



REPUBLIC OF KENYA



**Mwenye & 5 others v Tsama & 3 others (Civil Suit 136 of 2020)
[2023] KEELC 19197 (KLR) (19 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19197 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT 136 OF 2020
LL NAIKUNI, J
JULY 19, 2023**

BETWEEN

**MKUZI TSAMA MWENYE 1ST PLAINTIFF
SALIM ABDALLA TSAMA 2ND PLAINTIFF
DZUYA JOHA KANYONGE 3RD PLAINTIFF
PANGA KWALE MKUZI 4TH PLAINTIFF
ADAM KANGO SAID 5TH PLAINTIFF
RICHARD CHIBULE JOHA 6TH PLAINTIFF**

AND

**JULIUS MKAUMA TSAMA 1ST DEFENDANT
MBODZE TSAMA MKAUMA 2ND DEFENDANT
KILIFI LAND REGISTRAR 3RD DEFENDANT
KILIFI DISTRICT LAND ADJUDICATION OFFICER 4TH DEFENDANT**

RULING

I. Introduction

1. This ruling is in respect to the Notice of Motion application dated 21st November, 2022 by the 1st, 2nd, 4th & 5th Plaintiffs/Applicants, Mkuzi Tsama Mwenye, Salim Abdalla Tsama, Panga Kwale Mkuzi and Adam Kango respectively. The Application was premised under the provision of Order 12 Rule 7, Order 51(1) of the *Civil Procedure Rules, 2010* and Sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap. 21.



2. From the records, direction over this application were taken on 21st November, 2022. The Plaintiffs were ordered to serve the application and thereafter parties to file replies and written submissions. Unfortunately, there is no evidence of any service having been undertaken and hence the Defendants were not able to comply. Instead, they proceeded to file their submissions on the Judgement of the suit having closed their case as a Defence and Counter Claim.
3. Nonetheless, this being Land matter with its sensitivities and bade on the principles of natural Justice Equity and Conscience – the right for fair hearing and the Overriding Objectives (The Oxygen Rule) founded under the provision of Articles 25 (c), 47, 48, 50 (1) & (2) and 159 (1) and (2) of the Constitution of Kenya, 2010 the Honourable Court will proceed to deliberate on the application whatsoever and grant its directions hereinafter.

II. The 1st, 2nd, 4th & 5th Plaintiffs/Applicants.

4. The 1st, 2nd, 4th & 5th Plaintiffs/Applicants sought for the following orders that: -
 - a. Spent
 - b. The Honourable Court be pleased to set aside the orders made on 25th October 2022 dismissing the Plaintiff's suit and all other consequential orders thereto.
 - c. The Honourable Court be pleased to grant an order reinstating the suit herein.
 - d. Pending the hearing and determination of this application interparties the honourable Court be pleased to review its orders directing that the hearing of the matter had been closed submission to be file in fourteen day mention 24/11/2022 for a judgment date on the counterclaim issue.
 - e. The Court be pleased to arrest its judgment in the current suit slated for mention 24/11/2022 pending the hearing and determination of the application inter partes.
 - f. The Honourable Court be pleased to issue further or better orders as shall meet the ends of justice.
 - g. The costs of this application be in the cause.
5. The Application was based on the grounds on the face of it, the testimonial facts and the averments founder under the 10 Paragraphed Supporting Affidavit by Jane Akinyi Onyango on the same date as the application. She averred that:
 - a. She was an Advocate of the High Court of Kenya practising as such in the Law firm of Messrs. Onyango Onunga Advocates, who have had the conduct of this matter on behalf of the Plaintiffs herein. Hence, she was well versed with the matters that were the subject of these proceedings herein and thus competent to swear this affidavit.
 - b. The suit was dismissed on 25th October 2022 for want of prosecution of the matter.
 - c. The Plaintiffs/Applicants were willing and ready to prosecute the matter and the same was demonstrable.
 - d. The Plaintiffs/Applicants never intentionally fail to prosecute the matter. Being the current Coast Representative of FIDA-KENYA, she was invited to an urgent Board meeting in Nairobi scheduled for 25th October 2022 and out of courtesy did make a call to the Defendant's advocate on record explaining to her the circumstances she was facing.



