



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Faraj & 4 others v Halai & 17 others (Environment & Land Case
198 of 2015) [2022] KEELC 3488 (KLR) (27 January 2022) (Ruling)**

Neutral citation: [2022] KEELC 3488 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 198 OF 2015**

M SILA, J

JANUARY 27, 2022

BETWEEN

MUSA MUSA FARAJ & 4 OTHERS PLAINTIFF

AND

PARBAT LALJI HALAI & 17 OTHERS DEFENDANT

RULING

1. The application before me is that dated 12 February 2021 filed by the plaintiffs. The application seeks the following orders :-
 - (i) Spent (certification of urgency)
 - (ii) That this Honourable Court be pleased to reinstate this suit and re-list the same for hearing/mention for directions.
 - (iii) That this Honourable Court do review and or reverse its orders made on 18th January 2021 dismissing the whole suit in the absence of the plaintiff/applicants (sic) and/or their Advocates on record who were not served with the Mention Notice or Notice of hearing for the said date.
 - (iv) That there be a stay of the said orders issued on January 18, 2021 dismissing the suit pending the hearing and determination of this Application.
 - (v) That the costs of this application be provided for.
2. By way of background, this suit was commenced through a plaint filed on 27 August 2016. That plaint identified the plaintiffs as Faraj Musa & Others and the defendants as Parbat Lalji Halai & Others. The “others” were not named in the plaint. Be that as it may, there was delay in the prosecution of the case and it was listed on 22 February 2018 before Omollo J for dismissal for want of prosecution. The Judge did not dismiss the suit but allowed the plaintiffs time to serve the defendants by way of substituted means through an advertisement in the dailies and directed the case to be mentioned on



17 May 2018. On that date, there was no appearance on the part of counsel for the plaintiff in court and since there was no evidence of service, the court dismissed the suit for want of prosecution. There followed an application dated 2 July 2018 to reinstate the suit which the court allowed on 7 March 2019. The matter was then listed for “formal proof” hearing before me on 24 February 2020. On that date, I pointed out the anomaly in the plaint, that the parties were not identified, and therefore the suit was defective. I directed that the plaint be amended in 14 days and specifically identify the persons sued. I made an order that if no amended plaint was filed as directed then the court reserved the discretion to strike out the plaint. I further directed that the case be mentioned on 8 May 2020. The file does not appear to have come to court on 8 May 2020 and the plaintiffs’ counsel took the date of 23 November 2020 for mention. I did not sit on that day but I issued directions that this matter be mentioned on 18 January 2021. The directions were sent by email to all counsel and in the file is the email sent on 16 December 2020. There is also evidence of another email sent on 13 January 2021 reminding them of the court’s sitting the following week for the matters that had been adjourned in November 2020.

