Kianjoya Enterprises v Kimani & 4 others (Environment & Land Case 59 of 2019) [2022] KEELC 14993 (KLR) (24 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14993 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT & LAND CASE 59 OF 2019

LA OMOLLO, J

NOVEMBER 24, 2022

BETWEEN

KIANJOYA ENTERPRISES ..... APPLICANT

AND

SAMUEL MACHARIA KIMANI ..... 1ST RESPONDENT

JUDY NJERI THUO ..... 2ND RESPONDENT

JOHN NG'ANGA GITHII ..... 3RD RESPONDENT

JOSEPH MWANGI WAITHAKA ..... 4TH RESPONDENT

CHIEF LAND REGISTRAR ..... 5TH RESPONDENT

RULING

Introduction

1. This ruling is in respect to the applicant's notice of motion dated March 21, 2022. The application is expressed to be brought under the provisions of article 159 and article 50 of t*Constitution* of Kenya, 2010, section 1A and 3A of the *Civil Procedure Act*, cap 21 Laws of Kenya, order 12 rule 7, order 17 rule 1 and 2, order 42 rule 6 (1) & (2) and order 51.

2. The application seeks the following orders:

    i. Spent.

    ii. Spent.

    iii. That this honourable court be pleased to set aside the ruling of this court dated March 15, 2022 dismissing this suit for want of prosecution and reinstate the same for full hearing and determination.

iv. That an order of stay of execution be issued pending the hearing and determination of this suit.

v. That this honourable court does order that the plaintiff/applicant's suit do proceed for hearing and the same be determined on its merit.

vi. That costs be in the cause.

3. The application is based on the grounds on its face and supported by the affidavit sworn on March 21, 2022 by one Hon Maina Wanjigi a Director of the plaintiff/applicant herein.

Factual Background

4. The plaintiff/applicant commenced this suit *vide* a plaint dated June 15, 2019. In the plaint, it prays for judgment against the defendants for:

a. A declaration that the plaintiff is the legitimate and lawful owner of the suit premises known as Miti Mingi/Mbaruk Block 8/1400, 1401, 1402, 1403, 1404, 1405, 1406, 1407, 1408, 1409, 1410, 1411, 1412, and 1413 (Kianjoya "D")

b. Cancellation of the illegal titles registered as Miti Mingi/Mbaruk Block 8/1400, 1401, 1402, 1403, 1404, 1405, 1406, 1407, 1408, 1409, 1410, 1411, 1412, and 1413 (Kianjoya "D") held by the defendants and a consequence order directing the 5th defendant to rectify the register in respect of the suit premises by restoring the plaintiff as the registered proprietor of the suit premises.

c. A permanent injunction restraining the defendants by themselves, their agents, employees from trespassing into, encroaching onto or interfering with the plaintiff's quiet possession of the suit premises or in any way dealing with the suit premises or the title thereto.

d. General damages for trespass.

e. Costs of this suit.

5. The 1st, 2nd and 3rd defendants filed their statement of defence and counter-claim dated September 15, 2020 on September 21, 2020 wherein they denied the plaintiff's allegation in the plaint. In their counter-claim, they seek the following orders:

a. An order of permanent injunction restraining the defendants whether by themselves, their servants and/or agents or others whomsoever from trespassing or in any other manner howsoever from interfering with the plaintiff's peaceful occupation and use of their land known as Miti Mingi/ Mbaruk Block 8/1400, 1401, 1402, 1403, 1404, 1405, 1406, 1407, 1408, 1409, 1410, 1411, 1412, and 1413 (Kianjoya "D")

b. A declaration that the 1st, 2nd and 3rd defendants are the rightful owners of land known as Miti Mingi/Mbaruk Block 8/1400, 1401, 1402, 1403, 1404, 1405, 1406, 1407, 1408, 1409, 1410, 1411, 1412, and 1413 (Kianjoya "D") having been registered in their names on January 14, 1998.

c. In the alternative and without prejudice to prayer (b) the 1st, 2nd and 3rd defendants be declared to have a beneficial interest and/or to have acquired land known as Miti Mingi/Mbaruk Block 8/1400, 1401, 1402, 1403, 1404, 1405, 1406, 1407, 1408, 1409, 1410, 1411, 1412, and 1413 (Kianjoya "D") or thereabouts by way of adverse possession.

d. Costs of the suit.

e. Interest on (a) above.

f. Any other reliefs that this honourable court will deem fit to grant.

