



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kibe & another v Chief Land Registrar & 5 others (Judicial Review
1 of 2020) [2022] KEELC 14463 (KLR) (31 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 14463 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

JUDICIAL REVIEW 1 OF 2020

JG KEMEI, J

OCTOBER 31, 2022

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT NO. 4 OF 2015

AND

**IN THE MATTER OF THE ORDERS OF THIS HONOURABLE COURT
MADE ON 2ND MAY 2019 IN SIMON KIBE MWANGI AND 4 OTHERS
VERSUS THIKA GARISSA ROAD DEVELOPERS LIMITED AND 5 OTHERS
(ELC 279 OF 2017 CONSOLIDATED WITH THIKA ELC 212 OF 2017
(FORMERLY NAIROBI ELC 110 OF 2013 AND NAIROBI ELC 212 OF 2017)**

BETWEEN

ALICE NJOKI KIBE 1ST APPLICANT

SARAH MUMBI KAMANDE 2ND APPLICANT

AND

CHIEF LAND REGISTRAR 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

COUNTY GOVERNMENT OF KIAMBU 3RD RESPONDENT

ISHMAEL MURIITHI NGURINGA T/A ISHMAEL & CO

ADVOCATES 4TH RESPONDENT

**SIMON KIBE MWANGI, JOSEPH NDUNGU WAIRIMU, GEORGE KIMANI
NGANGA, JOYCE WANJIRU THUO, MARY WAIRIMU MUIRURI (BEING
SUED AS THE CHAIRPERSON, VICE CHAIRPERSON, SECRETARY,
TREASURER AND WOMEN REP OF GACHAGI GROUP) .. 5TH RESPONDENT**

ATTORNEY GENERAL 6TH RESPONDENT



RULING

(Application dated 9/11/2020)

1. The 1st Applicant filed the instant Notice of Motion dated November 9, 2020 under Sections 1A, 1B and 3A of the *Civil Procedure Act*; Order 12 Rule 7 *Civil Procedure Rules* seeking in the main, that the Honorable Court be pleased to vacate the dismissal orders made on 3/9/2020 and reinstate the 1st Applicant's case for hearing. The Motion is based on the grounds thereat and Supporting Affidavit of even date of Alice Njoki Kibe, the 1st Applicant. The 1st Applicant also filed AN1, an authority to act on behalf of the 2nd Applicant dated 9/3/2020.
2. The gist of the Application is that the 1st Applicant's case was listed for hearing on 3/9/2020 without her knowledge despite her due diligence to follow up on the matter.
3. The Application is opposed by the 4th and 5th Respondents.
4. The 4th Respondent filed a Replying Affidavit sworn on 6/4/2021 by Ishmael Muriithi Nganga who deponed that the Application is an abuse of Court process and vexatious against him having acted for the 5th Respondent in a previous case. That the previous case Thika ELC No. 279 of 2017 Simon Kibe Mwangi & 4 others vs Thika Garissa Road Developers Ltd & 6 Others is now subject of appeal in Nbi C.A No. 287 of 2019 as shown by the copies of appellate pleadings, GKN1. Further that the 1st Applicant has not tendered cogent evidence to demonstrate how she followed up on her case and was only awoken from her slumber upon being served with the bill of costs. He beseeched the Court to dismiss the Application with costs.
5. On behalf of the 5th Respondents, George Kimani Nganga swore a Replying affidavit on 1/4/2021 as the secretary and on behalf of the rest of the officials. Just as the 4th Respondent, he deponed that the Applicants are perennial litigants over LR No. 4953/1855 which is also the subject of Appeal in Nbi C.A No. 287 of 2019. That the Applicants are hell bent to abuse the Court process and frustrate landless squatters who comprise the membership of the 5th Respondent. That if the Applicants had a genuine claim over LR No. 4953/1855, they would have applied for joinder in Thika ELC No. 279 of 2017 and now pending appeal as aforesaid. That the Application is misguided and the prayers sought therein are akin to this Court supervising the Court of Appeal.
6. In a rejoinder, the 1st Applicant filed a Supplementary Affidavit dated 19/4/2021. Conceding the aforementioned appeal at the Court of Appeal, she avowed that the said appeal is not a stay of this Honourable Court's orders issued on 2/5/2019. That the merits/demerits of the Judicial Review application can only be determined on merit upon its reinstatement and reiterated that she was not notified of the hearing date. She also pointed out that the Respondents have not filed any responses to the JR Application and urged the Court to allow her Application.
7. On 13/4/2021 directions were taken to canvass the Application by way of written submissions. Only the 1st Applicant, acting in person, filed her submissions dated 19/4/2021. The submissions are a replica of the grounds in the Application maintaining non-communication of the hearing date upon her.
8. The main issue for determination is whether the Application is merited.



