court even extended leniency and ordered through a Ruling delivered on March 21, 2022 that they fix the matter for hearing within sixty (60) days and comply with Order 11 of the Civil Procedure Rules, failure of which it would stand dismissed. Further, that this suit was dismissed for want of prosecution on March 21, 2023. He insists that the Deputy Registrar had already issued directions that the orders of March 21, 2022 were not complied with and the matter placed before the Judge for dismissal. He avers that the Applicants admitted that the matter came up before the Judge on February 2, 2023 for directions but there were orders prevailing from the onset of the Ruling delivered on March 21, 2022 and the Court could not proceed to subvert from its own



assertion in the first instance, on orders it had already issued. He states that even though there were directions on filing of submissions, the said directions were already superseded by the Applicants non-compliance of the Court Order.

5. The Application was canvassed by way of written submissions, although the Respondents opted to rely on their respective Replying Affidavits.

Analysis and Determination

6. Upon consideration of the instant Notice of Motion Application including the respective Affidavits and Plaintiffs' submissions, the only issue for determination is whether this suit should be reinstated for hearing on merit.
7. The Plaintiffs in their submissions reiterated their averments and argued that this suit ought to be reinstated for hearing. To support their arguments, they relied on Articles 50 and 159 (2) (d) of the Constitution including Section 3A of the Civil Procedure Act as well as the following decisions: Gold Lida Limited Vs NIC Bank Limited & 2 Others [2018] eKLR and Bilba Ngonyo Isaac v Kembu Farm Limited & Another [2018] eKLR which echoes the decision in Shah Vs Mbogo & Another [1967] EA 116.
8. The Plaintiffs have sought for the orders issued on March 21, 2023 dismissing this suit for want of prosecution to be set aside, which is opposed by the Defendants and Interested Parties. It is the Plaintiffs arguments that this suit should not have been dismissed for want of prosecution since it is the Court that failed to give them a hearing date. Further, that on the date the suit was dismissed for want of prosecution, it was scheduled for directions in respect to the Interested Parties' application dated November 10, 2022. They insist that failure to comply with the Order of the Court issued on March 21, 2022 was beyond their control.
9. On setting aside of a Judgment as well as reinstatement of a dismissed suit I will proceed to highlight the legal provisions governing the same. Order 10 Rule 11 of the Civil Procedure Rules stipulates that:

“Where Judgment has been entered under this order, the court may set aside or vary such judgement and any consequential decree or order upon such terms as are just.”
10. In the case of CMC Holdings Limited vs Nzioki [2004] 1 KLR 173 it was observed 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.”
11. I wish to reproduce an excerpt of the Order this court issued on March 21, 2022:

“In associating myself with the decisions cited above as well as the legal provisions which I have quoted, I find there was no intention by the Plaintiffs to delay the matter as there are triable issues raised in the Amended Plaint which parties should be allowed to ventilate upon. Further, Article 50 of the Constitution grants a party a right to be heard. In the circumstance, I will decline to dismiss this suit for want of prosecution. It is against the foregoing that I find the 3rd Defendant's Notice of Motion Application dated the 25th August, 2021 unmerited and will disallow it. Costs will be in the cause. I direct that this suit



be set down for hearing within sixty (60) days from the date hereof, failure of which it will be dismissed for want of prosecution.”

12. From a reading of this excerpt, it is very explicit that the Plaintiffs were to set down the suit for hearing in sixty (60) days failure of which it stood dismissed for want of prosecution. I note the Plaintiffs have blamed the Court for dismissing this suit, insisting that it is the Court that failed to give them a hearing date. However from perusal of the Court record, from March 21, 2022, I note there were various mention dates that were fixed in the Registry and before the Deputy Registrar but there is no indication if the Plaintiffs ever sought for a hearing date. Insofar as the Plaintiffs contend it was wrong for the Court to dismiss the suit on the date it had scheduled the Interested Parties application dated November 10, 2022 for directions, which Application ironically also sought for dismissal of their suit, I opine that the Plaintiffs were bound by the orders of the Court issued on March 21, 2022 and cannot extricate themselves from it. From the reasons provided herein including one annexed letter addressed to the Deputy Registrar, I find that the Plaintiffs have not demonstrated how they sought to get an early hearing date from court. I opine that this Court granted the Plaintiffs a chance to proceed with their matter but they failed to do so.
13. It is my considered view that it was duty of the Court to grant directions to any pending Application but this did not mean the Court was not supposed to refer to previous orders already made, as sought by the Plaintiff. Further, as per paragraph 43 of the Environment and Land Court Practice Directions issued by the Chief Justice on July 25, 2014, it states that:

“Non-compliance with relevant Civil Procedure Rules, Orders and or directions issued by a Judge, shall attract sanctions including but not limited to imposition of costs, fines, striking out of pleadings, the dismissal of a suit and/or meting out punishment prescribed by the [Environment and Land Court Act](#) or any other Statute as the Court may deem fit bearing in mind the overriding interests of justice.”

14. In the foregoing, I find the instant Application unmerited and will dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 26TH DAY OF JULY, 2023

CHRISTINE OCHIENG

JUDGE

