



REPUBLIC OF KENYA



KENYA LAW
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**Mukua & another v Kariuki & 2 others (Environment & Land Case
521 of 2017) [2022] KEELC 3460 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3460 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 521 OF 2017**

JG KEMEI, J

JULY 28, 2022

BETWEEN

JAMES MWANIKI MUKUA 1ST PLAINTIFF

GEORGE MUNYUA MBIRA 2ND PLAINTIFF

AND

MARK MUGEKENYI KARIUKI 1ST DEFENDANT

CALVARY TEMPLOE VICTORY CHURCH 2ND DEFENDANT

BISHOP MUGEKENYI ACADEMY 3RD DEFENDANT

RULING

1. To place the application in context, a brief background of the facts in this suit is necessary. Five years ago, the plaintiffs instituted their suit vide a plaint dated 24/4/2017 seeking inter alia eviction and permanent injunction orders against the defendants from cultivating, building and trespassing on land parcel known as Limuru/Kamirithu/3214 (hereinafter referred to as the suit land). Contemporaneously, the plaintiffs sought interim injunction against the defendants vide an application of even date which the court granted Status Quo orders in its ruling dated 9/3/2018.
2. The court further ordered the parties to comply with pretrial directions in readiness for the hearing of the suit in 45 days from that date and set down the matter for hearing. It was not until 8/10/2019 that the parties complied with order 11 *Civil Procedure Rules* and the matter fixed for hearing on 23/3/2020. With the onset of Covid-19 Pandemic the hearing did not proceed until 10/11/2021 the matter slotted for hearing at 10.15 a.m on the material date. Neither the plaintiffs nor their counsel turned up for the hearing at the stipulated time prompting the defendants to apply for dismissal of the suit for non-attendance/want of prosecution which application was allowed with costs.



3. The defendants then proceeded to prosecute their counterclaim as pleaded in the statement of defence dated 27/11/2017. The defendants called one witness in support of the counterclaim and closed their case as the court granted them 14 days to file final submissions and Judgment was reserved for 28/4/2022.
4. Before delivery of the Judgment, the plaintiff filed an application dated 8/12/2021 principally seeking to set aside the dismissal orders. The Application was listed for hearing on 28/2/2022 when neither the plaintiffs nor their Counsel were present incourt. The application was given a further date of 5/4/2022 but the plaintiff did not turn up. However, the Court was not sitting and the application was listed for hearing on 21/4/2022 when again in the plaintiffs and their advocate were absence despite service. The defendants applied for the dismissal of the application. The application was dismissed and judgment reserved for 28/7/2022 hence the instant application.
5. The plaintiffs/applicants filed the instant motion dated 5/7/2022 premised on order 51 rule 1 Civil Procedure Rules, section 3(1) of the Distress Section for Rent Act order 51 rule 15 Civil Procedure Rules seeking orders that; 108(a) of the Transfer of Property Act 1882 (sic) ad sections 63, 1A, 1B, 3A Civil Procedure Act for orders That;
 - a. Spent.
 - b. Spent.
 - c. There be stay of any further proceedings in this suit and specifically delivery of the judgement slated for July 28, 2022 pending the hearing and determination of this application interpartes.
 - d. Order made and/or given in this matter dismissing the plaintiffs' application dated December 8, 2021 for non-attendance be set aside and the application dated December 8, 2021 be reinstated for hearing and determination on merit.
 - e. The costs of this application be provided for.
6. Notably Prayer 2 of the application sought leave for the firm of Mungai Kalande Advocates to come on record for the plaintiffs in place of the firm of C.W Kinuthia Advocates which was allowed by consent on 20/7/2022.
7. The application is based on the grounds on the face it that are reiterated in the supporting affidavit of even date of James Mwaniki Mukua, the 1st applicant. He deponed that their suit was dismissed for non-attendance on November 10, 2021 resulting to the hearing of the defendants' Counterclaim that is pending judgement on 28/7/2022. That the failure to attend court was not deliberate on their part but blamed their previous advocate for the same and urged that the mistake of counsel ought not be visited on them. The applicant further averred that it will be adverse if Judgment is entered without granting them a chance to prosecute their suit considering that he is the registered owner of the suit land having obtained interim orders.
8. The application is strenuously opposed vide grounds of opposition dated July 13, 2022 and replying affidavit of even date.
9. The respondents' Counsel G.J Kahuthu swore the replying affidavit dated 13/7/2022. He avowed that the application was vexatious and an abuse of the court process because the plaintiffs were aware of the hearing date but failed to attend court. That there are no interim orders against the Respondents as claimed and the applicants have frustrated the prosecution of this suit. He beseeched the court to pronounce its Judgment herein on 28/7/2022 as scheduled.