- e. Notwithstanding, the Plaintiffs were personally present in court on 25th October 2022 ready to corroborate that their advocate on record was out of jurisdiction and be granted an adjournment.
 - f. As aforesaid two of Plaintiffs innocently without knowing the procedure requested the Court to hear them but the court ruled.
 - g. The Plaintiffs/Applicants had an arguable case with high chances of success and it was in the best interest of justice that this suit be reinstated so that it could be heard and determined on merit.
 - h. This was a suitable case for the exercise by this court of its unfettered discretion to set aside the ex-parte orders.
 - i. Under the provision of Article 159 of the Constitution of Kenya and Sections 1A and 2A of the Civil Procedure Act, Cap. 21 it would be fair expedient and in the best interest of justice to reinstate this suit.
 - j. The Plaintiffs/Applicants' the application sought to have the Judgment arrested so that the matter was heard on merits and they be accorded a hearing because, that if Judgment was entered as a consequence of the advocate's failure to attend court on date which was taken ex-parte by the Defendants on date when Plaintiffs' advocate was Attending National FIDA-KENYA function, the Plaintiffs would suffer damage.
6. As already indicated, non of the parties herein filed any responses nor submissions as directed by Court. Therefore, the matter will be determined own its merit.

III. Analysis and Determination

7. I have keenly assessed and considered the filed pleadings by the 1st, 2nd, 4th & 5th Plaintiffs/Applicants herein, the relevant provisions of the Constitution of Kenya, 2010 and the statutes.
8. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following two (2) issues for its determination. These are:-
- a. Whether the Notice of Notiin Application dated 21st November, 2022 by the 1st, 2nd, 4th & 5th Plaintiffss/Applicants herein has any merit and whther the parties are entitled to any reliefs sought.
 - b. Who will bear the Costs of the application.
- ISSUE No. a). Whether the Notice of Notiin Application dated 21st November, 2022 by the 1st, 2nd, 4th & 5th Plaintiffss/Applicants herein has any merit and whther the parties are entitled to any reliefs sought.
9. Under this Sub – heading, the main substratum of the matter is setting aside Court orders dismissing a for non attendance and want of prosecution by parties thereof and causing it to be reinstated. The facts of this matter are rather straight forward. On 25th October, 2022, this suit having been slated for hearing by the Consensus of the parties but the Advocate for the Plaintiffs hailing to turn up nor send a representative, this Honourable Court proceeded to dismiss the Plaintiffs' suit against the Defendants for non-attendance under the provision of Order 12 Rule 1 and for want of prosecution under the provision of Order 17 Rule 1 & 3 of the Civil Procedure Rules, 2010 with costs to the Defendants. Pursuant to that, the matter proceeded for the hearing of the Counter Claim by the Defendants.



10. Legally speaking, the relevant law governing setting aside judgment or dismissal is under the provision of Order 12 Rule 7 of the [Civil Procedure Rules, 2010](#). 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”

11. The decision of whether to or not to allow an application for setting aside Judgment or an order for dismissal of a suit due to non-attendance of a Plaintiff is within the wide discretion of the court. This discretion has to be exercised judiciously, as was stated the case of “*Shah v Mbogo* (1979) EA 116 quoted with approval in the case of [John Mukuba Mburu v Charles Mwenga Mburu](#) [2019] eKLR, where that court held thus:

“.....this 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.”

12. For the Court to exercise its discretion in favour of the Applicant, he or she has satisfy it that there is sufficient cause or reason to warrant it to be put into use in setting aside the order of dismissal and subsequently reinstate the suit. Sufficient Cause was defined by the Supreme Court of India in the case of:- “*Parimal v Veena* which was cited with approval in the case of “[Wachira Karani v Bildad Wachira](#) [2016] eKLR. In the case, the said Supreme Court stated 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”

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.”

13. In the instant case, the Plaintiffs/Applicants claimed that the suit was dismissed for want of prosecution for non-attendance on the date of hearing. They have indicated the Learned Counsel handling the matter and being a Coast representative of FIDA – KENYA had to attend an urgent Board



meeting. Further, that she called to inform her Colleague of her predicament but her clients attended Court but could not persuade the Court. With due respect, this is a misconception. The Rules do not provide for dismissal of a suit for want of prosecution on a date it is set down for hearing. Instead they provide for dismissal on account of non-attendance of a Plaintiff or a Defendant who has a counter-claim for that matter. Thus, to set the record straight, the way I understand the facts and the record herein is that the suit was dismissed for non-attendance of both the Plaintiffs and their learned counsel on the date of hearing (of their case).

