



Malwenyi & another v Ngugi & 4 others (Environment and Land Case Civil Suit 1212 of 2013) [2023] KEELC 18711 (KLR) (13 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18711 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 1212 OF 2013**

MD MWANGI, J

JULY 13, 2023

IN RESPECT OF THE NOTICE OF MOTION APPLICATION DATED 6TH APRIL 2023 BY THE PLAINTIFF/APPLICANT BROUGHT UNDER THE PROVISIONS OF SECTIONS 1A & 1B OF THE CIVIL PROCEDURE ACT SEEKING REINSTATEMENT OF THE APPLICATION DATED 6TH FEBRUARY 2023 FOR NON- ATTENDANCE.

BETWEEN

FRANCIS INWANI MALWENYI 1ST APPLICANT

IRENE WAMBUI INWANI 2ND APPLICANT

AND

HENRY KARANJA NGUGI 1ST RESPONDENT

ANDREW MUTHEE GATIMU 2ND RESPONDENT

FLORENCE ELIZABETH WANJIRU 3RD RESPONDENT

AGNES WAMBUI NJERU 4TH RESPONDENT

SUPER MICRO VENTURES SELF HELP 5TH RESPONDENT

RULING

Background

1. The application by the Plaintiffs/Applicants seeks to reinstate the earlier application dated 6th February 2023 which was dismissed by the court on 27th February 2023 for non- attendance. Interestingly, that application was seeking a stay of taxation of another application dated 21st October 2021 that was in turn seeking review of an order dismissing the Plaintiff's suit for non attendance way back on 21st October 2021. The current application is expressed to have been brought under the provisions of sections 1A & 1B of the [Civil Procedure Act](#), amongst the other cited provisions of the law.



2. The application is supported by the affidavit of Francis Inwani Malwenyi sworn on 6th April 2023. In the said affidavit, the deponent revisits the history of the litigation in this matter.
3. The Deponent states that the court dismissed the Plaintiff's suit as against the 3rd and 4th Defendants with costs on the 21st October 2021, despite their readiness and willingness to prosecute the case. Pursuant to the dismissal, the 3rd & 4th Defendants filed their bill of costs dated 6th September 2022. It was scheduled for taxation on 17th April 2023 before the Deputy Registrar. This is what prompted the Plaintiffs to file the application dated 6th February 2023 seeking to stay the taxation of the bill of costs by the Deputy Registrar.
4. The Deponent deposes that the said application dated 6th February 2023 was dismissed on 28th February 2023 for non-attendance. The dismissal of the application dated 6th February 2023 has exposed the Plaintiffs to taxation yet there is a valid application to review the orders awarding costs which the 3rd & 4th Defendants seek to tax.
5. According to the Deponent, the non- attendance was due to a mix up of dates on the part of their Advocates since the Deputy Registrar had also issued them with another date being 17th April 2023. The date of 28th February 2023 according to the Deponent had on the other hand had been issued through the e-filing portal.
6. The deponent reiterates that the application dated 6th February 2023 came up for the first hearing on 28th February 2023 and that justice would demand that the Plaintiffs/Applicants be granted another chance to prosecute the application. The Applicants plead that if the application is not granted, the taxation of the 3rd & 4th Defendants' bill of costs will proceed rendering their application for review otiose to their detriment. They argue that no prejudice will be suffered by the Respondents.

Response by the 3rd Defendant.

7. The application is opposed by the 3rd Defendant by way of a Replying affidavit sworn by Crispin N. Ngugi on 12th April 2023
8. The Deponent states that the Plaintiffs and their Advocates have demonstrated an unmistakable carefree attitude, neglect of duty and absolute lack of interest in the applications before the court. The applications therefore amount to an abuse of the process of court. The deponent deposes that the actions by the Plaintiffs and their Advocates is unnecessarily clogging the court's diary, causing delays, annoyance and increasing the costs in a manner only fashionable to vexatious litigants.
9. The Respondent reminds the court of the overriding objective that enjoins the court to dispense justice expeditiously and in a manner that promotes efficient use of court resources and affordability in costs. He urges the court to exercise its discretion judiciously. The Respondent avers that there is no accident, inadvertence or excusable mistake demonstrated by the Plaintiffs. The conduct of the Plaintiffs and their Advocates is inexcusable. No sufficient cause has been shown to warrant the exercise of the court's discretion in favour of the Plaintiffs.
10. The Respondent terms the averments by the Plaintiffs that the non- attendance was due to a mix up of dates on the part of their advocates pretentious and spurious since the Plaintiffs' Advocates were well aware of the date of the hearing of the application being 27th February 2023. The court order issued by the court clearly indicated the hearing date as 27th February 2023. The application was dismissed on 27th February 2023 and not 28th February 2023.



11. The Plaintiffs filed a Supplementary affidavit sworn on 10th May 2023 by Dr. Francis Inwani Malwenyi, the 1st Plaintiff/Applicant. The Deponent mainly delves to the merits of the suit.
12. The Deponent further reiterates that the failure to attend court was as a result of an inadvertent mix-up of dates on the part of their Advocates. He asserts that his Advocates only came to learn of the dismissal on 6th April 2023 when they filed the current application. He states that it is in the interests of justice that the application dated 6th April 2023 be reinstated.

