



Maneno & others v Ibrahim & 3 others (Environment & Land Case 30 of 2016) [2023] KEELC 19324 (KLR) (28 August 2023) (Ruling)

Neutral citation: [2023] KEELC 19324 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 30 OF 2016**

**MAO ODENY, J
AUGUST 28, 2023**

BETWEEN

SALIM MWAROPHA MANENO & OTHERS PLAINTIFF

AND

IDDI IBRAHIM & 3 OTHERS DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated November 16, 2022 brought by the Defendant/Applicants seeking the following orders;
 - a. Spent
 - b. That this Honourable Court be pleased to grant leave to the Defendants to re-open the plaintiffs' case and to have the witness recalled for cross-examination.
 - c. That this Honourable Court be pleased to re-open the Defendants' case that had been closed.
 - d. That the costs of this application be in the cause.
2. The application was supported by the affidavit of Peter Omwenga sworn on November 16, 2022 where he deponed that on October 26, 2022 when the matter came up for hearing, he experienced a technical hitch which led to the hearing proceeding in his absence and both the Plaintiffs' and defendants' cases were closed. He stated that failure to attend court on that day was not by design but the same was due to circumstances beyond his control.

Plaintiff's Response

3. In response the 3rd Plaintiff filed a Replying affidavit sworn by Daniel Lwambi Tsolachiro on November 28, 2022 and deponed that both the 1st Defendant and counsel were absent on the day of the hearing



and that it was the 1st Defendant's obligation to be present as the matter belonged to him and not his legal representative.

4. He further deponed that there was no communication by counsel or written consent to adjourn the matter. That the defendants have an obligation to follow up their matters noting that this matter has been in court since 2016 to date.
5. Parties agreed to canvass the application vide written submissions, which were duly filed.

Defendants' submissions.

6. Counsel for the defendants reiterated the contents of the grounds on the face of the application and identified one issue for determination, whether the applicants have demonstrated a good case to warrant the reopening of the Plaintiffs and Defendants' cases.
7. Mr Omwenga submitted that the applicants have demonstrated genuine reasons to have this matter reopened for hearing of both the Plaintiffs and Defendants cases. It was counsel's further submission that 1st and 2nd Defendants' assurance that the matter would not proceed for hearing on October 26, 2022 since they had agreed to withdraw the same. Further, that counsel experienced a technical hitch during the virtual hearing.
8. On the issue of the technical hitch experienced by counsel, he relied on the following cases, *Nashit Raikundlia & Sawan Raikundalia vs Sol Electronics Kenya & 2 others Nairobi HCCC No 94 of 2017* and *Salim Mohamed vs Robert Fondo Kirimo Malindi Miscellaneous Application No 3 of 2021*. Counsel also submitted that the Defendants' case had triable issues and went ahead to rely on the case of *Theresia Ktuku Vulu vs Kavata Muendo Ndolo & 5 others Makueni ELC Case No 3 of 2018* and Joseph Ndungu Kamau v John Njihia ELC case No 392 of 2016.

Plaintiff's Submissions

9. Counsel submitted that for the Defendants motion to succeed they must demonstrate that the failure to attend court on the date for hearing was because of an excusable mistake, inadvertence, accident or error.
10. Mr Nyange submitted that he was not made aware any negotiations between the 1st and 2nd Plaintiffs and in any event, the consent by the 1st and 2nd Plaintiffs does not bind the 3rd and 4th Plaintiffs.
11. It was counsel's submission that the issue of negotiations and the consent between the Defendants and the 1st and 2nd Plaintiffs cannot be deemed to amount to excusable mistake, inadvertence, accident or error. Further, that counsel did not file the application on the same day to demonstrate the urgency of the motion but he instead opted to file the same after twenty-one (21) days.
12. Counsel submitted that upon withdrawal, the 1st and 2nd Plaintiffs ceased being parties to the suit as far as their claim and participation is concerned and as such, they cannot proceed to file affidavits and pleadings.
13. Counsel relied on the case of *Smt. Rais Sultana Begam v Abdul Qadir & Others* and submitted that once the suit was withdrawn by the 1st and 2nd Plaintiffs, that marked the end of their participation and they cannot proceed to file affidavits and pleadings and therefore the affidavit sworn by the 1st Plaintiff is of no value after consenting to have their claim withdrawn.
14. It was counsel's submission that all hearings before this Honourable court are in open court and not virtual and that counsel has not explained his absence in open court and thus, the reasons advanced are



not excusable. It was also his contention that the mistake of counsel ought not to be visited upon the client and that the Court of Appeal in *Tana & Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others (2015) eKLR* dismissed this argument.

15. In conclusion, counsel submitted that the court ought not indulge any negligent conduct of a litigant taking into account that this matter has been in court since 2016 and most of the adjournments have been occasioned by the defendants and that this motion is another attempt to delay the conclusion of the matter.

Analysis and Determination.

16. The issue for determination is whether the Applicants have made a case for reopening the plaintiff's and the Defendants' cases.
17. Counsel for the Applicants stated that on October 26, 2022 when the matter came up for hearing, he experienced a technical hitch which led to the hearing proceeding in his absence and both the Plaintiffs' and defendants' cases closed.
18. Mr Omwenga stated that failure to attend court on that day was due to circumstances beyond his control and that the 1st and 2nd Plaintiffs have since withdrawn their case as against the Defendants and as such, counsel was under the impression that the suit was concluded based on the consent.
19. Counsel for the respondents submitted that the purported consent cannot be the basis upon which the orders sought can issue and that clients have an obligation to follow up their matters noting that this matter has been in court since 2016 to date without having been concluded.
20. This matter was filed in court on February 19, 2016 and was heard on October 26, 2022 after several attempts whereby the adjournments were caused by the Defendants. The reasons given by counsel for not attending court were contradictory as in one breathe counsel stated that he had a technical hitch when trying to log in, and on the other that he thought that matter had been concluded after a consent by the 1st and 2nd Plaintiff on withdrawal of the case. This shows that counsel deliberately did not attend court together with his client who was also not present in court. The application was also not filed in a timely manner. If the issue was as serious as he puts it, then he could have filed it immediately. This delay is not only inexcusable but also inordinate.
21. One of the cardinal principles in our constitution is 'the expeditious delivery of justice' under Article 159 (2) (b) of the *Constitution* of Kenya, which in effect codifies the 17th century maxim of 'Justice delayed is justice denied'. This means that if justice is not provided in a timely manner to the parties, it loses its importance and it violates the human rights of the litigants.
22. In the case of *Shah v Mbogo and another (1967) EA 116*, Harris, J stated as follows as regards the power of the Court to set aside an ex-parte judgment made in exercise of a discretion:

' I have carefully considered, in relation to the present application, the principles governing the exercise of the Court's discretion to set aside a judgment obtained ex-parte. This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.'



23. Further in the case of Joseph Ndungu Kamau v John Njihia (2017) eKLR, while dealing with an issue on reopening a case, the Judge observed that:

' Reopening will not normally be allowed if failure was deliberate. Needless to state, the decision whether or not to allow such an application is a discretionary one which must be exercised judiciously.'

24. I have considered the application, submissions by counsel and find that the Applicants have not demonstrated to the satisfaction of the court why it should exercise its discretion in their favour.

25. In the interest of justice, I order that the Applicant pays Kshs 15,000/ within 30 days failure to which the order lapses. Further, that only the defence case will be reopened after complying with the first order.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 28TH DAY OF AUGUST, 2023.

M.A. ODENY

JUDGE

