



Bakamoyo Limited v Registrar of Titles Mombasa District Land Registry & 2 others (Environment & Land Petition 156 of 2015) [2022] KEELC 3088 (KLR) (19 May 2022) (Judgment)

Neutral citation: [2022] KEELC 3088 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION 156 OF 2015**

**LL NAIKUNI, J
MAY 19, 2022**

BETWEEN

BAKAMOYO LIMITED PETITIONER

AND

**REGISTRAR OF TITLES MOMBASA DISTRICT LAND
REGISTRY 1ST RESPONDENT**

COMMISSIONER OF LANDS 2ND RESPONDENT

CHIEF LAND REGISTRAR 3RD RESPONDENT

JUDGMENT

Introduction

1. Before this Honorable court for its determination is the Notice of Motion application dated September 10, 2021 by the Interested Parties. It is brought under the Provisions of Article 50(1) of the Constitution of Kenya, Order 12 Rule 7 of the Civil Procedure Rules 2010 and Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya.

II. The Interested Party Case.

2. The Notice of Motion application by the Interested Party seeks for the following orders:-
 - a. That the order of January 26, 2021 issued by this Honorable Court and all consequential orders be set aside and
 - b. That costs be provided.
3. The said application is premised on the facts grounds and averments of the 23 Paragraphed Supporting Affidavit of Donald Scaver Mwakio – the 2nd Interested Party hereof sworn and dated September 10,



2021 with the authority to on behalf of the other Interested Parties, the six (6) annexures marked as “DSM – 1-6” annexed hereto.

4. He deposed that he was the 2nd Interested Party/Applicant herein and duly authorized to swear this affidavit on behalf of the other Interested Parties herein. He stated that this suit came up for hearing on July 15, 2020 and the same was dismissed for non - attendance on the part of the Petitioner and it's Advocate on record. The said order dismissing the suit was served upon the Petitioner's then firm of Advocates and the Respondents. He informed Court that their Advocate informed them the suit had been intended to be heard on July 28, 2021 but on that material date when they appeared before court they informed it the suit had been dismissed on July 15, 2020. He indicated that although they learned immediately after the dismissal of the Notice of Motion application dated November 5, 2020 to reinstate the suit, the Petitioner had not served them with it, and he held that they learned that the Petitioner instead had been serving the law firm of Messrs. Omondi Waweru and Advocate the previous Advocates for the Interested Party instead of their current Advocates Messrs. Omondi Kinyua & Company Advocates as per the Notice of Change of Advocates February 2, 2016 marked as “DSM - 5”. Their Advocates immediately wrote to the Advocate for the Petitioner requesting them to set aside the court order of January 26, 2021 to be set aside by consent but the same never elicited any response.
5. He deposed that thus suit had been pending for hearing since the year 2012 and the same had remained unprosecuted due to the failure on the part of the Petitioner. They held that despite the court's directions on November 25, 2019 for the Petitioner to file legible documents the same had to date not been complied with which showed that the Petitioner was not ready to prosecute the said matter.
6. He held that in the spirit of natural justice, they should be given a chance to be heard on merit on the application to set aside the order of July 15, 2020 as they had not been aware of the re-instatement of this suit until their Advocate stumbles on it listed as a hearing on July 28, 2021. They held that they were opposed to the Petitioner's application to reinstate the suit. He held that if the orders were not set aside it would prejudice the Interested Parties who had been kept away from enjoying their full proprietary rights over their properties.

He stated that they had approached this court with clean hands and without delay immediately they learnt of the existence of the order of January 26, 2021 and neither the Petitioner nor the Respondent would suffer any injustice if the said order was set aside as it would instead enable this Honorable Court to determine on merit the Petitioner's application dated November 5, 2020.

