Nyaigoti v Oketch (Sued in her Capacity as the Personal Representative of the Estate of Anderikus Ogalo Wao) (Environment & Land Case 179 of 2017) [2022] KEELC 14683 (KLR) (31 October 2022) (Ruling)

Neutral citation: [2022] KEELC 14683 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ENVIRONMENT & LAND CASE 179 OF 2017

MN KULLOW, J

OCTOBER 31, 2022

BETWEEN

NYAKUNDI MAECHE NYAIGOTI ..... PLAINTIFF

AND

MARY ANYANGO (SUED IN HER CAPACITY AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF ANDERIKUS OGALO WAO) ..... DEFENDANT

RULING

1. By notice of motion dated November 17, 2021 and filed under certificate of urgency, the applicants sought the following orders: -

    a. Spent.

    b. That the orders issued on May 13, 2021 dismissing the suit herein for want of prosecution be set aside.

    c. Cost of this application be provided for.

2. The application is based on the 12 grounds thereof and the supporting affidavit of Rodgers Abisai, the advocate on record for the applicant, sworn on December 9, 2021. It is his contention that the matter was scheduled for notice to show cause on the March 24, 2020; however, he inadvertently failed to diarize the said date and consequently was unable to attend court on behalf of the applicant to show cause as scheduled.

3. He further averred that the applicant; who is an old man has been ailing for quite a long time and only visited his office this year and expressed his desire to proceed with his case since his health had improved.

4. He thus urged the court to exercise its inherent jurisdiction by setting aside the dismissal orders and not to visit the inadvertent mistake on the part of the counsel upon the innocent applicant who is ready to prosecute his case without further delays. It is his claim that the application has been made in good faith and without undue delay and that no prejudice shall be caused to the respondent if the application is allowed.

5. The application was opposed. The respondent filed a replying affidavit sworn on February 28, 2022. It is her contention that the matter was scheduled for notice to show cause on several occasions to wit; July 31, 2019, March 24, 2020 and May 13, 2021 when the same was finally dismissed for non-attendance by both the plaintiff and his counsel on record.

6. The respondent dismissed the application as being an afterthought since the applicant was not keen on prosecuting the matter despite being aware of the status of the matter.

7. It is further her contention that upon the dismissal order of May 13, 2021; she sold the suit parcel to 3rd parties. She thus urged the court to dismiss the said application with costs.

8. The application be disposed of by way of written submissions on November 24, 2021. Both parties filed their respective submission which I have read and taken into account in arriving at my decision hereunder;

Analysis and Determination

9. This court is of the considered opinion that the sole issue arising for determination is: -

    a. Whether the applicants have made out a case for setting aside the dismissal order made on May 13, 2021 and all the consequential orders.

10. The grounds for setting aside an *ex-parte* judgment or order are now well settled. The court in determining whether or not to grant such orders ought to exercise such powers judiciously taking into account the circumstances of each case; by looking at the facts and the circumstances of both the dismissal and the application for setting aside the dismissal.

11. In *Mbogo vs Shah* 1968 EA 93 the court held that: -

> " This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, 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"

(See also: *CMC Holdings Limited vs Nzioki* [2004]1 KLR 173)

12. As stated above, an order for setting aside is discretionary in nature and such discretion ought not to be exercised in favor of an undeserving party. The applicant's counsel contends that he inadvertently failed to diarize the date when the matter was scheduled to come up in court for notice to show cause and thus urged the court not to visit the mistakes of the counsel upon the litigant. He further stated that the delay in prosecuting the matter was caused by the health status of the applicant who had been ill for a long time since 2017.

13. In defining what amounts to sufficient cause, Mativo J in the case of *Wachira Karani vs Bildad Wachira* [2016] eKLR held that: -

> " Sufficient cause is thus 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."

14. I have careful looked at the court record and I note that the matter was scheduled for notice to show cause on several occasions, to wit; 31/7/2019, 26/9/2019, November 21, 2019, December 10, 2019, 24/3/2020 and 13/5/2021. In all instances; the applicant was duly served electronically through his advocates on record, either by the court or the respondent's counsel. However, the applicant's counsel has pegged the instant application on only one occasion, May 13, 2021 and has either by design or omission failed to give a sufficient explanation for his failure to attend court on the remaining occasions outlined above. This in my view is inexcusable and does not deserve the exercise of the court's discretion in his favor.

15. The applicant's advocate has further deponed that the delay in prosecuting the matter was also caused by the applicant's long illness of over 3 years. It is important to note that even though the applicant made allegations of illness, no evidence was adduced in support of the said claims; either in the form of a doctor's report or treatment notes. It is trite law that he who alleges must prove. In the absence of such proof, I find that there has been an inordinate delay in prosecuting the matter and no evidence and/or sufficient justification has been tendered to proof thereof.

16. Article 159 (2) (b) is clear in this regard, justice delayed is justice denied. The right to fair hearing must equally be exercised between all the parties to litigation. Further, section 1B of the *Civil Procedure Act* provides that there should be a just, efficient and timely disposal of the disputes presented in court.

Conclusion

17. In the upshot, I accordingly find that the application dated November 17, 2021 is not merited and the same is hereby dismissed with costs to the respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 31ST DAY OF OCTOBER, 2022.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

Mr. Singei for the Applicants

Non-Appearance for the Respondent

Tom Maurice - Court Assistant