Court's directions.

13. The court's directions were that the application be canvassed by way of written submissions. Both parties complied and the court has had the opportunity to peruse the said submissions including the supplementary ones by the Plaintiffs/Applicants.

Issues for Determination.

14. From the submissions filed by the parties, all are in agreement that the court has the discretion to set aside the order dismissing the Plaintiffs' application dated 6th February 2023. The court's discretion is intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice. {Shah –Vs- Mbogo (1967) EA 116, Patel –Vs- East African Cargo Handling Services Ltd (1975) EA 75}
15. In exercising the said discretion, the court should consider among other things, the facts and circumstances both prior and subsequent and all the respective merits of the parties (*Josephine Gakumuri Kibanga –Vs- Peter Gitonga Mbogori & another (2006)* eKLR)
16. The sole issue then for determination by the court is whether the Plaintiffs' application is merited to justify the exercise of the court's discretion in their favour.

Analysis and determination.

17. The application that the Plaintiffs seek to reinstate dated 6th February 2023, as the court's record shows was dismissed on 27th February 2023; not 28th February 2023, as the 1st Plaintiff deposes in the affidavits in support of the application.
18. The said application was filed under certificate of urgency. On 8th February 2023, the court after considering the application ex parte directed that it be served for inter partes hearing on 27th February 2023. This is the order that the Plaintiffs served up the Respondents. The date for inter partes hearing is clearly spelt out.
19. The 1st Plaintiff who is the deponent of the affidavits in support of the application deposes that there was a mix up of dates by his Advocates. That is the reason given for non – attendance on 27th February 2023 when the application was scheduled for inter partes hearing.
20. The 1st Plaintiff further deposes that his Advocates only became aware that the application had been dismissed on 6th April 2023 from the e-filing portal when they filed the application under consideration.
21. The application is strenuously opposed by the 3rd Defendant/Respondent who urges the court not to exercise its discretion in favour of the Plaintiffs/Applicants. In her submissions, the 3rd Defendant/



- Respondent submits that the application is incompetent since the Applicants did not pray to set aside the order of dismissal first before seeking reinstatement of the application dated 6th February 2023.
22. I disagree with the submission by the 3rd Defendant/Respondent in that respect. The omission by the Plaintiffs/Applicants to pray for setting aside of the impugned order is not fatal. It is a technicality that the court will overlook and proceed to consider the application on its merits.
23. In the case of *Habo Agencies Ltd – Vs- Wilfred Odhiambo Musingo (2015)* eKLR, the court stated that: -
- “it is not enough for a party in litigation to simply blame the advocate(s) on record for all manner of transgressions in the conduct of litigation. Courts have always emphasized that parties have a responsibility to show interest in and follow up their cases even when they are represented by Counsel.”
24. In this case the Advocate who allegedly mixed up the dates has not filed an affidavit to explain the alleged mix up and how exactly that came to be. Was it that he failed to diarize the date? Or was it that he diarized the wrong date? This has not been sufficiently explained. How could the Advocate have mis-diarized yet he served the Respondents with the correct date? The explanation offered in my view is not plausible.
25. As I had already stated earlier on, the court is bound to also among other things, consider the facts and circumstances prior to and subsequent to the dismissal.
26. The Plaintiffs’ application which had been brought under certificate of urgency was dismissed on 27th February 2023. The current application was filed on 6 April 2023, thirty nine (39) days thereafter.
27. Where an application is filed under certificate of urgency, one would reasonable expect that the Applicant would diligently follow it up in view of the urgency of the issues at hand if indeed the intention was to have such issues addressed expediently. The conduct of the Applicants after the dismissal of their application is not that of a vigilant litigant keen on pursuing his rights.
28. The overriding objective under section 1A and 1B of the *Civil Procedure Act* and section 3 of the Environment and Land Act enjoins this court not only to do justice but to also ensure timely disposal of the proceedings and the efficient disposal of the business of the court. Parties and their Advocates too are obligated to assist the court to further the overriding objective.
29. The pronouncement by Kiage J.A in the case of *Nicholas Kiptoo Arap Korir Salat –vs- IEBC & 6 others (2013)* eKLR, perfectly captures the spirit of the overriding objection and the provisions of Article 159 of *the Constitution* of Kenya, 2010. The Learned Judge stated that: -
- “I am not in the least persuaded that Article 159 of *the constitution* and the oxygen principles which both command courts to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an archical free-for-all in the administration of justice. This court, indeed all courts, must never provide the succor and cover to parties who exhibit scant respect for rules and timelines. These rules and timelines serve to make the process of Judicial adjudication and determination fair, just, certain and even handed. Courts cannot aid in the bending or circumventing of rules and shifting of goal posts for while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so



that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned.”

30. Having considered the Plaintiff’s application and the particular circumstances of this case, I find no merit whatsoever in the Plaintiff’s application dated 6th April 2023. I hereby dismiss it with costs to the Respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JULY 2023.

M.D MWANGI

JUDGE

In the virtual presence of:

Mr. Musana holding brief for Mr. Ngugi for the Respondent.

No appearance for the Plaintiffs/Applicants.

Court Assistant –Yvette.

M.D. MWANGI

JUDGE

