



**Ng'ang'a v Wamiti (Environment & Land Case 11 of 2020)  
[2022] KEELC 3081 (KLR) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3081 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE 11 OF 2020  
LN GACHERU, J  
MAY 26, 2022  
IN THE MATTER OF SECTIONS 37 AND 38 OF THE LIMITATION OF  
ACTIONS ACT, CAP 22 LAWS OF KENYA  
IN THE MATTER OF LAND TITLE NUMBER LOC.2 GACHARAGE/670**

**BETWEEN**

**JACINTA NJERI NG'ANG'A ..... APPLICANT**

**AND**

**MIRIAM MUGURE WAMITI ..... RESPONDENT**

**RULING**

1. By a notice of motion application dated August 5, 2021, the applicant has sought for orders that;
  1. That this honourable court be pleased to set aside the orders made on the March 3, 2021, dismissing the applicant's application dated February 10, 2021, and then order that the application be reinstated and heard on merit.
  2. That the cost of this application be provided for.
2. The application is premised on the grounds set out on the face of the application and on the supporting affidavit of Alphaxard Osoro Mogikoyo, Advocate, sworn on December 16, 2021. He averred that his Law Firm filed and served a Notice of Appointment on December 3, 2020. That pursuant to instructions given to him, by the Applicant, he prepared the Application dated February 10, 2021, and it was filed on 11<sup>th</sup> February, 2021 and served on February 17, 2021. That subsequently he was served with a replying affidavit dated February 22, 2021 on February 26, 2021. That the application dated February 10, 2021, was fixed for hearing on March 3, 2021. That on the said March 3, 2021, he was engaged in the High Court of Kenya at Nairobi in P&A No. 1708 of 2005. That on the said date, he instructed another advocate to hold his brief in the instant suit with a view of adjourning the hearing of



the application dated February 10, 2021, but the said advocate arrived in court late and the application dated February 10, 2021 was dismissed for want of prosecution.

3. Further that failure to arrive in court on time to argue the application was neither intentional nor deliberate. That he tried to get a proper explanation as to what really happened in court on March 3, 2021, but he only managed the said explanation on December 15, 2021. That the delay to file the instant application was occasioned by the need to get a true brief of what took place on 3<sup>rd</sup> March, 2021. That he chose to attend P&A 1708 of 2005, because it was an old and complex matter, which he needed to attend personally. That the delay to file the instant application is not inordinate or inexcusable. That the application dated February 10, 2021, raises fundamental, weighty and legal issues and it was in the interest of justice that the orders of the court dismissing the said application be set aside and it be reinstated for hearing on merit.
4. The application is opposed through the replying affidavit sworn by J. Mwangi Ben, Advocate, on January 14, 2022. He averred that the application dated December 16, 2021, is frivolous and vexatious and meant to stall and prevent expeditious disposal of this matter. That the Application is grossly misconceived as it seeks to review orders of dismissal issued almost over a year ago. That if the applicant was dissatisfied with the dismissal order, he had all the time to appeal or approach this court to set aside the said order. That on July 12, 2021, Counsel for the applicant was present before court for pretrial directions in the substantive suit and sought a hearing date. That even then Counsel for the applicant did not raise any issue or challenge the dismissal orders. That the instant suit was brought before court on various occasions and the applicant's Counsel neither raised the issue nor sought reinstatement of the application dated 10/2/2021.
5. The application was canvassed by way of written submissions. The applicant filed her written submissions dated January 26, 2022, through the Law Firm of Osoro Mogikoyo & Co. Advocates. The Applicant relied on the case of *James Mwangi Gathara & Another vs. Officer Commanding Station Loitoktok & 2 others* (2018) eKLR, where the court held that;

