



REPUBLIC OF KENYA



**Ryoba & 4 others v Mwita & another (Environment & Land Case
27 of 2019) [2023] KEELC 22533 (KLR) (29 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22533 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 27 OF 2019**

**MN KULLOW, J
DECEMBER 29, 2023**

BETWEEN

**FRANCIS CHACHA RYOBA 1ST PLAINTIFF
JOHN SINDA NGORO 2ND PLAINTIFF
JULIUS BATIROBA NGORO 3RD PLAINTIFF
JAMES NYANGI NGORO 4TH PLAINTIFF
GATI GORE CHACHA 5TH PLAINTIFF**

AND

**MWITA MAISORI MWITA 1ST DEFENDANT
FLORENCE KAGONYA MIJARA 2ND DEFENDANT**

RULING

1. By Notice of Motion dated 26th October, 2023, the Plaintiffs/ Applicants sought for the following orders: -
 - a. Spent.
 - b. That this Honorable Court be pleased to set aside the orders issued on 3rd July, 2023 dismissing this matter for want of prosecution and subsequently reinstate the same.
 - c. That upon granting prayer (b) above (erroneously indicated as (a), the Plaintiffs'/ Applicants' case be fixed for hearing on priority basis.
 - d. That costs be in the cause.
2. The application is based on the 11 grounds thereof and on the Supporting Affidavit sworn on even date by one Thomas Muniko Robi, an Advocate of the High Court having conduct of the matter on behalf



of the Applicants. The Application was opposed by a Replying Affidavit sworn by the 2nd Respondent, on her own behalf and on behalf of the 1st Respondent deposed on the 1st November, 2023. It was canvassed by way of written submissions, both parties filed their rival submissions; the submissions and authorities for the Applicants are dated 14th November, 2023, while those of the Respondent are dated 10th November, 2023.

3. In summary, the Applicants averments and submissions are inter alia that the Applicants were ready to proceed with the hearing of the matter on the 03/07/2023, however due to their Advocate's late arrival in court, the same was dismissed for want of prosecution.
4. The Advocate contends that on the said date he had instructed his colleague, Mr. Achola to hold his brief and request that the matter be placed aside since he was on his way to court. That he arrived in court at around 11:30am only to be informed by the court assistant that the matter had already been dealt with and dismissed for want of prosecution.
5. It is therefore his claim that the Applicants should not be condemned unheard and his mistakes should not be visited on the innocent Applicants who have always been ready to prosecute their case on merit. He thus urged the court to set aside the said dismissal orders and reinstate the matter for hearing on merit on priority basis.
6. The Respondent on the other hand dismissed the Application as being an abuse of the court process, vexatious in nature and malicious and the same is being used as a delaying tactic. It is their contention that the Applicants have no valid grounds to warrant the reliefs of the orders sought; that the Applicant's counsel on record has deposed to the fact that he knew on the same day at around 11:30am that the matter had been dismissed for want of prosecution but the instant Application was only filed on 26/10/2023 after they had already filed an Application for eviction.
7. It is therefore their claim that the inordinate delay in moving the court since the dismissal date is manifestly indicative of the delaying tactics on the part of the Applicants. They maintained that the mistake absenteeism was occasioned by both the plaintiffs and their counsel and urged the court to dismiss the Application with costs.
8. I have read and considered the rival submissions filed by the parties herein;

Analysis and Determination

9. After a careful analysis, the issue for determination is whether the applicants have met the prerequisite conditions for grant of Orders sought;
10. Setting aside a dismissal Order for want of prosecution is governed by Order 12 Rule 7 which provides that: -

“Where under this Order judgement has been entered or the suit has been dismissed, the court on application may set aside or vary the judgement or order upon such terms as may be just.”
11. The jurisdiction of the Court to review and set aside its decisions is wide and unfettered. The Court of Appeal in *Shah v Mbogo and Another* [1967] EA 116 held that: -

“This discretion (to set aside ex parte proceedings or decision) is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”



