



Mbaabu v Attorney General; Mutunga (Interested Party) (Judicial Review Application 17 of 2017) [2023] KEELC 20055 (KLR) (27 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20055 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
JUDICIAL REVIEW APPLICATION 17 OF 2017
CK YANO, J
SEPTEMBER 27, 2023**

BETWEEN

MUTUMA JOHN MBAABU APPLICANT

AND

ATTORNEY GENERAL RESPONDENT

AND

JAMES KANYIKA MUTUNGA INTERESTED PARTY

RULING

1. The application before me for determination is the notice of motion dated June 26, 2023 seeking to set aside the order issued on July 9, 2018 dismissing the suit for non-appearance and want of prosecution and to reinstate the suit for hearing and determination on merit. The application is supported by the affidavit of Mutuma John Mbaabu, the applicant sworn on June 26, 2023 and is based on the grounds that the non-attendance by the applicant's previous advocates on the material date was an inadvertent mistake that should not be visited upon an innocent litigant. The applicant further states that his delay in bringing the application for reinstatement is because he has been dealing with health issues since the year 2018 and that the illness left him financially strained. The applicant further states that he has an arguable case with high chances of success and that it is in the interest of justice that the suit is reinstated for hearing and determination on merit.
2. The applicant has deponed that he had instructed the firm of M/s Kevin Nyenyire & Company advocates to file the suit on his behalf, but when the matter came up for mention on July 9, 2018 before Hon Justice L. Mbugua, the said advocates failed to attend court and the suit was dismissed.
3. The applicant has given a history of the matter in which objections were filed against him over the suit properties and a decision made by the District Land Adjudication Officer, Karama Adjudication Section sometimes on April 12, 2017 which decision aggrieved the applicant. That unless the suit is



- reinstated, the said decision will be confirmed and implemented to the detriment of the applicant who states that he shall suffer irreparably. It is the applicant's contention that the respondent herein will not be prejudiced if the suit is reinstated.
4. When the application came up for interpartes hearing on July 13, 2023 MS Maore advocate appeared for the applicant while Ms Mbaikyatta appeared for the respondent. Learned counsel for the applicant urged the court to allow the application since the same was not opposed. Learned counsel for the respondent did not oppose the application and left the same for determination by the court.
 5. I have considered the application herein. The issue for determination is whether the orders sought in the application should be granted as prayed or not.
 6. I have perused the court record. On May 10, 2017, the applicant filed an application for leave to apply for an order of certiorari out of time (sic) to remove into the court and quash the decision of the District Land Adjudication Officer Tigania East dated April 12, 2017 with regards to objection Nos 610, 458, 3283, 2235 & 5508 concerning plot No 6755 Karama Adjudication Section. Leave was granted by the court E. Cheronon J. on May 16, 2017 and the court ordered that the substantive motion be filed within 21 days from that date. I have gone through the court records and I do not see any substantive application in the file. Nonetheless, no action was taken in the matter for over one year, and on July 9, 2018, the matter was listed for notice to show cause why the suit should not be dismissed for want of prosecution pursuant to the provisions of order 17 rule 2 of the *Civil Procedure Rules*. When the matter came up on July 9, 2018, all the parties were absent and the court (L. Mbugua J) dismissed the case for want of prosecution. Now the applicant wants that order set aside and the suit reinstated.
 7. Under order 12 rule 7 the court has discretion to set aside or vary an order for dismissal and reinstate a suit dismissed for non-prosecution or non-attendance. In *John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation)* [2012] eKLR, the tests to apply in an application to reinstate a suit were given as "whether there are reasonable grounds to reinstate considering the prejudice that the defendant (respondent) would suffer if re-instatement of the suit was made against the prejudice the plaintiff (applicant) would suffer if the suit is not reinstated."
 8. The question herein is whether the applicant has demonstrated reasonable grounds for setting aside the dismissal order and for reinstatement of the case and whether the respondent will suffer prejudice if the suit is reinstated.
 9. In *Shah v Mbogo & another* [1967] EA 116, the Court of Appeal for Eastern Africa held as follows-;

"This discretion (to set aside ex parte proceedings or decision) is intended to be exercised so as 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 cause of justice."
 10. In the instant case, the applicant has blamed his previous advocates for failure to attend court during the hearing which led to the dismissal. However, the reason why the said advocates failed to attend court is not stated.
 11. The applicant further stated that he has been going through health issues for sometime since 2018. However, there is no documentary evidence such as treatment notes in support of the alleged illness that has been shown to the court by the applicant. It was incumbent upon the applicant to prove his allegation. I also note that the application has been brought after a period of over five (5) years from the time the dismissal order was made. In my view, the delay is not only inexcusable and quite inordinate, but the applicant has not given sufficient explanation for it. Moreover, the record shows that there was



no substantive motion that was filed by the applicant within 21 days as directed by the court on May 16, 2017. It can thus be said that there was no suit in the first instance and therefore there is nothing to reinstate. In the absence of a suit and there being no sufficient reason given for failure to attend court, this court cannot exercise its discretion in favour of the applicant.

12. Having looked at the circumstances of this case, and the reasons given for non attendance, the court is of the view that it would not be appropriate to grant the orders sought as the same would serve no purpose as there is no suit to reinstate. It is trite law that courts do not issue orders in vain.
13. The upshot is that this application is devoid of merit and the same is dismissed with no order as to costs.
It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 27TH DAY OF SEPTEMBER, 2023

IN THE PRESENCE OF

Court Assistant Kiragu V/Lena M

Ms Gachohi holding brief for Ms Maore for applicant

Ms Kithaura holding brief for Ms Mbaikyatta for respondent

C.K YANO

JUDGE

