



Kimuri Housing Company Limited v Frank Logistics Limited & 4 others (Environment and Land Case Civil Suit 877 of 2015) [2022] KEELC 12791 (KLR) (29 September 2022) (Ruling)

Neutral citation: [2022] KEELC 12791 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 877 OF 2015
SO OKONG'O, J
SEPTEMBER 29, 2022**

BETWEEN

KIMURI HOUSING COMPANY LIMITED PLAINTIFF

AND

FRANK LOGISTICS LIMITED 1ST DEFENDANT

COUNTY GOVERNMENT OF KIAMBU 2ND DEFENDANT

LAND REGISTRAR THIKA 3RD DEFENDANT

CHIEF LAND REGISTRAR 4TH DEFENDANT

DIRECTOR OF SURVEY 5TH DEFENDANT

RULING

1. The plaintiff brought this suit against the defendants on September 16, 2015 seeking several reliefs among others;
 1. A declaration that the plaintiff is the *bona fide* and legal owner of all that parcel of land known as LR No 4953/2342-Thika Municipality (hereinafter referred to as “the suit property”).
 2. A declaration that the issuance of a certificate of lease to the 1st defendant in respect of a parcel of land known as Thika Municipality Block 12/286 (hereinafter referred to as “the 1st defendant’s property”) and the subsequent entry and/or intrusion by the 1st defendant into the suit property smacks of impropriety, illegality, mistake, fraud and/or a corrupt scheme.
 3. An order cancelling the certificate of lease issued to the 1st defendant in respect of the 1st defendant’s property because the property is conterminous to and overlaps the suit property on the ground.



4. A permanent injunction restraining the 1st defendant from having any dealing with the suit property and/or the 1st defendant's property and from disturbing the plaintiff's quiet possession of the suit property.
2. The plaintiff averred that it was the lawful owner of the suit property which it acquired in 1999. The plaintiff averred that it held the suit property peacefully until September 2015 when people claiming to be representatives of the 1st defendant entered the suit property and started removing the beacons that the plaintiff had placed on the property. The plaintiff averred that the 1st defendant claimed to have a lease issued to it by the 2nd defendant in respect of the 1st defendant's property which lease entitled it to enter the suit property. The plaintiff averred that the purported issuance of a lease and a certificate of lease to the 1st defendant for the 1st defendant's property which is at the same location on the ground as the suit property was illegal, fraudulent and carried out through a corrupt scheme.
3. The 1st defendant filed a defence and a counter-claim against the plaintiff on November 16, 2015. In its defence, the 1st defendant averred that it was the plaintiff that acquired the suit property fraudulently and through a corrupt scheme. In its counter-claim, the 1st defendant averred that the plaintiff's director invaded the 1st defendant's property and destroyed the structures that 1st defendant had put up thereon together with the building materials. The 1st defendant sought judgment against the plaintiff in its counter-claim for among others; a declaration that it is the lawful owner of the 1st defendant's property and a permanent injunction restraining the plaintiff from dealing with the 1st defendant's property in any manner whatsoever.
4. Together with the plaint, the plaintiff filed an application by way of notice of motion dated September 15, 2015 seeking several interim orders pending the hearing and determination of the suit. In a ruling delivered on February 22, 2016, the court granted several orders that were sought by the plaintiff. After the ruling, the parties appeared before the court and the deputy registrar on several occasions between 2016 and 2018 for pre-trial case conference. On March 28, 2019, the court fixed the suit for hearing on February 19, 2020 in the presence of the plaintiff's advocate who was directed by the court to serve a hearing notice upon the defendants' advocates. When the suit came up for hearing on February 19, 2020, only the advocate for the 3rd, 4th and 5th defendants was in attendance. In the absence of the plaintiff, the said advocates applied to the court to dismiss the suit for non-attendance which the court did.
5. What is now before me is a notice of motion application dated July 23, 2021 brought by the plaintiff seeking the setting aside of the order that was made on February 19, 2020 dismissing the suit for non-attendance and reinstatement of the suit for hearing and determination. The application that is brought on the grounds set out on the face thereof and on the affidavit and supplementary affidavit sworn by Margaret Wambui Ngugi on July 23, 2021 and January 21, 2022 respectively was brought on several grounds. The plaintiff contended that its previous advocates who were on record when the suit was dismissed did not inform it of the hearing date of February 19, 2020 and that it was until July 2021 that the plaintiff learnt from its newly appointed advocates that the suit was dismissed on February 19, 2020 for non-attendance. The plaintiff contended that it appointed its current advocates due to lack of communication from its previous advocates and that its attempts to peruse the court file to find out the position of the suit was hampered by the strict Covid-19 restrictions on physical access to court premises that were put in place by the judiciary from March 2020. The plaintiff averred that the suit property is valued at tens of millions of Kenya Shillings and that the plaintiff is still desirous of prosecuting the suit since the dispute over the property still exists. The plaintiff averred that it would suffer great prejudice if the application is not granted.



