



**Muriria v Syokimau Farm Limited & another; Mang'eli & another (Interested Parties)  
(Environment & Land Case 423 of 2012) [2022] KEELC 3022 (KLR) (20 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3022 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 423 OF 2012  
CA OCHIENG, J  
JUNE 20, 2022**

**BETWEEN**

**BENSON NJERU MURIRIA ..... PLAINTIFF**

**AND**

**SYOKIMAU FARM LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**GILBERT MAGERA NORU ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**JOHN KILOLO MANG'ELI ..... INTERESTED PARTY**

**CHIEF LAND REGISTRAR ..... INTERESTED PARTY**

**RULING**

1. What is before Court for determination is the Plaintiff's Notice of Motion Application dated the November 25, 2021 brought pursuant to section 1A, 1B, 3A, 63(e) & 95 of the [Civil Procedure Act](#) and order 12 rule 7 and order 45 rule 1, 2 & 3 of the [Civil Procedure Rules](#). The Plaintiff seeks the following orders:
  1. Spent
  2. That any further proceedings in respect of this case be and are hereby stayed pending hearing and determination of this application.
  3. That the Order of Honourable Lady Justice Christine A. Ochieng made on the 3<sup>rd</sup> of November, 2021 dismissing the Plaintiff's suit filed herein be and is hereby reviewed, varied and/or set aside.
  4. That the amended suit dated June 5, 2020 be reinstated and reopened.



5. That this Honourable Court be pleased to recall the Defendant and all other Defendant's witnesses for purposes of cross-examination by the Plaintiff's advocate.
  6. That this matter be and is hereby referred for case management conference.
  7. That the Plaintiff's suit be heard on merit.
  8. That cost of this application be in the cause.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Benson Njeru Muriria where he deposes that on 3<sup>rd</sup> November, 2021 he was indisposed and thus could not attend court, which fact was communicated to the Defendants' Advocates via email on 2<sup>nd</sup> November, 2021. He claims on 3<sup>rd</sup> November, 2021, Mr. Mbai sought to mention this matter virtually but was informed that the matter would be mentioned in court at 11:30am. He avers that Mr. Mbatu informed court he would be there at 12:30pm as he was attending to another matter in Milimani Court. Further, that Mr. Mbatu left for Machakos and informed Mr. Kamunde. He further claims Mr. Mbatu arrived at around 12:00noon and met Mr. Kamunde who informed him the matter had proceeded with the Defendant's Counterclaim and the Plaintiff's suit had been dismissed. He insists his case was dismissed and the Counterclaim proceeded without him being accorded an opportunity. He reiterates that he now risks losing his property which he has litigated over for 10-13 years. Further, to deny him an opportunity to be heard is tantamount to driving him away from the temple of justice. He reaffirms that he is ready to proceed with his suit and that the Defendant's advocate is guilty of *malafides*, misrepresentation and non disclosure of material information. Further, that Mr. Kamunde, advocate for the 2<sup>nd</sup> Defendant was well aware he was indisposed. He further states that the orders of dismissal of his suit and consequent proceeding of the Defendant's Counter-claim was obtained through misrepresentation by the Defendant's advocates. Further, that the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties are yet to file their responses to the Plaintiff's suit. He contends that the Court ought to have ordered the Chief Land Registrar to file his response or at the very least summon him to shed light on the dispute between the Defendant and himself. Further, that this matter was not ripe for hearing as pre trial directions had not been complied with. He further insists he will be prejudiced if the orders sought are not set aside. Further, that the Defendant will not be prejudiced.
3. The 2<sup>nd</sup> Defendant opposed the application and filed a Replying Affidavit sworn by Daniel Njue Kamunde, the advocate in conduct of the matter on his behalf, where he deposes that the hearing date of the 3<sup>rd</sup> November, 2021 had been fixed on 29<sup>th</sup> September, 2021, wherein both counsels for the Plaintiff and himself acting for the 2<sup>nd</sup> Defendant were present. Further, the said date was fixed by consensus wherein they both confirmed they were ready to proceed having complied with Order 11 of the Civil Procedure Rules. He confirms the Court directed that the hearing would be conducted physically in open court. Further, on 3<sup>rd</sup> November, 2021 he was in court at 9:00am but Mr. Mbatu appeared virtually but the Court reiterated the position that the hearing would proceed physically. He avers that Mr. Mbatu arrived way after the Court had exhausted its cause list for the day and informed him that he had tried to come in the morning but Mr. Lagat, Advocate, Senior Partner at Ham & Hamsley Advocates that employed him, told him to appear virtually. Further, that Mr. Lagat had failed to provide taxi fare for him to promptly reach court as directed hence he had to use public means. He contends that no prior communication in adequate time had been made by the Plaintiff. Further, this is not the first time the Plaintiff had shown disinterest in the matter and proceeded to highlight five instances when the Plaintiff sought adjournment in this case. He states that the Plaintiff's suit was dismissed for want of prosecution but the Court reinstated the same later on. He further contends that the Plaintiff has not sought for stay of proceedings and it is fair this court proceeds with the Judgment.