3. On 18 January 2021, there was no appearance on the part of counsel for the plaintiffs. Present were Mr. Muthee for the 7th defendant and Mrs. Akwana for the 8th defendant. Mrs. Akwana pointed out that the plaintiffs did not file their amended plaint within the prescribed time and there was no application for extension of time. That was indeed the position. On record was an amended plaint filed on 18 March 2020, which was out of the 14 days given on 24 February 2020. Given that there was no counsel to explain the delay and the orders of 24 February 2020, I proceeded to strike out the amended plaint.
4. This application was subsequently filed and as I have mentioned, it is an application to reinstate the suit. The application is supported by the affidavit of Joyce Chesaro (Mrs), who is counsel appearing for the plaintiffs. In her affidavit, she has deposed that after the date of 23 November 2020, when the court did not sit, her court assistant followed up with the court registry for new dates but was not successful until her offices closed for Christmas holiday on 15 December 2020 and reopened on 18 January 2021. She has averred that the notice for new dates was posted on 16 December 2020 when she had already closed her offices. She has further deposed that she was unwell from 12 January 2021 to 28 January 2021. She then sent her court clerk to find out if the case had been given a new date only to find out that it had been dismissed. She avers that the advocate’s error ought not to be visited on her clients.
5. The 8th respondent has opposed the application through the affidavit of Janet Mwaka, who is also counsel for the 8th defendant. She has given the history of the matter and pointed out the two emails sent on 16 December 2020 and 13 January 2021 informing counsel of the date for the case. She avers that there is no explanation advanced as to why counsel did not comply with the directions of 24 February 2020. She is of opinion that counsel has conveniently structured her affidavit to show that her offices were conveniently closed on 15 December 2020, a day before the first notification by email, and that she fell sick on 12 January 2021, a day before the reminder email. She has averred that failure to observe timelines set by the court is a disregard of the rules of procedure and has argued that the court’s discretion cannot be exercised to assist a person who deliberately seeks, whether by evasion or otherwise, to obstruct or delay the cause of justice.
6. Mrs. Chesaro swore a supplementary affidavit where she inter alia refuted that her absence in court on 18 January 2021 was deliberate or negligent as she was unwell. She has deposed that she served the defendants with the amended plaint. She has asserted that she did comply with the court order of 24 February 2020. She has stated that 16 December 2020 was Christmas vacation and she had left office thus the date was not diarized. She believes that it is in the interest of justice that the suit be reinstated.
7. Both counsel filed written submissions to canvass the application and I have taken note of the same. Mrs. Chesaro more or less rehashed what is already deposed in her affidavits. Ms. Mwaka on the other hand submitted that the plaintiffs’ have founded their application under Order 45 for review but this



cannot apply. Counsel submitted that the medical records provided by Mrs. Chesaro have no bearing as the suit was dismissed for failure to comply with the orders of 24 February 2020 and not because of non-attendance of counsel. She submitted that there is no new evidence on record, no error apparent on face of record, and no sufficient reason to review the orders of 18 January 2021. On whether the court should exercise its discretion to reinstate the suit, she submitted that the plaintiffs do not deserve the court's discretion as they have over the years wilfully failed to comply with the court's directions. Counsel submitted that the plaintiffs have been given the opportunity to be heard but have declined to utilize the same. She relied on the case of *Union Insurance of Kenya v Ramzan Abdul Dhanji*, Civil Application No Nai 179 of 1998.

8. I have considered the application. The application is brought under the provisions of Sections 1A, 3 and 63 of the *Civil Procedure Act*, Order 5 (1) and 45 Rule 1 of the Civil Procedure Rules, 2010. The application is based on the following grounds :-
 - (a) That the plaintiffs/applicants and their Advocates on record were not served with the mention notice or notice of the hearing for 18th January 2021.
 - (b) This matter had earlier been listed for mention on 23rd November 2020 to confirm compliance whereby the court was not sitting on that day and parties were advised by the Court Assistant that the Hon. Judge will issue new dates for all matters and parties will be notified.
 - (c) This Honorable Court do review and or reverse its order made on 18th January 2021 dismissing the whole suit in the absence of the plaintiffs/applicants and their Advocates on record as they were not aware or made aware of the mention date of 18th January 2021.
 - (d) The plaintiffs/applicants Advocate closed their offices for December holidays on December 15, 2020 and opened its offices on January 18, 2021 there be stay of the said orders issued on January 18, 2021 (sic).
2. It is apparent that this is an application to set aside the orders made on 18 January 2021 which orders dismissed the plaintiffs' suit. Though section 63 of the *Civil Procedure Act* and Order 45 Rule 1 have been cited, which touch on review, I do not see their utility. Under Order 45, a court may issue an order for review where there is discovery of new evidence which could not be availed at the time the order was made; or where there is an error apparent on the face of the record; or where there is other sufficient cause. Within this application, I have not been told that there is some new evidence being introduced which could not be introduced on 18 January 2021 when the order was made; neither have I been pointed to any error apparent on the face of the record; and neither have I been informed that there is some reason which I need to look at so as to make an order for review. I agree with Ms. Mwaka, that this application does not meet the threshold of an application for review. As far as I can see, this is nothing more than an application to reinstate a dismissed suit.
3. This would ordinarily be a fairly simple application. Indeed, courts are encouraged to do as much as possible to see to it that parties are fully heard on merits and I agree with that principle. When a party asks the court to set aside its orders, it is asking the court to exercise a discretion. The court is enjoined to exercise its discretion judiciously and indeed, it is not uncommon to find courts allowing applications such as this. When a party is asking the court to exercise its discretion in his/her favour, I believe that such party has an obligation to be truthful and candid and be prepared to avail all material facts. Where there is a mistake, a party ought to be honest, and acknowledge the mistake, and call for the court to excuse that mistake in order to do justice. I on my part would be hard pressed to be tough on a party that has been forthright and sincere. In the same vein, I wouldn't want to encourage persons to come to court asking for the court to exercise its discretion while at the same time being outrightly evasive



