



Autosprings Manufacturing Limited v Kioko (Suing as the Legal Representative of the Estate of S. K. Mangeli) (Environment & Land Case 44A of 2013) [2023] KEELC 21680 (KLR) (22 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21680 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 44A OF 2013
A NYUKURI, J
NOVEMBER 22, 2023**

BETWEEN

AUTOSPRINGS MANUFACTURING LIMITED PLAINTIFF

AND

BEATRICE NDUNGE KIOKO (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF S. K. MANGELI) DEFENDANT

RULING

Introduction

1. Before court is a notice of motion dated June 17, 2022 filed on August 31, 2022 by the plaintiff seeking the following orders;
 - a. Spent.
 - b. The order issued on January 20, 2022 dismissing the suit herein be set aside and the suit reinstated for hearing.
 - c. Upon reinstatement, this honourable court be pleased to issue directions for the priority hearing and determination of the main suit.
 - d. That costs of this application be in the cause.
2. The application is anchored on the supporting affidavit dated June 17, 2022 sworn by Rajesh Patel, a director of the plaintiff. The applicant states that the plaintiff's witness was not able to attend the hearing due to persistent miscommunication between the directors of the plaintiff, the witness and the plaintiff's advocates on record, which unfavourable circumstances have since changed. That the plaintiff was remorseful, and will not repeat the circumstances that led to the dismissal of the suit, and ought to be forgiven by the court. They also stated that the plaintiff was not indolent and was willing to



prosecute their suit and sought for an opportunity to be heard. He stated that when the suit was fixed for hearing on July 13, 2021, both parties were ready to proceed but the court's schedule necessitated an adjournment.

3. The application is opposed. Nzilani Muteti, counsel for the defendant/respondent swore a replying affidavit dated November 30, 2022 in opposition to the application. She deponed that on July 13, 2021 when the matter came up for hearing, the court ordered the plaintiff's counsel in 14 days to either file application to cease acting or file witness statement as the plaintiff's witness was said to have left the plaintiff's employment. That since that date to date, the plaintiff's counsel never filed application to cease acting or witness statement.
4. She asserted that on October 21, 2021, parties were granted 30 days to comply and the court ordered that no further adjournment will be granted to the parties. That the plaintiff's counsel was served the hearing notice by email on October 25, 2021 and physically on November 15, 2021, but on the hearing date of January 20, 2022, Counsel for the plaintiff sought for time to file application to cease acting as they had no instructions from the plaintiff. That the court gave a time allocation for hearing and at 11 am when counsel for the plaintiff and the plaintiff were not in attendance, the suit was dismissed for want of prosecution.
5. The deponent stated that the defendant has been on the suit property since 1974, but the plaintiff has not been willing to prosecute this matter as the plaintiff has no witness statement on record. She stated that the application was an afterthought and there was inordinate delay in filing the instant application without any reason.
6. The application was disposed by way of written submissions. On record are the applicant's submissions dated November 30, 2022 and the respondent's submissions dated February 2, 2023.

Applicant's submissions

7. Counsel for the applicant submitted that the history of the proceedings herein do not portray the plaintiff as indolent as the plaintiff's counsel wrote to the deputy registrar of this court on October 22, 2021 asking for a hearing date, but was served with a hearing notice by the defence counsel on October 25, 2021. Counsel argued that the defendant's family had unlawfully settled on the suit property without title and that it is in the interests of justice that the plaintiff reclaims possession thereof. Counsel stated that the dismissal was occasioned by miscommunication between the plaintiff and their counsel.
8. On whether the applicant had met conditions for setting aside the order dismissing the suit for want of prosecution, counsel relied on the cases of *David Kimutai Kotut v Mary Jelimo Ruto & 3 others* [2017] eKLR and *Joseph Kinyua v G.O. Ombachi* [2019] eKLR for the proposition that dismissal of a suit without hearing it on merit is draconian as the plaintiff ought not be driven away from the seat of justice. Counsel argued that the delay of six months in filing the application herein was not intentional, contumelious or inordinate and therefore it is excusable. It was further argued for the applicant that this court had the duty to further the overriding objective under sections 1A, 1B and 3A of the *Civil Procedure Act*, and to facilitate the just, expeditious, proportionate and affordable resolution of disputes before court and ensure the ends of justice are met.
9. Counsel submitted that under order 12 rule 7 of the *Civil Procedure Rules*, an order for dismissal of a suit may be set aside. Counsel maintained that on the date of the dismissal he attended court in the morning and that justice will be served if the dismissal order is set aside.



Respondent's submissions

10. Counsel for the respondent submitted that although this court has wide discretion in allowing the prayers sought by the applicant, that discretion must be exercised judiciously. To buttress that submission, counsel relied on the case of *Shah v Mbogo* (1968) EA 116 and argued that the discretion should be applied to avoid injustice and not to assist a person delaying justice.
11. It was submitted for the respondent that for the court's discretion to be exercised in favour of the applicant, they must satisfy the court that there is sufficient cause to warrant orders setting aside orders dismissing the suit for want of prosecution. Counsel referred to the case of *Wachira Karani v Bildad Wachira* [2016] eKLR for the proposition that a sufficient cause means a party did not act negligently or that there was want of bonafide on its part in view of the facts and circumstances. Counsel argued that the test to be applied was whether the plaintiff honestly and sincerely intended to remain present when the suit was called for hearing and whether there was sufficient cause for his absence. It was contended for the respondent that the applicant failed to demonstrate that they were prevented from attending court by sufficient cause. Reliance was placed on the cases of *Julius Kibiwott Tuweiv Reuben Argut & 7 others* [2022] eKLR and *John Mukuha Mburu v Charles Mwenga Mburu* [2019] eKLR.
12. Counsel contended that the plaintiff's counsel had not given any justifiable cause for his failure to attend court on January 20, 2022 at 11:00 a.m when the matter was called for hearing when the court had made time allocation; and that neither had the director of the plaintiff given reasons why he was not available in court on the hearing date. Counsel submitted that the allegation of miscommunication was a flimsy excuse that should not be entertained by the court.
13. It was further pointed out on behalf of the respondent that since July 13, 2021 to date, that plaintiff had not filed any witness statement and that court orders should not be made in vain. Counsel argued that the conduct of the plaintiff showed malafides as they had misrepresented facts and alleged falsehoods to get favourable orders. They maintained that there was inordinate delay as the instant application was filed on August 31, 2022, upon being served with the defendant's bill of costs. Counsel held the view that the application herein was an afterthought meant to mislead the court and keep the defendant on an expensive litigation.

