



REPUBLIC OF KENYA



KENYA LAW
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Ndeto & another v Wajohi & 17 others (Environment and Land Appeal E020 of 2021) [2023] KEELC 20844 (KLR) (18 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20844 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E020 OF 2021
A NYUKURI, J
OCTOBER 18, 2023

BETWEEN

WINFRED MUTINDA NDETO 1ST APPELLANT

REGINA KALOKI & JOHN ILIA T/A KAENI HARDWARE 2ND APPELLANT

AND

GERALD MAINA WAJOHI 1ST RESPONDENT

AGNES MUTHONI MUTUNGU 2ND RESPONDENT

CHARLES NDINGE MUTHIANI 3RD RESPONDENT

JULIUS KADIMA LANYA 4TH RESPONDENT

SUSAN WAMBUI WACHIRA 5TH RESPONDENT

FRANCIS NYADIMO YWAYA 6TH RESPONDENT

JAPHETH MWAKAVI MUKINYI 7TH RESPONDENT

JOSEPHINE WAMBUA SYOVATA 8TH RESPONDENT

PIUS FRANK NJOROGE 9TH RESPONDENT

AMOS KANYOI MUIKIA 10TH RESPONDENT

SALOME MUTHONI MBICHIRI 11TH RESPONDENT

BETTY CHEPNGENO CHIRCHIR 12TH RESPONDENT

JOHN WRIGHT OICHOE NYANGAU 13TH RESPONDENT

ABDIRIZA MOHAMED RAHOY 14TH RESPONDENT

JULIUS MANGO MUGO 15TH RESPONDENT

MUSA OBUYA 16TH RESPONDENT



RULING

1. Before court is an application dated 23rd March 2022 filed by the Appellants seeking the following orders;
 - a. Spent
 - b. That the Honourable court be pleased to reinstate the Applicants' application dated 17th June 2021 seeking stay of execution pending the hearing and determination of this Appeal together with the temporary orders of stay issued on 18th June 2021 and all consequential orders.
 - c. That further or other orders be made as will meet the ends of justice.
 - d. That costs of this Application be in the cause.
2. The Application is based on grounds on the face of it and supported by the affidavit of one of the Appellants one Ilia Kaloki sworn on even date. She deposed that the Appellants made an application dated 17th June 2021 for stay of execution pending appeal and that temporary orders were issued on 18th June 2021 as directions were given for the hearing of the application and filling of submissions. She further stated that her counsel has been sickly and in and out of hospital and thus deputized another counsel to work on the submissions on her behalf but due to an inadvertent mistake, the submissions for appeal were filed instead of the submissions on the application.
3. She also averred that when the suit came up for hearing on the 9th March 2022, this Honourable Court made an order dismissing the application dated 27th June 2021 for want of prosecution as both counsel did not attend court. She deposed that her counsel's failure to attend court on the said date was not intentional but was occasioned by reasons beyond her control as she had been unwell.
4. She stated that she is desirous of prosecuting the said application for stay of execution pending appeal and unless the orders sought are granted, she stands to suffer irreparable loss that cannot be compensated by way of damages as execution may ensue at any time which will render their appeal nugatory.
5. She deposed that the respondents will in no way be prejudiced by the reinstatement. She stated that the application had been brought without inordinate delay and that they had a strong and arguable appeal with high chances of success. She also stated that it is in tandem with the overriding objectives of the court and in the interest of substantive justice to allow this application.
6. The Application is opposed. The Respondents filed Grounds of Opposition dated 27th April 2022 in response to the application. They stated that the temporary orders of stay issued on 18th June 2021 expired when they were not extended as such there is no provision in law for reinstatement; that the Applicant has never filed submissions to their application dated 17th June 2021 and thus there is absolutely no basis to support reinstatement; that no evidence had been tendered to show why submissions were not filed or that counsel was unwell; that no explanation had been tendered why the counsel who was tasked to attend to the matter never complied with the orders or even attended court when the matter came up in court; that stay orders cannot be granted to maintain status quo where the Applicant is perpetuating an illegality in that she has not applied for and acquired development



permission from the County Physical Planner and a license from NEMA, and that the Applicant has not met the legal threshold to warrant reinstatement of the said application.

7. The Application was canvassed by way of written submissions. On record are the Applicants' submissions filed on 27th October 2022 and the Respondents' submissions filed on 3rd February 2023.

Applicants' submissions

8. Counsel for the Applicants submitted that the Applicants had met the threshold to warrant the setting aside of the dismissal orders, citing provisions of Order 12 rule 7 and argued that the court has the discretion to reinstate a dismissed suit on terms that are just. To buttress their case, they relied on the case of *[John Nabashon Mwangi vs Kenya Bank Limited](#)* [2015] eKLR amongst other cases, where the preconditions for reinstatement of a dismissed suit were laid down.
9. They further submitted that they had good and sufficient cause for non-attendance as the counsel having conduct of the matter had been unwell for a long time and that the filing of submissions in support of the appeal instead of submissions on the application for stay was an inadvertent mistake of counsel which should not be visited upon the client. Reliance was placed on the case of *[Wachira Karani v Bildad Wachira](#)* [2016] eKLR for the proposition that where a party seeks setting aside ex parte orders, they must show that they were prevented from attending court by sufficient cause.
10. Counsel further submitted that the Applicants will suffer great prejudice if the orders sought are not granted since the application was never heard on its merit and their constitutional right to fair hearing will be infringed upon.
11. It was their opinion that article 159 of *[the Constitution](#)* requires that justice be administered without undue regard for technicality.

