REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

ELC CASE NO 74 OF 2021

PWANI BARIDI WATERWAYS LIMITED.....PLAINTIFF

VERSUS

LINUS CHIRA MUYA.....1ST DEFENDANT

LAND REGISTRAR KWALE.....2ND DEFENDANT

RULING

The Application

1 This ruling is with respect to the Plaintiff application dated 6/10/2021. The application seeks for the following orders; -

1) Spent.

2) This honourable court be pleased to review and set aside its orders issued on the 23rd June 2021 by the Honourable Justice C Yano.

3) This honourable court be pleased to issue the claimant with an early hearing date.

4) Costs of this application be provided for.

2 The orders proposed for review were issued by my brother Justice Yano on 23/6/2021 dismissing the Plaintiffs Notice of Motion Application dated 8/2/2021 for non-attendance with costs to the 2nd Defendant. The application is supported by the Affidavit of **Nancy Kilonzo advocate for the Plaintiffs sworn on 6th October 2021. It is deposed that** the court had set the matter down for hearing on 23/6/2021 in the presence of the 2nd Respondent. That come 23/6/2021 the Applicant was ready to proceed with the hearing of the application only to experience logging in difficulties as the hearing was through the virtual platform. That the failure to attend court and proceed with the hearing was inadvertent due to the unanticipated technical challenges and by the time they logged in the matter had already been dealt with. It was stated that the non-attendance was unintended and the court was urged to review and set aside the dismissal orders.

3 To set matters into context, the application that was dismissed is the Plaintiffs Notice of Motion application dated 8th February 2021 for temporary orders of injunction restraining the 1st Defendant from developing, interfering, trespassing or remaining on Kwale/Tiwi/1734 which is the suit property subject of this suit. The court had on 18/2/2021 granted interim orders against the 1st Respondent pending the hearing and determination of the application. Counsel further stated that to date the 1st Respondent has never entered appearance in this matter and has blatantly continued trespassing on the suit property despite the said interim orders.

The 1st Defendants Response

4 The 1st Defendant subsequently entered appearance in the suit. They opposed the application through the replying affidavit sworn by Linus Chira Muya on 16th November 2021. It is deposed that Tat the time the application was dismissed the 1st Defendant had not been served with any pleadings in this matter. Further that he was not aware of the interim orders issued on 18th February 2021 and that he was not the owner of the property subject of the order. The other grounds are inordinate delay at filing the present application and failure on the part of the Applicant do demonstrate the loss to be suffered if the status quo is maintained pending the determination of this suit.

The 2nd Defendants Response

5 The application is also opposed by the 2nd Defendant through grounds of opposition dated 21st June 2021 as set out herebelow;-

1) That the application is fatally defective, an abuse of courts process and a nullity in law and equity.

2) That the crux of the application is reinstatement of a suit that was dismissed for non-attendance on 23/6/2021.

3) That the application is a waste of courts judicial time and must be dismissed since the court has already pronounced itself on the issue, court is therefore functus officio hence court lacks jurisdiction to determine the suit

4) That it is trite law that where a suit is filed in a court that lacks jurisdiction to hear and determine the suit, then the suit would be deemed a nullity as per the decision of Nyarangi JA in the case of **Owners of Motor Vessel Lillian S V Caltex Oil[K] Ltd [1989] KLR1.**

5) That hence 2nd Defendant avers that this honourable court lacks jurisdiction to determine the issue.

6) That no iota of evidence has been filed to support the allegations herein, no proof of attempt to contact the court assistant or no proof of emails or communication enquiring on the same, hence the application must fail.

7) That it is trite law as held in **Caroline Mwirigi V African Wildlife Foundation [2021]** and **Kipkoech Kigen V Mwanahamisi Iddi [2021]** mere explanation of counsel's inability to log in to courts virtual platform is not sufficient, evidence and or proof must be submitted demonstrating that they had faced technical glitches when in court.

8) **Bilha Ngonyo Isaac v Kembu Farm & Anor [2018**] on appeal, court emphasised that it is incumbent upon the party seeking the courts favour to adduce sufficient and plausible reasons that are persuasive to the court.

SUBMISSIONS

6 On agreement of the parties this application was canvassed by way of written submissions.

Plaintiff's submissions

7 The plaintiff filed its submissions on 17/11/2021 and contended that order 10 rule 11 of the Civil Procedure Rules gives courts unfiltered discretion to set aside interlocutory judgement or any order as entered. It was submitted that the Plaintiff stands to suffer irreparable harm if the application is not heard on merit as the 1st Respondent has continued trespassing on the suit property regardless of the court orders issued and served upon him. Relying on the cases of **Rose Wanjiru Kamau V Tabitha Kamau & 3 Others [2014] eKLR**, **Lochab Bros Ltd V Peter Karuma T/A Lumumba, Lumumba Advocates 203 eKLR** and **Esther Wamaitha V Safaricom Limited [2014] eKLR** counsel emphasised that that the discretion to set aside a judgement or order had no restrictions as long as it was done in a just manner. Further that the concern of the court is to do justice to the parties before it and avoid hardship resulting from inadvertence or excusable mistake. The reason for failure to attend should be considered.