9. The germane prayer is the reinstatement of the Applicant’s suit dismissed on 29/9/2021. The legal provisions for such application is found in Order 12 Rule 7 Civil Procedure Rules that;

“7. Setting aside judgment or dismissal [Order 12, rule 7.]

Where under this Order judgment has been entered or the suit has been dismissed, the Court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

10. Reinstatement of a suit is an exercise of discretionary powers of the Court. In the case of *Shah -vs- Mbogo & Another* (1967) EA 116, the Court stated on the matter of Court’s discretion, that such discretion is intended to be exercised to avoid injustice or hardship resulting from 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.

11. In the persuasive authority of *John Nabashon Mwangi v Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR the Court reiterated the test to apply in application of this nature that a Court of law should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated.

12. The Court of Appeal in the case of *Richard Ncharpi Leiyagu -vs- Independent Electoral Boundaries Commission & 2 others* [2013] eKLR in allowing an appeal against the trial Court Ruling that had dismissed a petition for want of prosecution as a result of the petitioner failure to attend Court, observed that;

“[18] We agree with those noble principles which go further to establish that the Court’s discretion to set aside an *ex parte* judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. We have considered the reasons that were offered by the appellant regarding their failure to attend Court on the June 10, 2013 with anxious minds. We have asked ourselves whether failure to attend Court on June 10, 2013, constituted an excusable mistake, an error of judgment regarding counsel’s failure to diarize the date properly or was it meant to deliberately delay the cause of justice

13. The 1st Applicant has elaborated the reasons for failing to attend Court on 3/9/2020 mainly on the basis that she was not served with the hearing notice for that day. A perusal of the Court record confirms that the matter was mentioned on 8/6/2020, 21/7/2020 and 20/8/2020 in absence of rival parties. Directions were given for the parties to be served electronically of the hearing date but there is no proof of such service upon them in the Court file. It will be recalled that this was at the peak of the covid-19 pandemic, a judicially noted contagion. Further it is noted that the Applicants are acting in person and the provisions of Articles 48 and 159 2 (a) of *the Constitution* of Kenya accord them the right to access justice and call upon this Court to ensure that justice shall be done to all, irrespective of status.

14. The decision to dismiss suit for want of prosecution/non-attendance amounts to a judgment of the Court. The question that arises is whether such judgment is regular or irregular having satisfied the mind of the Court that the Applicant was not served with hearing date. To this end, it is my respectful



view that such and guided by the Court of Appeal judgment in *James Kanyiita Nderitu & another vs. Marios Philotas Ghikas & another* [2016] eKLR that;

“In an irregular judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justitiae*, as a matter of right. The Court does not even have to be moved by a party once it comes to its notice that the judgment is irregular, it can set aside the default judgment on its own Motion. In addition, the Court will not venture into considerations of whether the intended defence raises triable issue. Or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See *Onyango Oloo V Attorney General* [1986 – 1989] EA 456). The Supreme Court of India forcefully underline the importance of the right to be heard as follows in *Sangram Singh V Election Tribunal, Kotch*, AIR 1955 SC 664, at 711:.....”

15. The above position was recently affirmed by the Court of Appeal in the case of *Kwanza Estates Limited v Dubai Bank Kenya Limited (In Liquidation) & 2 Others* [2019] eKLR whereby the Appellate Court dismissed an appeal challenging the trial Court decision to set aside an irregular judgment that was prematurely entered.
16. On that ground of non-service of the hearing date alone, the Application succeeds.
17. The Application is allowed. Costs be in the cause.
18. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 31ST DAY OF OCTOBER, 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

1st Applicant – present in person

2nd Applicant – present in person

Respondents 1, 2, 3, 4, 5 & 6 – Absent but served – See email dated 28/10/2022 on record.

Court Assistant – Dominic