III. The Petitioner's Replying Affidavit.

7. On November 16, 2021, the Petitioner filed a 13 Paragraphed Replying Affidavit of Dickson Munene Nkanata sworn and dated November 12, 2021 an Advocate of the High Court. He confirmed that the matter came up for hearing on July 15, 2020 whereby the same was “*Suo Moto*” dismissed for nonattendance. He noted that the Advocates for the Interested Parties did not want the suit to be dismissed as the substratum of the suit – being double allocation would remain unresolved.
8. He held that on November 5, 2020 they filed an application to have the suit reinstated and have the Petition be fixed for hearing on merit. He confirmed having served the law firm of Messrs. Omondi and Waweru Advocates with the application and which like in all other pleadings had received it. They never saw the Notice of Change in the Court file and that the present application by the Interested party was devoid of merit and was only meant to scuttle the hearing date set forth on November 29, 2021 as allowing it had the effect of taking the Petitioner back to the hearing of the Notice of Motion of November 5, 2020 which was already determined.



9. They denied that the Notice of Motion application was heard ex-parte, and held that while the role of the interested party would be necessary in order to enable the court effectively and completely adjudicate upon and settle all questions involved in the suit, it could not be then their role to move applications for striking out or dismissal of a suit. He held that it had failed to demonstrate the prejudice being occasioned by them if the suit was allowed to proceed and determined on merit.

IV. The Submissions

10. On October 14, 2021 while all the parties were present in court, they were directed to have the said Notice of Motion application be canvassed by way of written submissions. Pursuant to that all the parties complied and a ruling date was reserved accordingly.

A. The Interested Parties' Written Submissions

11. On October 6, 2021, the Learned Counsel for the Interested Parties Law firm of Messrs. Omondi Kinyua & Company Advocates filed their written submissions dated October 4, 2021. Mr Omondi Advocate submitted by recounting the brief facts of this case and posed the issue whether the Interested Parties were entitled to the order of setting aside the court order of January 29, 2021. On this point of law they relied on the Principle applicable for setting aside set out in the court of appeal case of "[*Joseph Njuguna Muniu V Medicino Giovanni*](#) (1998) eKLR where the Court held:-

“There are no limit or restriction on the Judge’s discretion except that if he does vary the judgement, he does so on such terms as may be justThe main concern of the court is to do justice between the parties”

12. Further they also relied in the decision of '*Shah V Mbogo* (1976) E A 116' he argued that the Notice of Motion application dated November 5, 2020 to reinstate the suit was served to another law firm which was previous on record for the interested parties and which the Petitioner’s Advocate admitted; He reinstated immediately they learned of this mistake they approached the Petitioner so that they would enter into a consent of setting those orders aside and have the Petition heard on merit but they had declined despite of their mistake of serving the application on the wrong firm of Advocates. He held it is the Petitioner who had never been keen on having this Petition heard as they had been settled in their property since the years of 1970s and had been kept away from enjoying the full fruits of their proprietary rights due to the pendency of this Petition. The interested parties need to respond to the application by the Petitioners dated November 5, 2020 – which they were never served and was heard ex-parte due to the Petitioner’s Advocate mistake of serving it on the wrong firm of Advocates a mistake they had admitted but not willing to rectify.

B. The Petitioner’s Written Submissions.

13. On November 16, 2021, the Learned Advocate for the Petitioner the Law firm of Messrs Okubasu and Munene Advocates filed their written submissions dated November 15, 2021. Mr Munene Advocate submitted that they were opposing to the Notice of Motion application dated September 10, 2021 by the Interested Parties seeking to have the court orders of this court of January 26, 2021 all its consequential orders be set aside and costs. He recounted on all the backgrounds of this matter to detail. He argued that it was trite law that allowing an application to set aside orders dismissing a suit for want of prosecution a court did so in exercise of its wide discretion which discretion could not be challenged unless it was shown that it was exercised injudiciously. In saying so the Learned Counsel relied in the decision of "*Shah V Mbogo* (1968) EA 93 and "[*David Kenei V Energy Regulations Commission and 2 others*](#) (2010) eKLR.



He stressed that there was no evidence to show that in reinstating the suit where the court exercised its discretion, the judge was clearly wrong and occasioned injustice. He affirmed that the court exercised its inherent jurisdiction in reinstating the suit and the Applicant had not demonstrated any evidence that it would have tendered in opposing invocation of such inherent powers.

