



**Ndungu v Wachira & another (Environment & Land Case
41 of 2018) [2022] KEELC 3055 (KLR) (19 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3055 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 41 OF 2018**

JG KEMEI, J

MAY 19, 2022

**(A) THE PLAINTIFF TAKES STEPS TO LIST THE MATTER
FOR HEARING IN THE NEXT 15 DAYS FROM THE DATE**

**(B.) THE PLAINTIFF WAS CONDEMNED TO PAY THROW AWAY COSTS TO THE 2ND
DEFENDANT IN THE SUM OF KSHS 10,000/- PAYABLE WITHIN THE NEXT 15 DAYS.**

(C.) IN DEFAULT THE SUIT SHALL STAND DISMISSED AT THE END OF THAT PERIOD.

BETWEEN

JAMES KAMAU NDUNGU PLAINTIFF

AND

NICHOLAS WAWERU WACHIRA 1ST DEFENDANT

KENYA WOMEN MICROFINANCE LIMITED 2ND DEFENDANT

RULING

1. On 29/9/2021, the plaintiff's suit was dismissed with costs for non-attendance/want of prosecution on the 2nd defendant's application. Five months later, the plaintiff filed the instant notice of motion dated 7/2/2022 seeking inter alia; stay of execution of the 2nd Defendant's statutory power of sale over Land parcel no. Ruiru/ruiru East Block 2/8048 (the suit land); setting aside the court's dismissal order made on 29/9/2021 and reinstatement of the same.
2. The application is based on the grounds thereto that the suit was slated for hearing on 29/9/2021 and her counsel miss nzioki logged into the virtual court. That by 10.00am the court session had not begun prompting the Counsel to call the Deputy Registrar who sent her an alternative link through which this court was proceeding. That unable to address the court online, the matter was later mentioned in open court in the absence of counsel hence the dismissal. That the mistake of counsel ought not be visited on a client who stands to lose his property through an auction.



3. The application is supported by the affidavit of the applicant, James Kamau Ndungu of even date. The contents of the said supporting affidavit are in total variance with the prayers in the Motion being averments on how his late estranged wife applied for a myriad of loans through forged signatures and her relationship with the 1st respondent. thus the grounds in the notice of motion are not supported by any evidence thereto.
4. The application is opposed vide the 2nd respondent's RA sworn by its Legal officer, Bernard Kiprotich on 15/2/2022. He deponed that 1st respondent applied for a loan facility of Kshs 5M secured by a legal charge over the suit land. That he defaulted in repayments and the 2nd respondents issued necessary notices to pave way for exercise of its statutory power of sale for the accrued amount of Kshs. 6,299,955.70 as evidenced by the statement of account, annexure BP4. That the applicant filed his suit on 12/2/2018 but has willfully neglected to prosecute it and even the instant application has been inordinately filed late in the day without plausible explanation. He contended that the 2nd respondent will stand to suffer greatly should the application be allowed and ultimately stop it from recovering the loan amount.
5. The 1st respondent did not file any response to the application hence the same is undefended.
6. On 16/2/2022, directions were taken to canvass the application by way of written submissions. Only the 2nd respondent filed its submissions dated March 8, 2022 through the firm of Muturi S. K. & Co. Advocates. The applicant failed to file written submissions in spite of the directions aforesaid.
7. The 2nd respondent submitted that despite filing their suit and an application for interim injunction against it on 12/2/2018, the court issued status quo orders pending the hearing and determination of the suit. That however, the applicant went to slumber and never set down the suit for hearing. That the applicant's averments that his late wife is the one who was instructing his firm of Advocates contrary to his wishes have not been substantiated. That the claim of forgery against his wife is also unproven; that despite being served with a Hearing Notice on 11/6/2021, the Applicant mischievously filed a notice of change of advocates on 27/9/2021, two days to the hearing date. That the applicant has failed to give sufficient reasons for his non-attendance in court.
8. On whether its statutory power of sale should be suspended, it was pointed out that the applicant seeks stay of execution and not injunction against the 2nd respondent. That since the suit was dismissed for want of prosecution, there cannot be stay of execution against a negative order as was stated in the case of *Catherine Njeri Maranga vs. Serah Chege & anor.* [2017] eKLR. That after the suit was dismissed, the parties resumed the earlier position being that the plaintiff had defaulted in the loan repayment and the 2nd respondent's statutory power of sale under section 96(1) of the *Land Act* has crystallized.
9. The main issue for determination is whether the application is merited.
10. The germane prayer is the reinstatement of the applicant's suit dismissed on 29/9/2021. Order 12 rule 6 (1) *Civil Procedure Rules* allows a plaintiff to apply to the court to reinstate the suit. however, this is a discretionary remedy that the court will exercise in favour of a deserving party upon plausible explanation of the reason(s) for non-attendance.
11. The applicant concedes that his advocates were aware of the hearing date and despite encountering hurdles in logging into the virtual court, the advocates did not attend the open court session. The non-attendance notwithstanding and knowledge of the dismissal orders, it took the applicant five months to file the instant motion. In my view, inordinate delay thereto has not been satisfactorily explained by the applicant.



12. In the persuasive authority of *John Nabashon Mwangi vs. Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR the court reiterated the test to apply in application of this nature that 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 2nd respondent has urged that its statutory power of sale has crystallized. The applicant did not canvass his application as prayed and further as already pointed out the, motion is not supported by cogent evidence in the supporting affidavit. The applicant was granted status quo but opted not to prosecute his case. The duty of this court under section 1B of the *Civil Procedure Act* include to ensure efficient use of the available judicial and administrative resources. Relevantly article 48 of *Constitution of Kenya* provides that access to justice is for the 2nd respondent also to be accorded justice of this case by exercising its statutory power of sale. I shall make the4 appropriate orders in the end.
14. Having said that, and entirely in the interest of justice, the court exercises its discretion to reinstate the suit on conditions;
 - a. That the plaintiff takes steps to list the matter for hearing in the next 15 days from the date hereof.
 - b. The plaintiff is condemned to pay throw away costs to the 2nd defendant in the sum of Kshs 10,000/- payable within the next 15 days.
 - c. In default the suit shall stand dismissed at the end of that period.

DELIVERED, DATED AND SIGNED AT THIKA THIS 19TH DAY OF MAY 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Kagoi holding brief for Njanja for the Plaintiff/Applicant

Ms. Thuo holding brief for Kimani for the 1st Defendant/Respondent

Ms. Maina for the 2nd Defendant/Respondent

Court Assistant - Phyllis

