



**Ramadhan & 3 others v Kenya Urban Roads Authority & 4 others (Petition
974 of 2016) [2022] KEELC 12763 (KLR) (28 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12763 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
PETITION 974 OF 2016
SO OKONG'O, J
SEPTEMBER 28, 2022**

BETWEEN

**ABDULMAJID RAMADHAN 1ST PETITIONER
AMINA BURHAN 2ND PETITIONER
SULEIMAN KASSIM 3RD PETITIONER
SHAFI ALI HUSSEIN 4TH PETITIONER**

AND

**KENYA URBAN ROADS AUTHORITY 1ST RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT
NATIONAL LAND COMMISSION 3RD RESPONDENT
NATIONAL ENVIRONMENT AND MANAGEMENT AUTHORITY 4TH
RESPONDENT
H YOUNG COMPANY LIMITED 5TH RESPONDENT**

RULING

1. A declaration that the intention of the respondents to build a road passing through the Nubian land of Lindi, Kambi Aluru and Mashimoni is a threat to the petitioners' constitutional rights to property under article 40(2) of the Constitution of Kenya, 2010 and as such null and void.
2. A declaration that the imminent demolition of the homes and dwellings of the petitioners is a violation of the petitioners' right to dignity under article 28 of the Constitution.



3. A declaration that the imminent demolition of the homes and dwellings of the petitioners is a violation of the petitioners' right to accessible and adequate housing guaranteed under article 43(1)(b) of the Constitution.
4. A declaration that the intended road having been diverted/deviated from the original map to be constructed on a different path where the dwellings of the petitioners are situated is a violation of article 27 of the Constitution which prohibits different treatment.
5. A declaration that the respondents have failed to protect the rights of the petitioners who are a marginalized community contrary to article 23(1) of the Constitution.
6. An order compelling the 3rd respondent to discharge its lawful statutory and constitutional obligations in articles 63(3) and (4) of the Constitution and advice on the appropriate redress.
7. An order prohibiting the respondents from altering the original survey map.
8. Together with the petition, the petitioners filed an application by way of notice of motion dated August 5, 2016 seeking conservatory orders pending the hearing of the petition. The application was heard and dismissed by the court on April 28, 2017.
9. The petitioners did not take any action in the matter after the said ruling. The court directed that a notice to show cause be served upon the petitioners to appear in court on October 23, 2017 to show cause why the petition should not be dismissed. When the parties appeared in court on February 14, 2018 in response to the notice to show cause, the petitioners informed the court that they were still interested in pursuing the petition. The petitioners' advocate told the court that the petitioners wished to amend the petition to claim compensation. The court after hearing from the parties was persuaded that the petitioners had shown reasonable cause why they had not taken action in the matter. The court granted the petitioners leave to amend the petition within 21 days. I have not seen an amended petition on record. On March 21, 2019, the court fixed the petition for hearing on January 27, 2020 in the presence of the petitioner and the 2nd respondent's advocates. When the petition came up for hearing on January 27, 2020 neither the petitioners nor their advocate appeared in court for the hearing of the petition. On application by the advocate for the 3rd respondent, the court dismissed the petition with costs for non-attendance.
10. 'What is now before me is the petitioners' notice of motion application dated February 16, 2021 seeking a review and setting aside of the proceedings of January 27, 2020 and a new hearing date for the petition. The application which is supported by the affidavit of Michael Kioko Munguti, a clerk with Katiba Institute is brought on the ground that the advocate who appeared in court for the petitioner on March 21, 2019 erroneously indicated in his diary a wrong date for the hearing of the petition. The petitioner has contended that whereas the court fixed the petition for hearing on January 27, 2020, the said advocate indicated in the diary that the petition was to come up for hearing on January 27, 2021. The petitioner has contended that as a result of this error, neither the petitioner nor the petitioners' advocate appeared in court on January 27, 2020 resulting in the petition being dismissed.
11. The application is opposed by the 1st and 2nd respondents through grounds of opposition dated October 28, 2021. The 1st and 2nd respondents have contended that the petitioners' application is frivolous, vexatious and amounts to an abuse of the process of the court. The 1st and 2nd respondents have contended that the reinstatement of the suit would not serve any purpose and that no justifiable reason has been given for the petitioners' failure to attend court on January 27, 2020.
12. When the application came up for hearing on July 18, 2022, the petitioners relied entirely on their affidavit in support of the application and urged the court to allow the same. The 1st and 2nd respondents