14. He submitted that the role of the Interested Party in the Petition had certain limitations and clearly it did not extend to urging an application to have the suit be dismissed. On this they relied in the decision of “[Marigat Group Ranch & 3 Others V Wesley Chepkoimet and 19 Others](#) (2014) eKLR.

In conclusion they argued that the jurisdiction of this court had not been properly invoked. They held that the Provisions of Law the Interested Parties cited were wrong as they did not grant court power to set aside the orders granted.

V. Analysis and Determination

15. I have keenly considered all the filed pleadings in this matter, the written submissions, the cited authorities and the relevant provisions of the law.

In order to arrive at an informed, just and fair decision I have framed the following salient three (3) issues for determination. These are:-

- a. What are the legal parameters for setting aside a court order grant by Court?
- b. Whether the Interested Parties through their Notice of Motion application dated September 10, 2021 entitled to the orders of setting aside of order of January 26, 2021?
- c. Who will bear the costs of the Notice of Motion application dated September 10, 2021?

ISSUE No. (a) What are the legal parameters for setting aside a court order grant by Court?

16. There are two (2) circumstances under which an order of court may be set aside or varied and any consequential decree or order upon such terms are just. These are:- (a) Under the provision of Order 10 Rule 11 for non attendance to a matter and the default of Defence and failure to serve. And thus one only needs to demonstrate that there was proper service having been effected by filing of an affidavit to that effect under Order 5 Rule 15 of the [Civil Procedure](#). (b) The other was is as provide for Under the provision of Order 12 Rule 7 of the [Civil Procedure Rules 2010](#) where though service was effected and defence filed but a party fails to attend court or even sent a representative to that effect.

Nonetheless, nothing is cast on stone. Under these circumstances, the Honorable Court has the discretionary powers upon dismissal of a suit of reinstating it. In this case, it's the second perspective that is applicable. In so doing this Honorable Court has to exercise its discretion judiciously. The guiding principles on setting aside to be considered by court are set out in the famous case of “*Shah – Versus - Mbogo* (1967) EA 116” where court held *Inter alia*:-

“I have considered, in relation to the present application, the principles governing the exercise of the Court’s discretion to set aside a judgment obtained ex - parte. The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertent or inexcusable mistake or error but is not designed to assist a person who had deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice”.

17. While considering the application to set aside the court has to be clear that while applying this discretion it had misdirected itself in some matter and as a result had arrived at a wrong decision or unless it is manifest from the case as a whole that the court had been clearly wrong in the exercise of its



discretion and that as a result there has been misjustice and that as a result and that as a result there had been misjustice, hardship as result from the inadvertent and inexcusable mistake or error on its part. That is the legal per position to be considered in the given circumstances.

ISSUE b). Whether the Interested Parties through their Notice of Motion application dated 10th September, 2021 entitled to the orders of setting aside of order of 26th January, 2021?

18. In order to fully and adequately tackle the issue under this sub-heading it is imperative that the court expounds on the brief facts to this case. The Petition was instituted on June 20, 2012 by the Petitioner seeking for declaration that there was a violation of the constitution of Kenya and infringement of the Petitioners property rights protected under Article 40 of the Constitution and a nullity of the creation of titled by the Respondents being Plot No 441 (new No Kilifi/Mtwapa/742) Plot No 442 (new No. Kilifi/Mtwapa 743. Plot No 443 (new No Kilifi/Mtwapa/744) Plot No 444 (new No Kilifi/Mtwapa/745) Plot No 445 (new No Kilifi/Mtwapa/746) Plot No 446 (new No Kilifi/Mtwapa/747) Plot No 447 (new No Kilifi/Mtwapa/748).

They sought an order nullifying and quashing entries, transfer and titles issued by the Respondents against the Petitioners title deed known as MN/Section IV/28 located in Mtwapa within the County of Kilifi.