and deceptive. I do not wish to give aid or be indulgent to a party that has deliberately gone out of his/her way to mislead court.

4. Turning to the application at hand, it will be seen that among the grounds raised is that. Counsel for the applicants was not served with the mention notice for 18 January 2021. That cannot be true. Counsel was indeed served by the emails of 16 December 2020 and 13 January 2021. Nowhere has it been mentioned in the affidavit of Mrs. Chesaro that the email address bearing her name, in the two emails of 16 December 2020 and 13 January 2021, is not her email. Nowhere does she say that these emails were never seen by her. Even assuming that it is correct that counsel's office was closed on 15 December 2020, counsel does not state that her email was closed or stopped working on 16 December 2020 and 13 January 2021. Counsel in fact had the audacity to state in her affidavit that it is "alleged" that the notice was posted virtually when it is clear that the notice was posted to her email.
5. I am aware that counsel states that she closed her office on 16 December 2020. I don't know why any counsel would wish to close their office on 16 December of any year when court recess starts on 21 December of every year. If any counsel wishes to proceed on holiday early, so be it, but it would be irresponsible to close an office and have no one in it to attend to any issue that may arise, even if this falls within the period for court recess. Even the courts do have personnel to deal with matters that may come under urgency. But again I wonder whether the application is based on the reason that counsel was not served with the email, or was served but could not attend, because she was not aware of the date. On this, counsel has been ambivalent.
6. Having said all this, we need to recall that the amended plaintiff was not struck out because of absence of counsel. It was struck out for failure to abide by the timeline for filing the amended plaintiff which was 14 days of 18 February 2020. It was pointed out on the day by counsel that there was no application for extension of time. Within this application, the applicants have not bothered at all to explain why they did not file their amended plaintiff within the timeline given by the court. Maybe if they had addressed this issue, which is precisely what led to the dismissal of the suit, I would have been able to assess whether or not the discretion of the court ought to be exercised in their favour.
7. I have gone through the history of this case and I have seen numerous occasions when the applicants failed to comply with the timelines given by the court. I have set out the background. The suit was listed for dismissal for want of prosecution but was spared by court. It was nevertheless dismissed on 17 May 2018 because the applicants did not demonstrate compliance with the order to serve that was given on 22 February 2018. On the date that the suit was dismissed, counsel again was not present in court and no affidavit of service had been filed as directed. It appears as if this failure to attend court is very prevalent in this suit. It has certainly led to the delay in concluding the matter. It is now more than six years since the suit was filed and it is yet to proceed for hearing.
8. I have every reason to dismiss this application. The applicants do not deserve the discretion of this court but through grace I will bend over backwards and accommodate them. I will set aside the order of dismissal of the suit made on 18 January 2021. I will even allow the amended plaintiff that was filed out of time. But this will be subject to the applicants paying thrown away costs on this application of Kshs. 20,000/= to the 8th defendant who attended court on 18 January 2021 and was fully entitled to oppose this motion, and further pay a fine of Kshs. 5,000/= to court for the late filing of the amended plaintiff. These sums of money be paid within the next 14 days. If they are not so paid, then this suit will remain dismissed with costs to the defendants.
9. Orders accordingly.

DATED AND DELIVERED THIS 27 DAY OF JANUARY 2022.



JUSTICE MUNYAO SILA
JUDGE, ENVIRONMENT AND LAND COURT
AT MOMBASA.