6. The application was opposed by the 1st defendant through a replying affidavit and a further affidavit sworn by Francis Nyaga Njeru on November 18, 2021 and February 2, 2022 respectively. The 1st defendant contended that the application was frivolous, vexatious and lacked merit. The 1st defendant averred that the plaintiff had a duty to follow up on the suit with its advocates and that failure to attend court for the hearing was as a result of the plaintiff's own fault. The 1st defendant averred that reinstatement of the suit would cause great prejudice to it since it had since the dismissal of the suit undertaken major developments on the suit property. The 1st defendant averred further that the application was brought after inordinate delay.
7. The application was heard by way of written submissions. The plaintiff filed its submissions dated February 15, 2022. The plaintiff submitted that it had established valid grounds warranting the exercise of the court's discretion in its favour. The 1st defendant filed submissions dated March 16, 2022. The 1st defendant reiterated that the delay in the prosecution of the suit was intentional and contumelious. The 1st defendant submitted that the suit had been pending for 5 years as at the time it was dismissed on 19th February 2020 and that the plaintiff took 1 year after the dismissal of the suit to file the present application for reinstatement. The 1st defendant reiterated that the plaintiff had a duty to follow up on its case which it never did. The 1st defendant submitted that the delay in the filing of the application was inordinate and inexcusable. The 1st defendant submitted further that the plaintiff had not shown that it will suffer any prejudice if the application was allowed. The court was urged to dismiss the application for lack of merit and as an abuse of the process of the court.
8. I have considered the application together with the affidavits filed in support thereof. I have also considered the affidavits filed by the 1st respondent in opposition to the application. The application was brought under order 12 rule 7 of the [Civil Procedure Rules](#). The burden was upon the plaintiff to establish that there exist sufficient grounds to warrant the setting aside of the order of this court made on February 19, 2020. Order 12 rule 7 of the [Civil Procedure Rules](#) gives the court a discretionary power to set aside an order of dismissal of a suit made in the absence of a party.
9. The court's discretionary powers must be exercised judiciously and not capriciously. The rationale behind the judicious exercise of discretionary powers was explained in [Patriotic Guards Ltd v James Kipchirchir Sambu](#) [2018] eKLR as follows:

"It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit."
10. The principles applied by the court in applications for setting aside of ex parte judgments were set out in the case of *Shah v Mbogo* [1967] EA 116 as follows:

"...the court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice."



11. In *Phillip Chemwolo & another v Augustine Kubede* [1982-88] KAR 103 at 1040, Apaloo J (as he then was) stated as follows:

"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."

12. In *Richard Nchapi Leiyangu v IEBC & 2 others*, Civil Appeal No 18 of 2013, the court stated that:

"The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent power to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day, there should be proportionality".

13. Applying the said principles to this case, I am inclined to exercise my discretion in favour of the plaintiff. From the record, I have noted that the plaintiff's advocates have always attended court which is evidence that the plaintiff was keen on prosecuting the suit. It is in fact the plaintiff's advocate only who was present when the suit was fixed for hearing on February 19, 2020. The plaintiff has contended that it was not aware of the hearing date for the suit and that is why its representatives did not attend court. The plaintiff has contended that the senior partner in the firm that was acting for it in the matter when the hearing date was taken and the suit dismissed died in August 2020 and as such it was no possible to obtain any information from the firm as to what may have happened. The death of Mr Nyakundi is not denied by the 1st defendant. I am persuaded that the plaintiff may not have been informed of the hearing date for the suit and as such it is not correct as claimed by the 1st defendant that the plaintiff's representatives' failure to attend court was intentional.
14. I am in agreement with the 1st defendant that the delay in the filing of the present application was inordinate. I am of the view however that the same was reasonably explained by the plaintiff. The court takes judicial notice of the Covid-19 restrictions that were put in place by the judiciary that affected physical access to the court registries. The delay on the part of the plaintiff's new firm of advocates to peruse the court file is therefore excusable.
15. I am also not persuaded that the 1st defendant would suffer prejudice if the plaintiff's application is allowed. From the nature of the dispute between the parties, I am of the view that justice can still be done in the matter. I do not think that the fact that the 1st defendant has carried out some developments on the suit property would have any impact on the hearing of the suit. I have also noted that the 1st defendant had filed a counter-claim against the plaintiff which is still pending. It was the plaintiff's suit that was dismissed. The counter-claim is still pending and should be heard as it has not been withdrawn by the 1st defendant. I can therefore see no prejudice if the plaintiff's suit is reinstated so that the same is heard together with the 1st defendant's counter-claim against the plaintiff.
16. For the foregoing reasons, I find merit in the notice of motion application dated July 23, 2021. The order made by this court on February 19, 2020 dismissing the suit with costs for non-attendance is set aside and the suit reinstated for hearing on merit. The 1st defendant shall have the costs of the application and thrown away costs assessed as Kshs 20,000/- payable forthwith.

DELIVERED AND SIGNED AT NAIROBI THIS 29TH DAY OF SEPTEMBER 2022



S. OKONG'O

JUDGE

**RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
CONFERENCING PLATFORM IN THE PRESENCE OF:**

Mr. Njenga for the Plaintiff

Ms. Odhiambo h/b for Ms. Opiyo for the 1st Defendant

Mr. A. Kamau for the 3rd, 4th and 5th Defendants

N/A for the 2nd Defendant

Ms. Valentine - Court Assistant