8 Counsel for the Plaintiff also submitted that parties to a litigation were from time to time bound to make mistakes including the failure to keep timelines hence guilty of laches, that sometimes the mistake is on the part of Counsel and not the litigant and the remedy for the same was the court to exercise its discretion to overlook that lapse as was the decision in **Philip & Another V Augustine Kibede 1982-88 KLR 103.**

9 Ms Kilonzo concluded by submitting on the cause of her non-attendance on 23/6/2021 by stating that the same was for reasons beyond her control and that the same ought to not be used in detriment of an innocent litigant. Reliance was placed on the holding in **Muwanga Estates & Another v N Part CA 49/2001** where it was held that a litigant who was not guilty of dilatory conduct would not be debarred from pursuing his rights in court because of his counsel's negligence. Section 1A [1] 3A of the Civil Procedure Act as they relate to the overriding objectives of the said Act to facilitate the just and expeditious resolution of disputes and for timely disposal of the same were also cited. The court was urged to reinstate the application dated 8/2/2021 and have the same heard and determined on merit.

1st Respondent's Submissions.

10 According to the 1st Respondent, the plaintiff has not demonstrated that they had encountered any technical difficulties in by reaching out to the 2nd respondent on the particular date of hearing to have the matter placed aside until they resolved their connectivity problems. That the application being governed by the provisions of Order 45 Rule 1[1] Of the Civil Procedure Rules, the delay in filing the application herein was unexplained and was clearly an afterthought. That the 1st defendant was bound to be prejudiced on enjoyment of his rightfully acquired property if the application was allowed and that the applicant had not demonstrated it will suffer if status quo is maintained pending determination of the suit. It was submitted that the application before court was baseless, an afterthought and the same should be dismissed with costs.

2nd Defendant's Submissions

11 In the submissions dated 7/12/2021 and filed before court on 8/12/2021, the 1st Defendant submitted that the Plaintiff failed to annex correspondence informing the court assistant that the link availed could not connect him to the virtual court. That there had been no pro-active measure to follow up with the court ICT or be in court by the applicant. It was submitted that no proof of emails had been availed as

communication to all advocates stating that counsel for the applicant had a problem with the Virtual Microsoft Teams Network.

12 The 2nd Defendant through Mrs Mvoi Senior State Counsel on whether the application should be allowed as prayed submitted that

Section 1A [1] of the Civil Procedure Act provides for an overriding objective to facilitate the just expeditious, proportionate and affordable resolution of the courts disputes as governed by the Act. That the applicant had failed to demonstrate proof of any of the averments in the application particularly that they had joined the virtual court late and the reason for filing the application inordinately late thus 4[four] months after its dismissal. Counsel urged for the court to abide by the decision in **Caroline Mwirigi V African Wildlife Foundation [2021] eKLR** where delay of 5 months without justifiable cause was held to be unreasonable. Further in **Francis Kipkoech Kigen V Mwanahamisi Iddi [2021]** and **Bilha Ngonyo Isaac V Kembu Farm Ltd & Another [2018] eKLR** where the court held that delay of 2 months with no explanation and proof that counsel had faced technical glitches when joining court was unreasonable and went ahead to dismiss the application for reinstatement with costs.

13 Further reliance was placed on **Augustine Ojiambo V Brinks Security Services Limited [2021]eKLR** where the applicant was on similar excuses was ordered to pay the Respondent Kshs 20,000/- as costs.

ANALYSIS AND DETERMINATION

13 I have considered the application and its grounds, counsels' submissions on the same as well the rival responses and submissions together with all the authorities cited. The issue for determination is whether the application by the Plaintiff/ Applicant has merit.

14 The application has been filed under the provisions of article 159(1) of the Constitution of Kenya 2010, Order 12 Rule 7 , Order 51 Rule 1 of the Civil Procedure. Article 159 is on judicial authority and sets out the principles that should guide the courts and tribunals in this regard. Indeed, the entire Order 12 deals with Hearing and consequences of nonattendance. This Court has discretion to set aside any orders upon terms that it considers just. The prayers sought in the application before court are in the discretion of the Court however discretion has to exercised judiciously.

