Katana & 56 others v Kenya Pipeline Company Limited (Environment & Land Case 281 of 2018) [2023] KEELC 22162 (KLR) (13 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22162 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 281 OF 2018

NA MATHEKA, J

DECEMBER 13, 2023

BETWEEN

ISHMAEL MANGI KATANA & 56 OTHERS ..... PLAINTIFF

AND

KENYA PIPELINE COMPANY LIMITED ..... DEFENDANT

RULING

1. The application is dated 31st October 2022 and is brought Rnder order 12 rule 7 of *Civil Procedure Rules* 2010 section 3A of *Civil Procedure Act* Cap seeking the following orders;
    1. This application be certified as urgent and be heard on priority basis.
    2. That the Orders of this Court issued on 25th October 2022 dismissing the suit herein for want of prosecution be set aside and the suit herein be reinstated for hearing.
    3. Costs be in the cause.
2. It is based on the grounds that the Plaintiffs filed this case on 4th December 2018 together with an Application for temporary injunction which was dismissed on 23rd January 2020 and the Plaintiffs have since lodged an Appeal to the Court of Appeal against the said Ruling which is pending determination. On 25th October 2022, when the matter was called out for hearing of notice to show cause why the same should not be dismissed the Court dismissed the suit in the absence of the Plaintiffs and their Advocate. That at the time the matter was called out, the Plaintiffs' Advocate Ms. Hellen A. Shiundu was before High Court Judge Honourable Naikuni in case ELC NO. 106 of 2018 *Musa Mohamed Bandari v Gulam Hussein*. That the non-attendance was not intentional and the same is excusable and in any case, it is a mistake of Counsel and not a mistake of the Plaintiffs who are not to be punished by Counsel's mistake. That the Plaintiffs are desirous to prosecute their case to logical conclusion and at the time of dismissal, the Plaintiffs had filed request for judgment. The Defendant shall suffer no prejudice if the Application is allowed.

3. 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"

4. 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 v Mbogo* (1979) EA 116 quoted with approval in the case of *John Mukuha Mburu v 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."

5. 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 v Veena* which was cited with approval in the case of *Wachira Karani v 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"
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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."

6. In the instant case the Applicant claimed that failure to appear in court on the 25th October 2022 by the Plaintiffs' Counsel was unintentional and inadvertent. That on 25th October 2022, when the

matter was called out for hearing of notice to show cause why the same should not be dismissed the Court dismissed the suit in the absence of the Plaintiffs and their Advocate. That at the time the matter was called out, the Plaintiffs' Advocate Ms. Hellen A. Shiundu was before another court. 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 23rd January 2020 when the Plaintiffs' application for an injuction was dismissed. The Plaintiffs took no steps until they were served with a mention notice for the 25th October 2022 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. The court further notes that though this application is dated 31st October 2022 the payment receipts reads 26th April 2023 when the taxation process began! I find that both the Applicants and their advocate demonstrated inexcusable laxity in prosecuting this case, and not only on the material date but others. It is the role of the Plaintiffs and their counsel to ensure that the case proceeds for hearing expeditiously. In the case of *Utalii Transport Co. Ltd and 3 Others v 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."

7. 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 v Daima Bank Limited* (2013)eKLR where the court while citing the case of *Mobil Kitale Service Limited v 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*."

8. The Plaintiffs/Applicants blame their advocate for the inadvertent mistake. This is the Plaintiff's case and they ought to have been vigilant. The case does not belong to their advocate. In the case of *Savings and Loans Limited v 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.

9. 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.

10. 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 v Alliance Media Kenya Ltd* (2014) eKLR). The Plaintiffs were 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 as the same was undefended.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 13TH DAY OF DECEMBER 2023.

N.A. MATHEKA

JUDGE