10. The application was argued orally on the 21/7/2022.
11. Learned Counsel Mr Masinde for the applicants contended that the mistake of Counsel in failing to attend Court ought not be visited on litigants.
12. In opposition, the respondents through Learned Counsel Kahuthu submitted that none of the previous Advocates who handled the matter had sworn any affidavit to demonstrate the alleged mistake of Counsel; that the 1st applicant lacked authority to swear the Supporting Affidavit on behalf of the 2nd Applicant pursuant to order 2 rule 13 of the Civil Procedure Rules and further that the Applicants had failed to comply with order 51 rule 13 Civil Procedure Rules. He urged the court to disavow the conduct of the plaintiffs in this suit and dismiss the application.
13. The germane issue for determination is whether the application is merited.
14. The applicants seek stay of further proceedings herein and in particular arrest of Judgment scheduled for 28/7/2022. I note with respect that some of the legal provisions relied on in the notice of motion as highlighted in para. 4 above are not relevant to the instant prayers for instance section 3 of the Distress for Rent Act provides for the right to distress while the Transfer of Property Act (sic) is no longer applicable in Kenya.
15. The 1st applicant blamed their counsel for failing to attend court on 10/11/2021 necessitating the filing of the Application dated 8/12/2021, almost a month later. Despite filing the Application under Certificate of Urgency, the Applicants failed to attend its hearing slated for 28/2/2022. The Application was given another date to wit 5/4/2022, again there was no appearance on the Plaintiffs' part and a further date for 21/4/2022 was allocated when it was dismissed for non-attendance/want of prosecution. The applicants have not in my view, given cogent explanations for failing to attend court on their part for the three consecutive dates. There is no evidence from the former Counsel on why she failed to attend Court on the said dates. The Applicants simply state that the mistakes of the erstwhile Counsel should not be visited upon them without elaborating the specific 'mistake(s)'. There is no evidence that has been placed before this Court to prove such mistake for the court to exercise its discretion upon. I rely on the recent Court of Appeal Ruling in Habo Agencies Limited v Wilfred Odhiambo Musingo [2020] eKLR in dismissing an Application to reinstate a dismissed appeal for hearing where the Learned Judges held;

“From the above, which is not disputed, the Applicant’s advocates had notice of the scheduled hearing of the appeal but elected not to attend Court. At any rate, there is no explanation of the nature of mistake that the appellant alleges on the part of its advocate. If this Court is to exercise its discretion in favour of a party, the party is obliged to place before it some material to justify exercise of discretion, otherwise the exercise of discretion will be perceived as capricious or whimsical. Clearly what the Applicant seeks to rely on is not mistake, but plain indolence and dilatoriness, which is not excusable. It has been accepted by this Court that sheer inaction by Counsel does not constitute an excusable mistake. (See Rajesh Rughani v. Fifty Investment Ltd. & Another (2005) eKLR).” [Emphasis added]
16. In the instant case, the plaintiffs were duly served and had notice of the hearing date as shown on the unchallenged affidavit of service on record.
17. It is also to be noted that the plaintiffs have not filed any reply to the defendants' counterclaim on record.



18. In seeking an adjournment, the plaintiffs' Counsel Ms. Kinuthia informed the court that she was not ready to proceed because of an 'emergency.' She did not state the nature of the emergency and on whose part, it was; whether hers or her clients'. The court rightly exercised its discretion and disallowed the adjournment and allocated hearing time and as an officer of the court, the plaintiffs' counsel had a duty to attend court or instruct another Counsel to hold her brief. She failed to do so and the matter then proceeded for ex parte hearing of the counterclaim. Despite knowing that the matter proceeded for hearing, it was not until one month later that Learned Counsel Kinuthia filed an Application to set aside the ex parte proceedings. The Applicants have not indicated when they learnt that their Counsel failure to attend Court for hearing of the attendant Application for setting aside. In fact, the applicants contend at para. h of the instant application that the former counsel deceived them to sign an affidavit in the impugned application; if they are reneging their signatures, then the supporting affidavit of the motion is defective just as the notice of motion . It is not lost on the court that the applicants too failed to attend court on the material date of the hearing. It has been held that the case belongs to the parties and never the advocate. A party must be at the forefront in prosecuting their case and keep tabs on each step of the prosecution of the case.
19. The applicants in support of the motion stated that they had obtained interim orders herein which is not the correct position because as earlier indicated, this court granted Status Quo orders only. The orders have been in place since 2018 and the plaintiff's' conduct in prosecution of the suit clearly is not that of diligent litigants.
20. Most recently in the Court of Appeal case of *Sakiri v Anyumba* [2022] KECA 521 (KLR) Kiage JA in dismissing an Application seeking extension of time that was filed inordinately late due to alleged counsel's mistake, court was emphatic that;

“...As earlier stated, solely blaming one's advocate is not enough to unlock the court's discretionary favor. the applicant has failed to advance any evidence of the actions he took, as the litigant and owner of the appeal, to have it lodged in time”
21. In that case, the court cited with approval the decision in *Daqare Transporters Ltd V Chevron Kenya Limited* [2020] eKLR that the mistake of Counsel should not be visited upon an innocent litigant does not have a blanket application and neither does it have doctrinal status. That the court will always look at the conduct of the party pointing the finger of blame in order to make a just decision
22. The totality of these binding authorities is that the alleged mistake of Counsel must be demonstrated by way of evidence in court and not mere inaction or indolence on the Counsel's part. The applicant having not satisfied me on why the dismissal orders should be set aside I see no necessity to stay the proceedings in this matter.
23. In the end, I find that the applicants application dated 5/7/2022 is unmerited and the same is dismissed with costs to the defendants.
24. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 28TH DAY OF JULY 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;



Masinde holding brief for 1st and 2nd Plaintiffs

Kahuthu for 1st, 2nd, 3rd and 4th Defendants

Court Assistant – Phyllis Mwangi

