



Kimani & another v County Government of Kiambu & 3 others (Environment and Land Appeal 108 of 2022) [2023] KEELC 19986 (KLR) (21 September 2023) (Ruling)

Neutral citation: [2023] KEELC 19986 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 108 OF 2022**

**JG KEMEI, J
SEPTEMBER 21, 2023**

BETWEEN

STEPHEN NJOROGE KIMANI 1ST APPLICANT

JOHN KINYUA & OTHERS 2ND APPLICANT

AND

COUNTY GOVERNMENT OF KIAMBU 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

RIGAT INVESTMENT CO LIMITED 3RD RESPONDENT

GEORGE KARANJA NGAHU 4TH RESPONDENT

RULING

1. The subject of this Ruling is the application dated the 7/6/2023 seeking orders of reinstating the Applicant's applications dated the 23/11/2022 and 28/11/2022 following the dismissal of the same on the 20/4/2023.
2. The application is grounded on the reasons annexed thereto and the Supporting Affidavit of Alex N Kibunja, counsel for the Applicants who deponed that when the matter was called out online on the material date of the 20/4/2023, he was unable to log in on account of a technical hitches with the network and WIFI connection in his office as the internet connection kept disconnecting. That later he called the registry and was initially informed that the matter had been given another date for the 15/6/2023 but later transpired that the application had been dismissed on the 20/4/2023. That the Applicants have always attended Court without fail and urged the Court to grant the orders and reinstate the applications.
3. The 1st and 2nd Respondents did not oppose the application.



4. The application is opposed vide the Replying Affidavit filed on the 18/7/2023 and sworn by George Kairianja Ngahu who deponed that he is the 4th Respondent with authority to so depose on behalf of the 3rd Respondent. That the application is not brought in good faith seeing that the Applicants filed several memorandum of appeals which they failed to prosecute which they were all dismissed. That even after the dismissal of the application, the Applicant took no steps to file the application and have not offered any reasons for the delay. That litigation must come to an end but the Applicants have brought application upon another to keep the Respondents in Court and from enjoying their judgement. He cited similar appeals in ELCA 13 of 2022 and ELCA 46 of 2022 dismissed on similar grounds of non-prosecution. The Court was urged to dismiss the application.
5. Although parties elected to canvass the application by way of written submissions, none complied with the orders of the Court.
6. The key issue for determination is whether the application is merited.
7. Order 12 rule 7 of the Civil Procedure Rules states as follows; -

“Where under this Order judgment has been entered or the suit has been dismissed, the Court, on application, may set aside or vary the judgment or order upon such terms as may be just.”
8. Rule 7 above then allows the aggrieved party to apply for the setting aside of that order and reinstatement of the suit. What the Court needs to determine is whether the failure to attend Court by the Applicant on the 20/4/2023 constitutes an excusable mistake or error or it was meant to deliberately delay the cause of justice. This Court in making this determination is guided by the decision in *Shah v Mbogo* [1967] EA 116, where the Court of Appeal held that;

“Applying the principles that the Court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.”
9. The Applicants moved the Court by way of Notice of Motion of Motion dated the 23/11/2023 seeking interalia leave to file an appeal out of time. On the 24/11/2023 the Court issued orders directing the Applicants to serve the application for interpartes hearing on the 7/2/2023. I have perused the file and there is no evidence that this application has ever been canvassed according to the record. It would appear there were no proceedings on the 7/2/2023. My reading of the record does not disclose that the application was ever heard.
10. On the 28/11/2022 the Applicants filed the Notice of Motion dated even date seeking orders of stay of execution in CMELC No 137 of 2020 pending the hearing and determination of the application dated the 23/11/2023.
11. On the 30/11/2022 the Court issued orders directing the Applicants to serve the application for interpartes hearing on the 8/1/2022. On the 19/12/2022 Mr Andayi holding the brief for Mr Kibunja informed the Court that the Respondents were duly served. The Court ordered the Respondents to file their responses to the motion dated the 28/11/2022 for hearing on the 9/3/2023. Come the 9/3/2023 the Court was not sitting and the parties took another date for the 20/4/2023. On this date the Applicants and their counsel were absent in Court. Mr Wanyoike for the 3rd and 4th Respondents moved the Court for the dismissal of the application dated the 28/11/2022. The application was dismissed for want of prosecution/non-attendance.



12. It is trite that the sufficiency of the explanation is what propels the Court to exercise discretion in favour of the Applicant. In this case the Applicants through their counsel on record states that he was prevented from virtually attending the Court by unreliable internet connection in his office. That said the said deponent failed to offer any evidence from his service provider to show that indeed there was a downtime with respect to the internet provision on that material date. Despite the failure to tender evidence as aforesaid the Applicants have not explained the delay of 36 days in filing this application.
13. For the reasons given above the Court finds that the application is not merited. It is dismissed.
14. For avoidance of doubt, the Court finds that the application dated the 23/11/2022 is yet to be heard the same having not suffered a dismissal like the current application.
15. Final orders
 - a. The application is dismissed with respect to the Notice of Motion dated the 28/11/2023.
 - b. The application dated the 23/11/2023 is yet to be prosecuted.
 - c. Costs of the application are payable to the 3rd and 4th Respondents.
16. Orders accordingly

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 21ST DAY OF SEPTEMBER, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

1st, 2nd and 3rd Appellants – Absent but served

1st, 2nd, 3rd and 4th Respondents – Absent but served

Court Assistant – Phyllis & Lilian