19. On the other hand the Interested Parties claim to be the registered properties and/or beneficial owners of those parcels known as Kilifi Mtwapa/1948, Kilifi Mtwapa/743, Kilifi/Mtwapa/1879, Kilifi/Mtwapa/742 (also known as Plot No 446 Mtwapa settlement scheme) Kilifi/Mtwapa/ 744, Kilifi/Mtwapa 1890 and Kilifi/Mtwapa/1891 pursuant to title deeds and title documents issued to them and/or their predecessors in title. They claimed to have acquired title deed from the settlement Fund Trust a state corporation lawfully established by Government of Kenya to facilitate the settlement of citizens and to encourage agricultural production.

The Petition was fixed for hearing on July 15, 2020 but on that deny none of the parties were present and the honorable Court dismissed it for non-attendance and decree issued to that effect vide an Notice of Motion application dated November 5, 2020 the Petitioner appealed to set aside the orders of dismissal its alleged the Petitioner served the previous Advocates for the Interested Parties instead of the current ones. The Interested parties protested as they would have wanted to be heard taking that they were opposing that application and that is the main gist of the application by the Interested parties.

20. I have keenly read through the pleadings and indeed taken cognizance that the Petitioners did serve their application dated November 5, 2020 upon the Law firm of Messrs Omondi Waweru and Advocates instead of Messrs Omondi Kinyua Advocate who were the previous advocates for the Interested Parties. Interestingly the said law firm which has an extreme close description would be accepting pleadings from the Petitioner. The Petitioner has indicated they never saw the notice of change of Advocate dated.....

21. From all the above state of confusion, which the Interested Parties hold led to them being denied a right and/or opportunity to be heard cannot be imputed to be an error or mistake apparent on the Honorable Court while invoking its discretion to set aside the orders as founded in the above set out legal principles. The honorable court applied its discretion judiciously.

Additionally, I strongly disagree with the Petitioner the role of the Interested Parties in a matter is very minimal to merely in order to enable court effectively and completely adjudicate upon and settle all questions involved in the suit, to me the legal preposition accords the Interested Parties a very wide latitude in a matter like any other party to a suit and hence they have the capacity to file any application



or move this court in whichever way possible to assist court arrive at a fair determination to a matter and that includes the instant application for that reason their application is very relevant and appropriate.

22. Be that as it may in the interest of justice, fairness and equity I strongly hold that there is a great need to hear the merit of this Petition which has been in this court many years and hold such weighty land issues. Its agreeable land is very emotive matter and as the Interested parties testify from their pleadings they need to enjoy the fruits of the proprietary rights over that suit land. To grant the orders as sought by the Interested Parties would be taking the parties to the hearing of more interlocutory application dated November 5, 2020 instead of the main Petition. For that reason I wish to guide the parties to agree to proceed on with the main Petition instead of spending too much resources on application.

VI. Conclusion and Disposition

23. Ultimately, and in the long run based on the above detailed analysis of the framed issues, I do now hereby proceed to make the following orders.
- a. That the Notice of Motion application dated September 10, 2021 be and is hereby disallowed in order to pave way for the hearing of the main Petition dated June, 2012 with no orders to costs.
 - b. That for expediency sake this Petition be and is hereby fixed for hearing and final determination within the next ninety (90) days from the date of this ruling without fail.
 - c. That the matter to be heard by both affidavit and way of adducing viva voce evidence.
 - d. That the matter to be mentioned on July 12, 2022 for pre - trial conference and fixing a hearing date.
 - e. That should the above condition fail the interested party or any other party be at liberty to move this court to dismiss the Petition for want of prosecution.
 - f. That each party to bears their costs.

RULING READ, SIGNED AND DELIVERED AT IN COURT THIS 19TH DAY OF MAY 2022.

HON JUSTICE L L NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT

MOMBASA

In the presence of:

M/s Yumnah Hassan, Court Assistant.

Mr Musyoki Advocate for the Applicant.

Non appearance for the 1st Respondent.

Non appearance for the 2nd Respondent.

Non appearance for the 3rd Respondent.

M/s Omondi Advocate for the Interested Parties/Applicant.