14. As indicated earlier, the merits or otherwise of the issue of the Advocate not attending court due to her position in FIDA- Kenya are considered by the Court and found wanting. In case the Applicant was dissatisfied with the findings of the Court on them she should have appealed against the decision of this Court. I take note that on different occasion it is not the said Deponent of the affidavit in support of this suit that appeared before Court but always send representatives. Therefore the Advocate had the choice to have someone hold her brief as it has now become a common norm and practise when she realized that she may not be able to attend the court herself or rather appear before court and seek an adjournment. I am however also concerned that the Learned Counsel for the Plaintiffs has claimed to have talked to the Defendants' Counsel about her dilemma information which was not relied to the court or the Honourable Court has not had the pleasure to examine due to there being a reply. I wonder the reason she never thought it wise to have written to her and copied to Court. Clearly, there was great and inexcusable lethargy and negligence on the part of the Advocate for the Plaintiffs. I am still surprised in the manner she took these matters of Court so casually.
15. Be that as it may, on the court's discretion under the provision of Order 12 Rule 7 *Civil Procedure Rules, 2010* the Honourable court is guided by the case of "*Richard Ncharpi Leiyagu v IEBC & 2 Others* [2013] on the proposition that the discretion to set aside an ex parte order is intended to avoid injustice, inadvertence or inexcusable mistake or error. That the court has powers to dismiss a suit or an application for non-prosecution/non-attendance is not in dispute as provided under Order 12 *Civil Procedure Rules*.
16. It's not in dispute that tThe Plaintiffs/Applicants were all along aware of the hearing date. The cause list had been published at least 7 days before the hearing date and the Plaintiffs/Applicants knew that the matter was the first one in the cause list. The court has no obligation to make enquires why a party has not appeared in court on time or at all. See the case of "*Solomon Ouko Onyango –Versus - Amedo Centre (K) Ltd.* [2019] eKLR.
17. Under the provision of Order 12 Rule 7, the court has discretion to set aside, recall and or reinstate a suit or application dismissed for non-prosecution or no-attendance. In the "*John Nabashon Mwangi v Kenya Finance Bank Limited (in Liquidation)* [2015 eKLR, the Court held that:-

“the tests to apply in an application to reinstate a suit are whether there are reasonable grounds to reinstate, considering the prejudice that the defendant would suffer if reinstatement of the suit was made against the prejudice the plaintiff would suffer if the suit is not reinstated.”
18. The question herein is whether the Plaintiffs/Applicants herein have demonstrated reasonable grounds for the reinstatement of the suit and whether the Defendants/Respondents will suffer prejudice if the suit was reinstated. The court's main mandate is to do justice to parties and must exercise the discretion judiciously to avoid injustice resulting from accident, inadvertence or excusable mistake. It is trite law the discretion is to be exercised not in a design of assisting a person who has deliberately sought to obstruct the court of justice.



19. The Applicant's counsel contends that her the Plaintiffs should not suffer as a result of her misdoing as she was not able to attend court on that day due to the fact that she is the Current Coast Representative of FIDA-KENYA and she had been invited to an urgent Board Meeting scheduled in Nairobi for the 25th October, 2022 and out of courtesy called and informed the Defendants' advocate on record explaining to her the circumstances she was in.
20. Suffice it to say, and giving the parties a benefit of doubt, by the end of the day, I am compelled to refer to the case of "*Belinda Murai & Others v Amos Wainaina* (1979) eKLR, Madan J as he then was, it was held mistakes of a legal adviser may amount to sufficient cause. While dealing with an issue relating to a mistake made by a lawyer, Court stated thus:-

“The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistake which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule.....”

