Obiero v Grewal & another (Environment & Land Case 80 of 2018) [2023] KEELC 21914 (KLR) (28 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21914 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 80 OF 2018

NA MATHEKA, J

NOVEMBER 28, 2023

BETWEEN

ERICK OWUOR OBIERO ..... PLAINTIFF

AND

SURJIT KAUR GREWAL ..... 1ST DEFENDANT

OMAR ABUBAKAR ZUBEDI ..... 2ND DEFENDANT

RULING

1. The application is dated 12th July 2023 and is brought under Section IA, 1B and 3A of the *Civil Procedure Act*, Cap, 21 Laws of Kenya and under Order 12 Rule 7; Order 45 Rule I; Order 51 Rule 1 of the *Civil Procedure Rules* 2010 seeking the following orders;

    1. That this Honourable court be pleased to review and/or set aside the Order issued on the by the Honorable Justice N. A. Matheka on the 23rd March, 2023 dismissing the Applicant's suit for want of prosecution and reinstate the suit for hearing.

    2. The cost of this application be in the cause.

2. It is based on the grounds that the failure to appear in court on the 23rd March, 2023 by the Plaintiff's Counsel was unintentional and inadvertent. That the Plaintiff/Applicant have been looking and/or seeking for the file at the Court registry with a view of having it listed for hearing to no avail as the file could not be locate at the registry. That the Plaintiff/Applicant only become aware that the suit had been dismissed upon initiating the process of having the file mapped in the e-filing system. That Plaintiff/Applicant reside on the suit property and is willing to have the matter determined within the shortest time possible. That the mistake of the Counsel must not be borne by their client. That the Plaintiffs suit raises pertinent issue that ought to be addressed. That it is in the interest of justice that the suit be reinstated and heard on merit. That failure to appear in court on the 23rd March, 2023 by the Plaintiff's Counsel was unintentional and inadvertent. That the Plaintiff/Applicant have been looking

and/or seeking for the file at the Court registry with a view of having it listed for hearing to no avail as the file could not be locate at the registry (Annexed and marked as "SNL 1" copies of the requisition forms). That .... they become aware of the suit having been dismissed upon initiating the process of having the file mapped in the e-filing system.

This court has considered the application and submissions therein. This suit was dismissed for non-attendance of the Applicant when it came up for on 23rd March 2023. 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"

3. 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 Mukuha 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."

4. For the Court to exercise its discretion in favour of the Applicant, he has satisfy the Court 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
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> 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"
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> 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."

5. In the instant case the Applicant claimed that failure to appear in court on the 23rd March, 2023 by the Plaintiff's Counsel was unintentional and inadvertent. That the Plaintiff/Applicant have been looking and/or seeking for the file at the Court registry with a view of having it listed for hearing to no avail as the file could not be locate at the registry. That the Plaintiff/Applicant only become aware that the suit had been dismissed upon initiating the process of having the file mapped in the e-filing system. That Plaintiff/Applicant reside on the suit property and is willing to have the matter determined within the shortest time possible. That the mistake of the Counsel must not be borne by their client. From the court record I note that the file was previously in court on 5th October 2021 when the Plaintiff was granted leave to serve the Defendants by substituted service. This was not done until 23rd March 2023 when the Plaintiff was served to attend court and when the matter came up for mention neither the Plaintiff nor his advocate where present in court hence the dismissal. This matter was filed way back in 2018.

I find that both the 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 Plaintiff 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."

33. 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."

6. The Plaintiff/Applicant blames his advocate for the inadvertent mistake. This is the Plaintiff's case and he ought to have been vigilant. The case does not belong to his advocate. 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.

7. 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). The Plaintiff 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 application is unmerited and I dismiss it with no order as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 28TH DAY OF NOVEMBER 2023.

N.A. MATHEKA

JUDGE