



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gaitho v Attorney General & 3 others (Environment & Land Petition  
271 of 2016) [2023] KEELC 21008 (KLR) (25 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21008 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND PETITION 271 OF 2016  
NA MATHEKA, J  
OCTOBER 25, 2023**

**BETWEEN**

**CRISPUS MAINA GAITHO ..... PETITIONER**

**AND**

**THE ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**KENYA RAILWAY CORPORATION ..... 2<sup>ND</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 3<sup>RD</sup> RESPONDENT**

**CHINA ROAD & BRIDGE CORPORATION ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The first application is dated 10<sup>th</sup> March 2023 and is brought under Order 12 rules 3 and 7 of the [Civil Procedure Rules](#) and Section 3A of the [Civil Procedure Act](#) seeking the following orders;
  1. That this Court be pleased to set aside its orders issued on 25<sup>th</sup> of January 2022 dismissing this Petition due to the absence of the Petitioner herein.
  2. That this Court do order that this Petition be heard on priority basis.
2. It is grounded on the following grounds that the Petitioner herein filed this Petition under certificate of urgency on the 6<sup>th</sup> October 2016 claiming compensation from the 2<sup>nd</sup> and 4<sup>th</sup> Respondents to a tune of Kshs. 1,840,000/- which was later amended to Kshs. 3,900,000/-. The Respondents filed their responses and preliminary objection to the entire suit. This Court dealt with the preliminary objection and a ruling was delivered by Justice Anne Omolo on the 3<sup>rd</sup> May 2017. This Court on 28<sup>th</sup> October 2020 directed all respective parties to file their documents and ordered the file to be mentioned on the 3<sup>rd</sup> February 2021 to confirm filing of documents. The relationship between the Petitioner and his advocate deteriorated and causing delay in hearing this Petition. The then Petitioner's advocate Mwaniki Gitahi & Partners did not inform the Petitioner of the hearing date of the petition scheduled



for 25<sup>th</sup> January 2022 when the Petition was dismissed due to absence of the Petitioner. The said firm of advocates kept quiet even after dismissal of this Petition. The Petitioner came to know of the dismissal of the Petition on 26<sup>th</sup> September 2022 when the Petitioner received through WhatsApp Notice of Taxation and client/ advocate bill of costs dated 15<sup>th</sup> of September 2022. Then as if that was not enough, the Petitioner was also served by the said firm Mwaniki Gitahi & Partners another Bill of costs from Ndegwa Katisya claiming payment of Kshs. 993,994.66/- which bill comes for Taxation on 29<sup>th</sup> March 2023.

4. The Petitioner contacted the said firm of advocates who only informed the Petitioner the Petition was dismissed due to his absence. The Petitioner has been ready and willing to be heard on this Petition all along. The Petitioner lost his land measuring 1.88 acres through compulsory acquisition of land by state or its value which is Ksh.3,900,000/-. The Petitioner even after losing his land or its value he has been slammed with a bill of costs amounting to Ksh. 2,146,973.30/- by his advocates and another one from Ndegwa Katisya & Sitonik Advocates for Ksh.993,994.66/-. The Petitioner has been ready and willing to prosecute this Petition to its logical conclusion. The Petitioner has expended a lot on the Petition and is willing to conclude it. The Petitioner is likely to lose his land or its value for mistake which is not his. The Petitioner has also been asked to pay a colossal amount of money to his advocate and advocates for the Respondents. The Petitioner failure to do this application was because of his advocates who never informed the Petitioner of the dismissal. The Petitioner is not to blame for the dismissal of his Petition but his advocates for lack of communication.
5. The second application is dated 5<sup>th</sup> May 2023 and is brought under Order 42 rules 6, Order 51 Rules 1 & 3 of the Civil Procedure Rules and Section 3A of Civil Procedure Act Section 3A of the Civil Procedure Act seeking the following orders;
  1. That this matter be heard exparte in the 1<sup>st</sup> instance.
  2. That there be an order of stay of execution of the taxed bill of Kshs. 289,700/- by the 2<sup>nd</sup> Respondent pending the hearing and determination of the Notice of Motion dated 10<sup>th</sup> March 2023 pending in this Court.
  3. That there be an order stopping the Deputy Registrar from proceeding pending the hearing and determination of applicants Notice of Motion dated 10<sup>th</sup> March 2023.
  4. That there be an order directing the applicants Notice of Motion dated 10<sup>th</sup> March 2023 to be heard on priority basis.
5. It is grounded on the following grounds that the suit was dismissed on 25<sup>th</sup> January 2022 because of the Petitioner's absence. The Petitioner filed the Notice of Motion dated 10<sup>th</sup> March 2023 for setting aside of the orders of this Court of the 25<sup>th</sup> January 2022. The Petitioner did not file the Notice of motion dated 10<sup>th</sup> March 2023 under certificate as there was no urgency. That thereafter the advocate for the 2<sup>nd</sup> Respondent filed a bill of costs which was taxed at Kshs. 289,700/- by the Deputy Registrar. The advocate for the 4<sup>th</sup> Respondent has also filed a bill of costs against the Petitioner which is pending taxation. That all these bills are on cause yet an application to set aside the orders dismissing the petition is still pending. That if an order of stay is not issued the 2<sup>nd</sup> Respondent is likely to execute against the Petitioner before his application is heard and determined. That it will be prudent to have a stay of execution of the 2<sup>nd</sup> Respondent's taxed bill of costs to await the outcome of the applicants Notice of Motion dated 10<sup>th</sup> March 2023. That an order of stay barring the Deputy Registrar from proceeding to tax the 4<sup>th</sup> Respondents bill of costs pending the outcome of the said Notice of Motion.