21. Further, the Plaintiffs/Applicants contended that if the suit was not reinstated, they would be condemned unheard and that they would suffer grave injustice and prejudice. I reiterated that the provision of Articles 25 (c), 47, 48 and 50 (1) & (2) of the *Constitution* of Kenya, 2010 guarantees every Kenya right to access to justice and fair hearing. Article 159 requires that justice shall be administered without undue regard to technicalities whereas Sections 3, 4, 13 and 19 of the *Environment and Land Court Act*, No. 19 of 2011 as read together with Sections 1A, 1B and 3A of the *Civil Procedure Act*, cap. 21 expects the court to strive towards substantive justice and where the Courts should facilitate the expeditious, proportionate, Just and accessible resolution of disputes. See the case of "*Lochab Bros Ltd v Peter Karuma T/A Lumumba, Lumumba Advocates* [2003] eKLR.
22. All said and done, looking at the totality of the circumstances in this matter, my considered view is the route of lesser risk of injustice is to allow the application otherwise the Plaintiffs/Applicants would be more prejudiced if denied a chance to prosecute the application dated 21st November, 2022.

See the case of "*Gladys Njeri Kirugumi v Langata Development Co. Ltd & Another* [2016] eKLR & *Films Rover International Ltd. – Vrsus - Cannon Film Sales Ltd.*, [1986] 3 All E.R. 772.

ISSUE No. Who is to bear the Costs of the application?

23. It is trite Law that that issues of Costs is at the discretion of the Court. Costs mean awarded granted to a party at the conclusion of the legal action or proceedings. The proviso of Section 27 (1) of the *Civil Procedure Rules, 2010* hold that costs follow the event. By events here means the results or outcome of the said legal action or proceedings.
24. In the instant case, although the application by the Plaintiffs/Applicants to setaside court's orders and reinstate the suit has been allowed, the Court takes cognisance of the trouble the Defendants have had to go through in Defending their case and the Counter Claim and also having to proceeded on once again in matter at the instance of the Plaintiss/Applicants they had known was closed. They are entitled to costs and some thown away costs to be borne by the Plaintiffs/Applicants herein.

IV. Conclusion & Findings

25. In the long run, having caused the analysis to the framed issues, this Honourable Court on preponderance of probabilities now proceeds to make the following specific orders. These are:-



- a. That the Notice of Motion application dated 21st November, 2022 by the 1st, 2nd, 4th & 5th Plaintiffs/ Applicants herein be and is allowed herein.
- b. That the orders granted on 25th October, 2022 dismissing the Plaintiffs' suit be and are hereby set side and that the Plaintiffs suit be reinstated forthwith.
- c. That the proceedings and the testimony already adduced by the 1st, 2nd, 3rd and 4th Defendants herein and recorded on 25th October, 2022 and any other date to be retained save that the Plaintiffs to be at liberty to recall any witnesses for strictly for cross examination only pursuant to the provisions of Sections 146 (4) of the *Evidence Act*, Cap. 80 and Order 18 Rule 10 of the *Civil Procedure Rules, 2010*.
- d. That for expediency sake this part heard suit to be fixed for hearing within the next One Hundred and Eighty (180) days from the date of the delivery of this Ruling being 4th March, 2024. There shall be a mention on 17th October, 2023 to ascertain the compliance of these orders.
- e. That the 1st, 2nd, 4th & 5th Plaintiffs shall pay a sum of Kenya Shillings twenty Thousand (Kshs. 20, 000. 000/=) upon the Advocates for the 1st & 2nd Defendants as thrown away costs within the next thirty (30) days from the date of this Ruling.
- f. That these Orders are purely conditional and shall vacated if the Plaintiffs fail to comply and and a date set for the delivery of Judgment thereof.
- g. That the 1st, 2nd, 4th & 5th Plaintiffs shall bear the costs of the application to be in the cause.

It Is Ordered Accordingly

RULING DELIEVERD THOUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 19TH DAY OF JULY 2023.

.....
HON. MR. JUSTICE L.L. NAIKUNI (JUDGE)

ENVIRONMENT & LAND COURT AT

MOMBASA

Ruling delivered in the presence of:

- a. M/s. Yumna, the Court Assistant.
- b. Mr. Lisanza Advocate holding brief for M/s. Onyango Advocate for the Plaintiffs.
- c. M/s. Kayatta Advocate for the 1st & 2nd Defendants.
- d. No appearance for the 3rd & 4th Defendants.