“In the application of this nature I see the following issues as the ones to be addressed to determine the Notice of Motion. Is there a reasonable excuse why the plaintiff/applicant counsel did not attend court? If the orders are not issued, would there be prejudice on the part of the Applicant? In any event, what are the appropriate orders to be granted by this court?”
6. The applicant urged the court to be guided by the same approach in determining the instant application. The applicant submits that she has given reasons why neither her nor her advocate was in court on March 3, 2021, when her application was called out. That the said reasons explain adequately why there was no appearance. That if the orders sought in the application are not granted, she will be greatly prejudiced in P&A 1708 of 2005, which is similar to this matter as the Parties are claiming beneficial ownership of the suit property, L.R NO. Loc. 2/Gacharage/670. That P&A 1708 of 2005, having been filed first ought to be disposed off first before the matter herein is Considered.
7. The respondent also filed her written submissions dated February 8, 2022, through the Law Firm of Kirubi, Mwangi Ben & Co. Advocates. It is the Respondent's submissions that the instant application is brought one year after the court's ruling of March 3, 2021. That as the record shows, much has transpired after the dismissal orders were issued by the court. The respondent urged the court to disallow the instant application with costs. That substantive justice demands that parties do not unduly focus and/or pre-occupy themselves with unnecessary Interlocutory applications, but rather to strive to have the matter heard and concluded.



8. The court has considered the pleadings in general, the rival written submissions, the cited authorities and the relevant provisions of law and finds the main issue for determination is;- whether the application dated December 16, 2021, is merited.
9. The instant application seeks to set aside the orders of the court issued on March 3, 2021, and reinstate the application dated February 10, 2021.
10. It is not in doubt that the application dated February 10, 2021, was dismissed on March 3, 2021, as the applicant therein was absent in court when it came up for hearing. Further, from a perusal of the court record, it is clear that a lot has transpired since March 3, 2021, and the substantive hearing of the instant suit is in progress. That on all the occasions, the instant matter was before the court after March 3, 2021, and before the instant application was filed on December 21, 2021, both parties were always present in court..

### **Whether the Application dated 16<sup>th</sup> December, 2021 is merited**

11. Reinstatement of a suit/application dismissed for want of prosecution and nonattendance is discretionary. The discretion is couched under order 12 rule 7 of the Civil Procedure Rules that provides: -

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.”

12. The principles governing reinstatement were enunciated in the case of John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation) [2015] eKLR, where the Court stated as follows:

The fundamental principles of justice are enshrined in the entire Constitution and specifically in article 159 of the Constitution. Article 50 coupled with article 159 of the Constitution on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the court. These principles were enunciated in a masterly fashion by Courts in a legion of decisions which I need not multiply except to state that; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such act are comparable only to the proverbial “Sword of the Damocles” which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated.”

13. The power of the court to set aside ex parte orders is discretionary and the court must use its discretion to come to a conclusion while also ensuring that Justice has been done. In the case Shah -vs- Mbogo & another (1967) EA 1116, the Court stated on the matter of its discretion, that;

The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has



deliberatively sought whether by evasion or otherwise to obstruct or delay the course of justice.”

14. In addition, the court in *Patel....Vs....E.A Cargo Handling Services Ltd* (1974) EA 75, held that:-

There are no limits or restrictions on the Judge’s discretion to set aside or vary an ex-parte judgment except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do Justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules.”

15. A court’s discretion to set aside its ruling/judgment is not restricted, but should be so exercised not to cause injustice to the opposite party. Further, the Court’s discretion must be exercised judiciously, based on facts and the law.

16. It is this court’s considered view that in deciding whether or not to grant the orders sought and exercise discretion, the court is also guided by whether there is sufficient cause for non-attendance and whether an injustice will be occasioned if the application is allowed. In *Wachira Karani ... Vs... Bildad Wachira* (2016) eKLR, in allowing an application to set aside an *ex parte* judgment, the Court held that: -

“The rationale for this rule lies largely on the premise that an *ex parte* judgment is not a judgment on the merits and where the interests of justice are such that the defaulting party with sound reasons should be heard, then that party should indeed be given a hearing.”

17. Based on the foregoing, this court finds that the principles that ought to be considered in this case is whether there will be any prejudice that will be occasioned to the respondent and whether the explanation for non-attendance is sound and excusable. It is incumbent upon the party seeking the court’s favour to; show demonstrable good faith, adduce sufficient and plausible reasons that are demonstrable and persuasive to the court.