15 The principles that guide the Court in its exercise of discretion are set out in the case of **Patel Vs East Africa Handling Services Limited (1974) E.A** where the Court stated that in setting aside judgements/orders the main concern for the Court is to do justice to the parties. In the case of **Shah – v- Mbogo & Anor (1967) E.A 470 the** Court of Appeal for Eastern African held: -

> ***"applying the principle that the Court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused".***

I have noted that above decisions were also quoted in the case of ***Esther Wamaitha V Safaricom Limited [2014] eKLR*** *relied upon by Counsel for the applicant.*

16 According to the Applicant herein, the matter was slated for hearing of the dismissed application on 23/6/2021, however due to technical hitches they logged in late and found that the matter had already been called out and dismissed for non-attendance. The Defendants state that no proof had been furnished on the said challenges and that no sufficient cause or reasons have been given on why it has taken the Applicant four months to file this application or reinstatement.

17 The question that needs to be answered by this court is whether sufficient cause has been demonstrated for non-attendance of the applicant for hearing of the dismissed application. It is imperative to therefore define or consider what constitutes sufficient cause, to warrant the exercise of the court's discretion. The Supreme Court of India case of **Parimal vs Veena** *as was mentioned in* **Wachira Karani v Bildad Wachira [2016] eKLR** *attempted to describe what was* **"Sufficient cause"** when it observed 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"*

18 This court based on the above definition and the reasons cited by Counsel for the Applicant is of the view that the Applicant has offered sufficient reasons as to why they failed to attend court on 23/6/2021. I also take cognizance of the fact that both litigants and lawyers are coming to terms with the use of virtual platforms in court proceedings. Indeed, we have done well however challenges still abound. None of us has never experienced these technical challenges and I will not require strict proof from the Applicant to demonstrate the same. I will take judicial notice that we are still perfecting this new practice.

19 It has been contended by the defendants that a delay of four months was inexcusable. From the record the orders dismissing the application were issued on 23rd June 2021. The Notice of Motion herein was filed on 6th October 2021 a period of at least 106 days including weekends and the court vacation translating into 3 months or thereabouts. It was placed before this court on 12th October 2021 under Certificate of Urgency. I have seen the authorities cited to buttress that there was delay. However, each case must be decided depending with the circumstances. I do not think this delay is such as those that should deny the Plaintiff the use my discretion in their favor. The court in the case of **Utalii Transport Company Ltd & 3 Others Vs NIC Bank & Another (2014)eKLR** emphasized that the

word inordinate should not be taken in its ordinary meaning since what amounts to inordinate delay will depend on the circumstances of each case. In my view this court will look at the delay in bringing this application vis a vis driving the Plaintiff from the seat of justice in having their application heard on merit which application seeks to preserve the suit property. It has been urged that the Applicant has not demonstrated to this court the loss they would suffer if the status quo is maintained. In my view this is an argument for the main application. *Questions such as whether it is unjust to maintain the injunction in force or it is otherwise unjust and inequitable to let the order remain will be asked when dealing with the application inter parties. I have read my brother Justice Munyao's decision in* ***Augustine Ojiambo V Brinks Security Services Limited [2021]eKLR*** *relied by Mrs Njau which dealt with log in challenges. However, the facts are distinguishable in the sense that there were a myriad of directions that counsel failed to comply with. In my view this is what exacerbated the courts displeasure with Counsels behavior.*

20 This court is guided by the holding in **Principal Mariakani Secondary School & another v Maglena Amina Kamau [2020] eKLR** where the court emphasised the need to have parties heard on merit as per the provisions of Article 50 of the Constitution of Kenya 2010. I therefore will invoke Articles 50 and 159 of the Constitution on the right to be heard and the need to administer justice without undue regard to technicalities such as time respectively. Indeed, the courts concern should be to do justice to the parties as has already been submitted.

21 The Court is inclined to reinstate the application dated the 8/2/2021 on the following conditions;

1) The Notice of Motion application dated the 8/2/2021 be and is hereby reinstated.

2) The interim orders granted on 16/2/2021 are hereby reinstated and extended pending the hearing and determination of the Notice of Motion application dated the 8/2/2021.

3) The Notice of Motion application dated the 8/2/2021 should be fixed for hearing inter parties within the next 30 days in default it shall stand dismissed.

4) Costs shall be in the cause.

DELIVERED AND DATED AT KWALE THIS 14TH DAY OF FEBRUARY 2022

A.E. DENA

JUDGE

RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM IN THE PRESENCE OF:

MS. MUEMA HOLDING BRIEF FOR MS. KILONZO FOR THE PLAINTIFF

MR. NOOR FOR THE 1ST DEFENDANT

N/A FOR AG FOR THE 2ND DEFENDANT

MR. DENIS MWAKINA- COURT ASSISTANT.