



REPUBLIC OF KENYA



Museni & another v Salim & 5 others (Environment & Land Case 287 of 2016) [2022] KEELC 3686 (KLR) (27 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3686 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 287 OF 2016
NA MATHEKA, J
JULY 27, 2022**

BETWEEN

HANIFSHAJI MUSENI 1ST APPLICANT

SHEELA HASSAN MUSENI 2ND APPLICANT

AND

MIRAJ MGANYI SALIM 1ST RESPONDENT

SAUM MOHAMED 2ND RESPONDENT

JUMA OMARI HASSAN 3RD RESPONDENT

MIRIAM MOHAMED 4TH RESPONDENT

SAID CANDY 5TH RESPONDENT

PUNGU FUEL DEVELOPMENT ASSOCIATION 6TH RESPONDENT

RULING

1. The application is dated 28th November 2018 and is brought under Article 159 of *the Constitution* of Kenya, 2010, Section IA, IB and 3A of the *Civil Procedure Act*, Order 12 Pule 7 and Order 51 Rule I of the *Civil Procedure Rules* 2010 seeking the following orders:
 1. That this Honourable Court be pleased to vary and or set aside the orders of this Honourable Court issued on the 28th November 2018, dismissing the Plaintiff/Applicants' suit.
 2. That this Honourable Court be pleased to reinstate the Plaintiff/Applicants' suit instituted via Plaint dated 7th October 2016 and filed on 10th October 2016.
 3. That the costs of this Application be in the cause.



2. It is based on the grounds that the Applicants filed the suit herein on the 10th October 2016 seeking orders restraining the Defendants from interfering with possession and ownership of Plot Number Kwale/Pungu Fuel Area/1 64, Kwale/Pungu Fuel Area/1 65 and Kwale/Pungu Fuel Area/STI. Contemporaneous to the Plaint, was a Notice of Motion Application dated 7th October 2016 seeking interlocutory injunctive orders against the Defendants. On the 5th December 2017 Honourable Justice Yano after considering the application, allowed the same with costs to the Plaintiffs. In allowing the application the court noted that the Plaintiff/Applicants have a prima facie case against the Defendants. On the 25th of September 2018 the Applicants were served with a Hearing Notice from this Honourable Court indicating that the matter is listed for Hearing of the main suit on the 2nd of November 2018. On 2nd of November 2018 the matter was listed before the Honourable Lady Justice Matheka for hearing. The matter did not proceed and was again listed for hearing on the 28th of November 2018. In preparation for the said hearing date the Applicant filed and served their List of Documents and even duly served the hearing notice upon the Defendants. On 28th November 2018 the Applicants' advocate Mr. Bwire sent a representative to court with instructions that the matter be placed aside since he was before another court. Unfortunately, the representative failed to appear in court on time since he was under the impression that the matter was still being handled by Honourable Justice Yano, who he was informed was on leave.
3. Upon perusal of the days cause list it was discovered that the matter was listed before Honourable Lady Justice Matheka. The representative quickly rushed to the said Court only to find the matter had been called out and since neither the plaintiffs nor the advocates were present, the court proceeded and dismissed the case for non-attendance. The Plaintiffs' Advocate promptly sought to recall the matter and reinstate the same, but the court wisely directed that it would be in the best interests of justice that the Plaintiffs file a formal application. The mistake and oversight on the part of the Plaintiffs' Advocates should not be visited upon the innocent litigants. The mistake is nevertheless honest and excusable. The applicants are at risk of suffering great prejudice if the orders sought herein are not granted. The Defendant/Respondents will not suffer any prejudice if the application is allowed and if at all any prejudice may be occasioned, the same can be adequately remedied by an award of costs. The plaintiffs are ready and willing to prosecute this matter to its final conclusion.
4. This court has considered the application and the supporting affidavit. The Respondents were served but failed to file any response to oppose the same. The relevant law governing setting aside judgment or dismissal is Order 12 Rule 7 of the Civil Procedure Rules. It provides as follows:

“Where under this order judgment has been entered or a suit dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just”
5. The decision of whether to or not to allow an application for setting aside judgment or an order for dismissal of a suit due to non-attendance of a Plaintiff is within the wide discretion of the court. This discretion has to be exercised judiciously, as was stated the case of *Shah vs Mbogo* (1979) EA 116 quoted with approval in the case of *John Mukuba Mburu vs Charles Mwenga Mburu* [2019] eKLR, where that court held thus:

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



6. For the Court to exercise its discretion in favour of the Applicant, he or she has to satisfy it that there is sufficient cause or reason to warrant it to be put into use in setting aside the order of dismissal and subsequently reinstate the suit. Sufficient Cause was defined by the Supreme Court of India in *Parimal vs Veena* which was cited with approval in the case of *Wachira Karani vs Bildad Wachira* (2016) eKLR. In the case, the said Supreme Court stated that;

“sufficient cause” is an expression which has been used in large number of statutes. The meaning of the word “sufficient” is “adequate” or “enough”, in as much as may be necessary to answer the purpose intended. Therefore the word “sufficient” embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, “sufficient cause” means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been “not acting diligently” or “remaining inactive.” However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously”

7. The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgment impugned before it. The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. 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.”

8. I find that it could be possible that the Plaintiff /Advocate’s reasons for nonattendance acceptable. I find that the Plaintiff ought to be given another chance this being a land matter and I grant the following orders;

1. That the Court sets aside the orders of this Honourable Court issued on the 28th November 2018, dismissing the Plaintiff/Applicants’ suit.
2. That the Plaintiff/Applicants’ suit instituted via Complaint dated 7th October 2016 and filed on 10th of October 2016 is reinstated.
3. That the costs of this Application be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH DAY OF JULY 2022.

N.A. MATHEKA

JUDGE