18. In the instant application, the applicant has argued that the inadvertent and excusable mistake was caused by his Advocate who though he sent a pupil to get someone to hold brief, the pupil was unable to give any Advocate the said instructions as he arrived late and by the time the matter was being called out, he was unable to give out the instructions on time. It is however the respondent’s contention that the applicant has not satisfactorily explained the reason for non-attendance. Further that there was inordinate delay on the Part of the applicant in bringing the instant application and she is only trying to delay the cause of justice.

19. This court notes that there are many instances when Advocates send their support staff to court with instructions to get another Advocate to hold their brief. In the court’s considered view, getting to court late and failing to get an Advocate to hold brief on time is an inadvertent and excusable mistake. The applicant’s Advocate on record has sworn a supporting affidavit acknowledging that the mistake was on his part and in so doing vindicated the applicant from any wrongdoing. Given that the said affidavit has not been challenged, the court is persuaded to believe that the same was the factual flow of events.

20. Having found that being late to court is an excusable reason, this court will now proceed to investigate the conduct of the applicant and whether the instant application was brought to court at the earliest and without inordinate delay.

21. As noted above, the instant application is dated December 16, 2021, and was filed in this court under Certificate of Urgency on December 21, 2021. Further the application that seeks to be reinstated was dismissed by the court for non-attendance on 3<sup>rd</sup> March 2021. It is evident that about Nine (9) months had lapsed since the time the application dated 10<sup>th</sup> February 2021, was dismissed and the time the



instant application was filed. What then begs an answer is whether said 9 months amount to inordinate delay and whether the same is prejudicial to the Applicant.

22. What amounts to inordinate delay was discussed by the Court in the case of *Mwangi S. Kimenyi Vs. Attorney General & another* (2014) eKLR where it was held thus;

There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case, the explanation given for the delay; and so on and so forth” nevertheless, inordinate delay should not be difficult to ascertain once it occurs, the litmus test being that it should be an amount of delay which leads the Court to an inescapable conclusion that it is inordinate and therefore, inexcusable.....”

23. From the record of this court, it is clear from the March 3, 2021, when the application dated February 10, 2021, was dismissed this matter has been placed before Court on various occasion to wit, June 9, 2021, July 12, 2021, September 27, 2021, and November 23, 2021. This Court notes that on all the aforementioned dates, both the applicant and the respondent herein were represented by their Counsels. Further that on June 9, 2021 and July 12, 2021, the matter was mentioned to confirm compliance with order 11 of the *Civil Procedure Rules* and on the other dates the matter was coming up for hearing but the said hearing only proceeded on 23<sup>rd</sup> November 2021. That on the said 23<sup>rd</sup> November 2021, the Plaintiff opened her case and called 2 witnesses to the stand before the matter was adjourned. A further hearing was set for 24<sup>th</sup> January, 2021.

24. The Applicant’s advocate has alleged in his further Affidavit paragraph 11 that he was not able to know exactly what transpired in Court on 3<sup>rd</sup> March 2021 until 15<sup>th</sup> December 2021. It is trite that equity does not aid the indolent and that he who comes to Equity must come with clean hands. This Court is of the considered view that the advocate is being mean with the truth as the matter was in Court on various times and he even filed his compliance documents after the said 3<sup>rd</sup> March 2021. Further, the Advocate being a professional who knows the ins and outs of Courts is expected to have at the first instance after learning of the dismissal perused the Court file to get a view of what transpired.

25. Be that as it may, it is not in doubt that the actions and/or inactions of an Advocate ought not to be visited upon a litigant. In the case of *Gideon Mose Onchwati...Vs...Kenya Oil Co. Ltd & another* (2017) eKLR the court held that;

Although it is an elementary principle of our legal system that a litigant who is represented by an Advocate, is bound by the acts and omissions of the advocates in the course of representation, in applying that principle, courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequences of the advocates default unless the litigant is privy to the default or the default results from failure, on the part of the litigant, to give the advocate due instructions.”