6. This court has considered both applications and submissions therein. This suit was dismissed for non-attendance of the Petitioner/Applicant when it came up for hearing on 25<sup>th</sup> January 2022. The relevant law governing setting aside judgment or dismissal is Order 12 Rule 7 of the Civil Procedure Rules. 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”

7. The determination 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 vs Mbogo* (1979) EA 116 quoted with approval in the case of *John Mukuba Mburu vs Charles Mwenga Mburu* (2019) eKLR, where that court stated that;

“.....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.”

8. For the Court to exercise its discretion in favour of the Applicant, he 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 *Parimal vs Veena* which was cited with approval in the case of *Wachira Karani vs 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.”



9. In the instant case the Petitioner/Applicant claimed that the suit was dismissed for want of prosecution for non-attendance on the date of hearing. The relationship between the Petitioner/Applicant and his advocate deteriorated and causing delay in hearing this Petition. The then Petitioner's advocate Mwaniki Gitahi & Partners did not inform the Petitioner of the hearing date of the petition scheduled for 25<sup>th</sup> January 2022 when the Petition was dismissed due to absence of the Petitioner. The said firm of advocates kept quiet even after dismissal of this Petition. The Petitioner came to know of the dismissal of the Petition on 26<sup>th</sup> September 2022 when the Petitioner received through WhatsApp Notice of Taxation and client/ advocate bill of costs dated 15<sup>th</sup> of September 2022.
10. From the court record I note that the said hearing date was taken by consent in court on the 6<sup>th</sup> May 2021. On the 25<sup>th</sup> January 2022 when the matter came up for hearing of the Petition neither the Petitioner nor his advocate were present in court hence the dismissal. This matter was filed way back in 2016.
11. I find that both the Petitioner/Applicant and his advocate demonstrated inexcusable laxity in prosecuting this case, and not only on the material date but others. It is the role of the Petitioner and his counsel to ensure that the case proceeds for hearing expeditiously. In the case of *Utalii Transport Co. Ltd and 3 Others -vs- N.I.C. Bank and Another* (2014) eKLR, the court held that;
- “It is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court.”
12. It is also the duty of the parties to assist the court to adjudicate on the matters brought before it expeditiously as was held in *Gideon Sitelu Konchella vs Daima Bank Limited* (2013)eKLR where the court while citing the case of *Mobil Kitale Service Limited vs Mobil Oil Kenya Limited*, held that:-
- “It is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice by delay would be a thing of the past. Justice would be better served if we dispose of matters expeditiously ....the overriding objection of this Act and Rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.”
13. The Petitioner/Applicant blames his advocate Mwaniki Gitahi & Partners stating that he did not inform the Petitioner of the hearing date of the petition scheduled for 25<sup>th</sup> January 2022 because of their deteriorating relationship. This is the Petitioner's case and he ought to have been vigilant. The case does not belong to his advocate. The Petitioner only woke up on the 26<sup>th</sup> September 2022 when he received through WhatsApp Notice of Taxation and client/ advocate bill of costs dated 15<sup>th</sup> of September 2022. Even then it was not until 10<sup>th</sup> March 2023 when he filed this application to set aside the dismissal.
14. In the case of *Savings and Loans Limited vs Susan Wanjiru Muritu* Nairobi HCCC397/2002, the court stated that;
- “Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocates failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case.
- The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case.



15. I am minded that dismissal of cases upon summary procedure may be draconian but when the occasion calls for such action, the court should not shy away from taking such measures (see the case of *Kenya Power & Lightning Co. Ltd vs Alliance Media Kenya Ltd* (2014) e KLR). I concur with the submissions of the 2<sup>nd</sup> and 4<sup>th</sup> Respondents that the Petitioner/Applicant has not satisfied the criteria of sufficient cause or reason. Further to this the Applicant has moved the court over one year later! The Petitioner is indolent and this is inexcusable. Suits are meant to be prosecuted. From the facts before me, the law and authorities cited above I find that the first application is unmerited and I dismiss it with costs. The second application is equally unmerited as there is no suit to stay and is dismissed with costs.
16. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25<sup>TH</sup> DAY OF OCTOBER 2023.**

**N.A. MATHEKA**

**JUDGE**