Respondents' submissions

12. Counsel for the Respondents submitted that the Applicants have not met the threshold for grant of orders sought. They contended that although it was within the court's discretion to grant the orders sought, such discretion must be predicated on acceptable legal tenets and principles as held in the case of *[John Nabashon Mwangi v Kenya Finance Bank Limited](#)* [2015] eKLR.
13. It was argued for the Respondents that before a dismissal order is set aside, a sufficient cause, which is factual, must be proved. Counsel pointed out that despite being represented by the same advocate throughout, on 28th October 2021, the Applicants had been accorded an opportunity and extended time to file their submissions but they failed to comply and instead filed submissions on the main appeal and that even after being accorded an opportunity to rectify the same on 9th December 2021, they refiled the same submissions leading to their case being dismissed for non-compliance. It was their argument that the issue was not non-attendance but non-compliance and that the court correctly exercised its discretion in dismissing the application.
14. They further submitted that the allegations of sickness on the part of the counsel for the Applicants have not been supported by any documentary evidence and that they also did not demonstrate any nexus between sickness of counsel and non-compliance. It was also their opinion that no prejudice will be suffered by the Applicants if the application is not reinstated as status quo will be maintained. Counsel maintained that the application was aimed at delaying proceedings in the lower court and misleading the court.



Analysis and determination

15. The court has carefully considered the application, the response thereto and the rival submissions by the parties. Therefore, the issue that commends itself for determination is whether the Applicants have given sufficient cause for reinstating their application dated 17th June 2021 which was dismissed for noncompliance. It is clear that the application dated 17th June 2021 seeking stay of execution pending appeal was dismissed on 3rd February 2022 in the absence of the parties, when for the third time, the Applicants had failed to comply with the order of filing submissions in support of their application. The Applicant has given the reasons for the non-compliance as their counsel's prolonged illness and counsel's inadvertence in filing the proper submissions.
16. An *ex parte* order may be set aside where sufficient cause is shown. It should be borne in mind that Section 1A (3) of the *Civil Procedure Act* places on parties and their advocates the obligation to assist the court to further the overriding objective of the Act, and to that effect to participate in the process of the court and to comply with the directions and orders of the court.
17. Order 12 Rule 7 of the *Civil Procedure Rules* provides 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.
18. The Court of Appeal pronounced itself on reinstatement of a dismissed suit in *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR, as follows;
We agree with those noble principles which go further to establish that the court's discretion to set aside an *ex parte* judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. We have considered the reasons that were offered by the appellant regarding their failure to attend court on the 10th June, 2013 with anxious minds. We have asked ourselves whether failure to attend court on 10th June, 2013, constituted an excusable mistake, an error of judgment regarding counsel's failure to diarize the date properly or was it meant to deliberately delay the cause of justice.
19. In the instant matter, the record shows that the application dated 17th June 2021, came up in court under certificate of urgency on 17th June 2021 when interim stay orders were granted *ex parte* and the application fixed for hearing, on 1st July 2021. On 1st July 2021, the parties were directed to file submissions and the matter fixed for 28th October 2021. On that date counsel holding brief for counsel for the Applicants sought time to file submissions and the matter fixed for 9th December 2021. On the next date, a different counsel was holding brief for the Applicants' counsel and it was noted that submissions for the main appeal had been filed instead of submissions for the application. However, those submissions were never filed and therefore, the application dated 17th June 2021 was dismissed for non compliance when both counsel were not in attendance although the date had been fixed in their presence.
20. It is evident that from the onset, there have been different advocates who held brief for the Applicant's counsel, who failed to comply with the court's directions on filing submissions leading to dismissal of the application dated 17th June 2021 for non compliance.
21. The Applicant has stated that her advocate was unwell for a long time. She also stated that there was a genuine mistake where submissions for the main appeal were filed instead of submissions for the



application for stay. Therefore, this court's discretion ought to be exercised in determining whether or not to grant the orders sought.

22. Exercise of judicial discretion cannot be based on caprice or whim, but must be exercised judiciously.
23. Having considered the application, it is clear that indeed there was a mistake by counsel who filed submissions for the appeal instead of submissions for the application. This was just a blunder on the part of the Applicants counsel, which in my view was inadvertent. Although the court gave the Applicant opportunity to correct the mistake, that was not done. The Applicant has attributed this to her counsel's illness. Although the Respondent argued that there was no evidence to show that the applicant's counsel had been ailing for a while, the Respondent did not deny that indeed the counsel for the Applicants had been unwell. Considering that on all the dates the matter came up, there was representation on the part of the Applicants, save on the date the application was dismissed, I am persuaded that the counsel with conduct of this matter for the Applicants was indisposed and therefore unable to attend court or comply with orders of this court. In the premises I find and hold that the Applicants have given sufficient cause to warrant setting aside the orders of dismissal of their application dated 17th June 2021.
24. On whether the interim orders granted on 18th June 2021 should be reinstated, I note that interim orders are only valid for fourteen days and there is no justification to reinstate orders made in 2021 and which were no longer in force on 9th March 2022, when the application for stay was dismissed. In the premises I find no justification for extending orders that had lapsed.
25. The upshot is that I find and hold that the application dated 23rd March 2022 is merited and the same is hereby allowed in the following terms;
 - a. That the orders of this court made on 9th March 2022 are hereby set aside and the application dated 17th June 2021, is hereby reinstated for hearing and determination.
 - b. There is no order as to costs
26. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 18TH DAY OF OCTOBER, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mr. Ayieko for Respondents

No appearance for Appellants

Mr. Abdisalam - Court Assistant