similarly relied on their grounds of opposition to the application and urged the court to dismiss the same. I have considered the application together with the affidavit in support thereof. I have also considered the grounds of opposition filed by the 1st and 2nd respondents in opposition to the application. The application was brought principally under order 45 rule 2 of the Civil Procedure Rules which deals with review of decrees and orders. I am of the view that this was not the correct order and rule for the type of the application before the court. The petitioners' suit was dismissed on January 27, 2020 for non-attendance. If the petitioners had reasonable excuse for not attending court on the said date, they could move the court under order 12 rule 7 of the Civil Procedure Rules for the setting aside of the order dismissing the suit. What is before me is not an application brought under order 12 rule 7 of the Civil Procedure Rules for the setting aside of the order of dismissal made on January 27, 2020. What has been sought by the petitioner is a review and setting aside of the proceedings of January 27, 2020. The application is baseless in my view to the extent that it seeks the review of the proceedings of January 27, 2020. That date was fixed in court in the presence of the advocate for the petitioners. The petitioners have not pointed out any error on the face of the record for the day. There is also no claim that the petitioners have discovered any new or important evidence. I am not satisfied also that any other sufficient cause has been shown to warrant the review sought.

13. Even if I am to consider the application under order 12 rule 7 of the Civil Procedure Rules, I still find no merit in the same. The burden was upon the petitioners to establish that there exist sufficient grounds to warrant the setting aside of the order of this court made on January 27, 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.

14. 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.”

15. 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] E.A 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.”

16. Applying the said principles to this case, I am not inclined to exercise my discretion in favour of the petitioners. I am of the view that the reasons given by the petitioners for their failure to attend court on January 27, 2020 are not truthful. This court's discretion is unfettered. That means that even where a party gives some reason for his failure to attend court which in the opinion of the court is not reasonable, the court can still exercise its discretion in his favour if the circumstances of the case so demands. The court cannot however exercise its discretion in favour of a party which the court thinks on the material before it is not truthful. I am unable to accept that the petitioners' advocate took the hearing date for the petition that was given on March 21, 2019 to be January 27, 2021 instead of



January 27, 2020. The court could not have given a hearing date of January 27, 2021 in March 2019. I also wonder how the petitioners' advocate would have had 2021 diary in 2019. I have also looked at the copies of the petitioners' advocate's diary for 2021 which were annexed to the affidavit in support of the application. I have noted that this particular matter is "inserted" as a "mention" and not a hearing on January 27, 2021. I am not convinced that the reason for the petitioners and their advocate's failure to attend court was the alleged erroneous diarizing of the hearing date. I am also not persuaded that the petitioners would suffer serious prejudice if the application is not allowed. I have noted that most of the reliefs sought in the petition have been overtaken by events. The court had granted the petitioners leave to amend their petition to introduce new claims which they never did at least from my record. As things stand now, even if the petitioners were to pursue their petition, the same would turn out to be an academic exercise.

17. For the foregoing reasons, I find no merit in the notice of motion application dated February 16, 2021. The application is dismissed with costs.

DELIVERED AND SIGNED AT NAIROBI THIS 28TH DAY OF SEPTEMBER 2022

S OKONG'O

JUDGE

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

Mr Lempaa for the Petitioners

N/A for the Respondents

Ms. C. Nyokabi - Court Assistant