12. The circumstances that led to the dismissal of the suit are not in dispute. The Applicant however seeks to set -aside and/or vacate the dismissal orders issued on the 3/7/2023; on the basis that the matter was dismissed due to their advocate’s late arrival and absenteeism. He thus contend that the mistakes of the advocate should not be visited on the litigants and the plaintiffs should not be condemned unheard.
13. The Respondent on the other hand averred that no valid grounds had been advanced to warrant the grant of the orders sought and dismissed the Application as being a delaying tactic. They averred that the Applicants had not given an explanation for the delay occasioned in the filing of the instant Application especially when the Applicants confirmed that they became aware of the dismissal on the same date 3/7/2023.
14. I have considered the rival position taken by both parties herein and on that account, I shall seek to address whether the explanation tendered by the Applicant amounts to sufficient cause and whether the same is satisfactory to persuade the court to grant the orders sought.
15. What amounts to Sufficient Cause was addressed in the case of *Wachira Karani v Bildad Wachira* [2016] eKLR, the Court held that: -

“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...” (emphasis mine)
16. Further, in *BML v WM* [2020] eKLR, the Court of Appeal cited with approval the he Supreme Court of India in Civil Appeal 1467 of 2011 *Parimal v Veena Bharti* (2011), where sufficient cause was defined as follows:

“Sufficient cause means that the parties 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 ...’”
17. I have looked at the Court record, particularly the proceedings of 3/7/2023. It is not in dispute that when the matter was called out, Mr. Achola was holding brief for the Plaintiffs’ Advocate and he duly informed the court that the plaintiffs were ready to proceed with the hearing of the plaintiff’s case. The matter was given time allocation for 11:00 A.M. At 11:15am, after the call over, neither the Plaintiffs nor their advocates on record were present in court as earlier scheduled.
18. The Applicant’s advocate contends that he arrived in court on the same day at around 11:30am only to be informed that the matter had already been dismissed for want of prosecution whereas he filed the instant application after 3 months. I find such averments by the Applicant hard to believe. The Plaintiff’s advocate has not outlined the efforts he made to either inform the court that he was running late, asked a colleague to hold his brief and inform the court that he was on his way or even reach the court assistant to pass the said information.
19. Moreover, the applicant has not given a plausible explanation or at all, for the over 3 months delay in filing the instant Application. It has been held in a number of cases that a delay even for a day may amount to an inordinate delay and the onus is on the Applicant to give a satisfactory and sufficient explanation for the delay occasioned in filing the instant Application.



20. The question that therefore follows is whether the explanation given by the Applicant for absenteeism is satisfactory and sufficient in the circumstances as held in the Bildad Wachira case and the Court of Appeal case above.
21. Taking the totality of the foregoing into account, it is my considered opinion that even though the explanation tendered by the Applicants is not sufficient and satisfactory in the circumstances and does not meet the threshold to warrant the grant of the reliefs sought, I appreciate that the subject matter is a land matter and land matters are emotive. Moreover, the mistake in question was that of the advocate on record and the same should not be visited upon the innocent litigants.
22. This court is further guided by the need to serve substantive justice and I will therefore grant the Applicant the benefit of doubt and allow the case to be heard on merit with finality. The Applicants herein have expressed their keenness in pursuing the matter going forward and no prejudice or irreparable loss is likely to be occasioned to the Respondents that cannot be compensated by an award of costs. However, this discretion will be exercised on strict terms and conditions.

Conclusion

23. In the upshot, I accordingly find that the Application dated 26th October, 2023 is merited and I will proceed to allow the same on the following terms: -
 - i. An Order be and is hereby issued setting aside the orders issued on 3rd July, 2023 dismissing the matter for want of prosecution and subsequently an Order Reinstating the suit is hereby issued.
 - ii. Consequently, I hereby direct that the Plaintiffs'/ Applicants' case be fixed for hearing within 30 days from the date of this ruling on priority basis.
 - iii. Further, the Plaintiffs/ Applicants are hereby ordered to pay Kshs. 30,000= as throw away costs before the next hearing of the matter.
 - iv. Failure to comply with order (b) above, Order No. (a) will be deemed vacated and the matter will stand dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 29TH DAY OF DECEMBER, 2023

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

_____ for the Plaintiff/ Applicant

_____ for the Defendant/Respondent

Tom Maurice/ Victor - Court Assistant