4. The application was canvassed by way of written submissions.

### **Analysis and Determination**

5. Upon consideration of the instant Notice of Motion Application including the respective affidavits, annexures and rivaling submissions, the issue for determination is whether the Orders issued on November 25, 2021 should be set aside and the Plaintiff's suit reinstated for hearing.
6. The Plaintiff in his submissions relies on the averments in his Supporting Affidavit to the instant Application and states that this Court has jurisdiction to review and or set aside the impugned orders. Further, that he is entitled to the right to be heard. He contends that he has explained the reasons for his absence, the Advocates' reasons and filed the instant application expeditiously. He reiterates that mistake of his advocate should not be visited upon him. To support his arguments, he relied on the following decisions including: *Benjob Amalgamated Limited & Another Vs Kenya Commercial Bank Limited* (2014) eKLR; *Edney Adaka Ismail Vs Equity Bank* (2014) eKLR; *Shah V Mbogo* (1968) EA 93; *Pithon Maina V Mugiria* (1982 – 1988) 1KAR 177; *John Kabira Kioni V George Namasaka Sichangi t/a Sichangi & Co. Advocates* (2019) eKLR; *Franklin J. B Chabari V Tharaka Nithi County Government & Another* (2019) eKLR; *Chemwolo & Another Vs Kubendi* (1986) KLR 492; *Lee G. Muthoga Vs Habib Zurich Finance (K) Ltd & Another*, Civil Appeal No. 236 of 2009; Civil Suit No. 177 of 2017 *Gold Lida Ltd Vs NIC Bank Ltd & 2 Others*; and HCCC No. 1 of 2016 *Joseph Kipngetchich Korir Vs Litein Tea Factory Co. Ltd & 2 others*.
7. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in their submissions insist the Plaintiff has been reluctant to prosecute this matter. Further, that the Court had given the Plaintiff several opportunities to prosecute matter and hence the Plaintiff's indolence is inexcusable. They insist the delay is prolonged and inexcusable. Further, the Plaintiff has not brought forth before Court sufficient grounds for review of its orders dismissing his case. To support their averments, they relied on the following decisions: *Mwangi S Kimenyi Vs Attorney General & Another* Civil Suit Misc. 720 of 2009; *Arun Jain & 4 Others V Martin Lakituru & 2 others* (2017) eKLR; *Ivita Vs Kyumbu* (1984) KLR 441 and *East African Excavation Co. Ltd V Nutech System & Trading Co. Ltd* (2021) eKLR.
8. The legal provisions governing review of court orders is contained in section 80 of the *Civil Procedure Act* and order 45 of the Civil Procedure Rules.
9. Section 80 of the *Civil Procedure Act* provides that:-

Any person who considers himself aggrieved— (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”
10. While order 45 rule 1(1) of the Civil Procedure Rules stipulates thus:

Any person considering himself aggrieved— (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review



of judgment to the court which passed the decree or made the order without unreasonable delay.”