Analysis and determination

14. The court has carefully considered the instant application, the reply thereto and parties' rival submissions. The issue arising for determination is whether the plaintiff deserves the court's discretion to set aside orders dismissing this suit for want of prosecution.
15. The law governing setting aside orders dismissing a suit for want of prosecution is provided for in order 12 rule 7 of the *Civil Procedure Rules 2010* as follows;

Setting aside judgment or dismissal

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.
16. Setting aside orders dismissing a suit for want of prosecution is not a right of any party. It is a discretionary order which can only be granted where the interests of justice so demand. It is an equitable remedy and it is upon an applicant for such prayer to demonstrate sufficient cause for the court to exercise its discretion in their favour, as the court's discretion ought not be exercised whimsically or capriciously but judiciously. As was held in the case of *Shah v Mbogo* [1968] EA 93, discretion should



- be applied to avoid hardship caused by accident, inadvertence or excusable mistake or error and not for assisting a party who deliberately seeks to obstruct or delay the course of justice.
17. In the instant matter, the order dismissing the suit for want of prosecution was made on January 20, 2022, and the plaintiff filed the instant application on August 31, 2022, which was after a period of 7 months. The reason given for non-attendance of court by the plaintiff's witness and their counsel, was that there had been a persistent miscommunication between the plaintiff's directors, their witness and their advocates on record.
 18. Having considered the record, I note that on July 13, 2021 when this matter came up for hearing, an application by the defence counsel for adjournment on grounds that he was not ready to proceed as he needed time to file application to cease acting, was rejected by the court and the suit fixed for hearing at 12 p.m that day. However, when the matter was called out at 1:55 p.m for hearing, counsel for the plaintiff had not filed a witness statement and on that basis sought adjournment which was granted and the plaintiff granted 14 days to file their witness statement. On October 21, 2021 when the matter came up for hearing, the plaintiff was absent and had not complied with the orders of July 13, 2021. The court therefore ordered both parties to comply in 30 days and directed that no adjournment will be granted at the instance of any of the parties as the suit had been pending since 2013. On January 20, 2022, when the matter came up for hearing, counsel for the plaintiff informed court that he intended to cease acting and sought for 21 days to file application to cease acting. However, the court ordered that the matter will proceed at 10 a.m. When the matter was later called at 11:06 a.m, both parties were absent and the court proceeded to dismiss the matter for want of prosecution.
 19. Therefore, the issue that ought to be addressed is whether nonattendance by the plaintiff on January 20, 2022 has been explained. The plaintiff stated that there was persistent miscommunication. No explanation has been given on the circumstances that led to the alleged miscommunication, how and when it began and when it was resolved. As the record shows, counsel for the plaintiff was in court on the morning of January 20, 2022, when the court directed that the matter was to proceed later that day. No explanation has been given by him why he did not attend court at 11 am when the matter was to proceed. From that date, both the plaintiff and his counsel kept off the court for 7 months, only to file the instant application on August 31, 2022, and no explanation for that delay has been given, notwithstanding the fact that this matter has been in court for fourteen years. No explanation has been given why the alleged miscommunication persisted for all this period. In addition, no explanation has been given why in a matter filed in the High Court in 2009 and transferred to the ELC in 2013, the plaintiff is yet to file a witness statement, when this court had on July 13, 2021 granted them 14 days to file the same.
 20. The record shows that the defendant's bill of costs was listed for taxation on August 3, 2022, and it is therefore clear that the plaintiff had lost interest in this matter and was only awakened upon service of the defendant's bill of costs. In addition, the plaintiff's misrepresentation of facts that on January 13, 2022 both parties were ready to proceed but the court's schedule necessitated an adjournment, when in fact the record shows that it is the plaintiff's failure to file a witness statement that constrained the court to adjourn the matter to give the plaintiff opportunity to file their witness statement, only points to the fact that the plaintiff's is not candid and their credibility on the reasons for nonattendance is in question, and hence their allegation of persistent miscommunication is merely a clutch at straws. It is trite that whoever approaches equity must do so with clean hands. However, in this case the incorrect allegations made by the plaintiff, show that they have approached equity with unclean hands and therefore do not deserve equitable orders sought herein.
 21. In my view, the conduct of the plaintiff in failing to file their witness statement which ought to have been filed without being prompted by the court; their failure to explain why they were not in court on



January 20, 2022; the inordinate delay of 7 months before they filed the instant application; and their overall conduct and lack of candidness, demonstrate that the plaintiff was not interested in prosecuting this matter and therefore they are undeserving of the orders sought.

22. In the premises, I am not persuaded that the applicant deserves the orders sought. Ultimately, I find and hold that the application dated June 17, 2022 lacks merit and the same is hereby dismissed with costs.
23. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 22ND DAY OF NOVEMBER, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.

A. NYUKURI

JUDGE