26. Based on the foregoing, it is clear that though a litigant is bound by the acts of his Advocate, the litigant ought not to bear the consequences of the Advocate default. However, the litigant also has a duty to check on his case to ensure that there is no delay of justice and that it is prosecuted promptly. The fact that neither the Applicant in person nor their advocate brought the instant application earlier and/ or informed the court on all the various occasions of their willingness to reinstate the application dated February 10, 2022, is evidence of their indolence and /or ignorance. See the case of *Edney Adaka Ismail ...Vs...Equity Bank Limited* [2014] eKLR where the court cited the case of *Savings and Loans Limited*



-vs- *Susan Wanjiru Muritu* Nairobi (Milimani) HCCS No.397 of 2002 Kimaru, J expressed himself as follows: -

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. 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. In the present Case, it is apparent that if the Defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the Defendant to be prompted to action by the Plaintiff's determination to execute the decree issued in its favour, is an indictment of the Defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the Court, it would be a travesty of justice for the Court to exercise its discretion in favour of such a litigant. (emphasis added)

27. This court recognizes that it is required to exercise its discretion judiciously and to ensure that the ends of justice are met and that no party suffers prejudice. The import of the Instant application would be to defer the substantive hearing of this suit and then hear and determine the application dated February 10, 2021, which seeks to stay the hearing of the instant suit until Nairobi Succession Cause 1708 of 2005, is heard and determined. This Court notes that the said Succession Cause has been filed in the High Court, In Nairobi, a court with equal status as this court. Further that this Court and the High Court have their jurisdictional areas and roles clearly cut out by article 165 of the Constitution. Further the Court notes that the parties herein are the same parties in Succession Cause 1708 of 2005, and the subject matter herein is part of the of the estate of the deceased in Succession Cause 1708 of 2005.
28. If the issue herein was purely on non-attendance of Court and inordinate delay on the part of the Applicant, this Court would have no problem to find that the Applicant had failed to warrant the exercise of Jurisdiction in her favor. However, a careful perusal of the application dated 10<sup>th</sup> February 2021, calls for this Court to judiciously exercise it jurisdiction with overarching justice to all parties in mind as above stated.
29. This Court therefore finds that it would be in the interest of Justice that the application dated 10<sup>th</sup> February 2021, be heard on merit as it may avoid an instance where two Courts of equal status pronounce themselves on the same subject matter. This Court is therefore inclined to exercise its discretion in favor of the Applicant herein and allow the instant application. The exercise of this discretion is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. In *National Super Alliance (NASA) Kenya v Independent Electoral and Boundaries Commission* [2017] eKLR, it was stated that:

Discretion vested in the court is dependent upon various circumstances, which the court has to consider among them the need to do real and substantial justice to the parties to the suit. [5] Discretion must be exercised in accordance with sound and reasonable judicial principles. The King's Bench in *Rookey's Case* [6] stated as follows:-

“Discretion is a science, not to act arbitrarily according to men's will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to



the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this court. That is a discretionary power, which neither this nor any other court, not even the highest, acting in a judicial capacity is by *the constitution* entrusted with.”

30. The upshot of the foregoing is that this court finds and holds that there is sufficient reason to allow the setting aside of the orders issued on March 3, 2021, and reinstate the application dated February 10, 2021.
31. Consequently, the court finds that the application dated December 16, 2021 is merited and the said application is allowed entirely.
32. On the issue of costs, it is trite that costs follow the event. In the instant application however, the applicant herein shall not have costs as the court is cognizant of the extremely long time that she took to file the instant application. On this premise and cognizant of the prejudice occasioned to the respondent, the Applicant herein shall pay the respondent throw away cost of Kshs. 20,000/= before the application dated February 10, 2021, is heard.
33. Therefore, this court directs the applicant herein to set down her application dated February 10, 2021, forthwith for hearing and failure to which the said application will stand dismissed

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MURANG'A THIS 26<sup>TH</sup> DAY OF MAY, 2022.**

**L. GACHERU**

**JUDGE**

**Delivered online in the presence of:**

Mr. Mwangi Ben for Plaintiff/Respondent

Mr. Mogikoyo for Defendant/Applicant

Alex Mugo - Court Assistant

**L. GACHERU**

**JUDGE**

**26/5/2022**