11. In the case of *Shah v Mbogo and Another* [1967] EA 116 the Court of Appeal of East Africa held that:

This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

12. Further, in the case of *Wachira Karani v Bildad Wachira* [2016] eKLR Mativo J held that:

Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause...”

13. While in the case of *CMC Holdings Limited -vs- Nzioki* [2004] 1 KLR 173 that:

In law, the discretion that a Court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would not be proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error.”

14. I note the Orders sought to be reviewed concerns the Court’s decision dated the 3<sup>rd</sup> November, 2021 where the Court dismissed the Plaintiff’s suit for want of prosecution and set down the counterclaim for hearing. From perusal of the Court records, I note on September 29, 2021, this matter was set down for hearing on 3<sup>rd</sup> November, 2021. Further, the Plaintiff was granted leave of 7 days to file and serve reply to Defence. On November 3, 2021, neither the Plaintiff nor his Counsel attended Court and at 12:43pm, the Court proceeded to dismiss his suit and set down the Counterclaim for hearing. From proceedings of Justice Angote dated the July 29, 2019, he has actually pointed that the Plaintiff’s actions/inactions led to the delay of this matter. The Plaintiff claims his Advocate communicated to the Defendants’ Advocates via email on November 2, 2021 of his being indisposed. He confirms on November 3, 2021, his Advocate Mr. Mbai sought to mention this matter virtually but was informed that the matter would be mentioned in court at 11:30am. Further, that Mr. Mbatia arrived at around 12:00 noon and met Mr. Kamunde who informed him the matter had proceeded with the Defendant’s Counter-claim and the Plaintiff’s suit had been dismissed. He reiterates that he now risks losing his property which he has litigated over for 10-13 years. Further, to deny him an opportunity to be heard is tantamount to driving him away from the temple of justice. From the proceedings in the Court file, I note this Court waited for the Plaintiff upto 12:43pm before dismissing his suit. Further, no Counsel informed Court of the Plaintiff’s predicament. It is worth noting that this suit had initially been dismissed for want of prosecution on July 29, 2019 but reinstated vide a Ruling dated the May 8, 2020 wherein the Plaintiff was granted leave to file his Reply to Defence, Defence to Counter-claim and Amended Plaint. From the 8<sup>th</sup> May, 2020, the Plaintiff now claims this suit should be reinstated and referred back for pre-trial conference. From the court records, I opine that the Plaintiff is responsible for the dismissal of his matter but now seeks to blame the 2<sup>nd</sup> Defendant’s Advocate and the Court. Further, the Court was never informed of the fact that the Plaintiff was indisposed and it seems this is an excuse that he has used earlier. I note the Plaintiff has annexed an email indicating they communicated



with the 2<sup>nd</sup> Defendant's Counsel but this was not brought to the attention of the Court. As for the issue of Pretrial, I note a date was set for the same on May 2, 2018 where all parties were directed to comply with order 11 of the *Civil Procedure Rules*. Further, when this matter came up for hearing for the first time on July 30, 2018, the Plaintiff's Counsel never informed Court they have not complied with pre-trial directions but only applied for an adjournment. On the May 28, 2019, the Plaintiff's advocate once more sought an adjournment and the matter did not proceed. While on July 24, 2019, the matter never proceeded but the Plaintiff's Counsel sought for more time to acquaint himself with the file.

15. Based on the facts as presented while relying on the legal provisions I have quoted and the decisions cited, I find that the Plaintiff has not provided plausible reasons to warrant the setting aside of this court's order. It seems the plaintiff has been responsible for delay in prosecuting his matter and seeks to blame the defendant's Counsel of the proceedings dated the November 3, 2021 that he now seeks to set aside. It is against the foregoing that I find the instant Notice of Motion Application unmerited and will dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 20<sup>TH</sup> DAY OF JUNE, 2022

CHRISTINE OCHIENG

JUDGE