6. The matter came up for hearing on March 15, 2022 and the plaintiff/applicant sought an adjournment despite having been granted last adjournment on 31st February, 2022.

7. The court ruled that the plaintiff/applicant was not keen on prosecuting its claim and proceeded to dismiss the suit for want of prosecution; in accordance with the provisions of 17 rule 1.

8. The above ruling now forms the basis of the instant application.

Plaintiff/applicant's Contention

9. The affidavit in support of the plaintiff/applicant's application is sworn by one Hon Maina Wanjigi. He states that he instituted this suit in 2019.

10. He avers that he later noticed some miscommunication with his previous advocate prompting him to instruct the current law firm of M/s Vivian Kinyanjui Advocates to represent it. He further contends that their advocates wrote to the Deputy Registrar and requested for a copy of the typed proceedings which his advocate received on February 4, 2022.

11. It is the plaintiff/applicant's contention that after perusal of the court file and typed proceedings they realized that the advocate had not complied with pre-trial requirements.

12. He contends that the advocate previously on record had also not heeded to his instructions to joined a 2nd plaintiff who, according to him, is a crucial witness in the suit.

13. He contends that their advocates immediately wrote to the respondents counsel *vide* a letter dated March 7, 2022 explained his predicament and sought their indulgence as they would not be ready to proceed with the hearing of the suit on March 15, 2022.

14. The plaintiff/applicant further contends that he was informed by his advocates whose information he believes to be true that counsel for the 1st - 3rd respondents wrote back and stated that they would oppose the attempted adjournment.

15. He contends that the suit was dismissed on March 15, 2022 for want of prosecution.

16. It is his contention that his attempt to amend the pleadings and comply with order 11 of the *Civil Procedure Rules* was not in any way a means of frustrating any of the litigants involved adding that the same was only an attempt to correct an anomaly occasioned by their previous advocate.

17. He contends that the mistake by an advocate should not be visited upon an innocent litigant adding that he has a strong suit with high chances of success and that they still have an interest in prosecuting the suit.

18. The plaintiff/applicant contends that the subject matter of this claim is land which is an emotive factor thus it would only be right proper and just that he is given an opportunity to be heard on merit.

19. He ends his deposition by stating that this court should exercise its discretion in his favour by setting aside the *ex parte* orders it had issued and order reinstatement of the suit.

Respondent's Response

20. In response to the application, the 1st, 2nd and 3rd respondent filed their grounds of opposition dated March 29, 2022 on April 25, 2022. They cite the following five (5) grounds in opposition to the application:

    1. That the court is certainly *functus officio* in relation to this matter.
    2. That the court has made a determination to dismiss the suit for want of prosecution and cannot therefore reopen the case to set aside.
    3. That the court cannot sit on its own appeal.
    4. That the available course would be to file an application for review or an appeal.
    5. That the instant application ought to be dismissed with costs.

Issues For Determination.

21. The plaintiff/applicant filed its submissions dated May 17, 2022 on May 19, 2022 where it gave a brief background of the case and identified the following issues for determination:

    a. Whether the court should issue an order reinstating the applicant's suit.

    b. Whether an order of stay should be granted.

22. On the first issue, the plaintiff/applicant relies on the decision in *Exon Investments Ltd v African Banking Corporation Limited* [2021] eKLR and article 159(2) (d) of the *Constitution*. He submits that the court ought to exercise judicial authority without undue regard to technicalities so as to administer substantive justice to parties. The plaintiff/applicant submits that it has always been willing to prosecute its claim to conclusion and is being condemned unheard yet the issues in the main suit has never been determined.

23. On the second issue the plaintiff/applicant argues that it continues to suffer irreparable harm by dismissal of this suit. He also states that the respondents will not suffer any prejudice if the present application is allowed. He adds that the prejudice to be suffered by the respondents if at all should however be weighed against the consequences of shutting out the applicant without the suit proceeding for hearing.

24. The plaintiff/applicant relied on order 42 rule 6(2) of the *Civil Procedure Rules* and the case of *Kenya Airline Pilots Association (KALPA) v Cooperative Bank of Kenya Limited & another* [2020] eKLR. He submits that the applicant will endure hardship in recovering the suit land in the event this application is not allowed.

25. He cited the Supreme Court decision in *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others* [2013] eKLR and submits that the court becomes *functus officio* only after

judgment or award has been perfected by a decree which has not been done in this case. He submits that the litigants should not be shut out from having their case heard.

26. He finally urges this court to allow the application for reinstatement of suit.

27. The 1st, 2nd and 3rd respondent filed their submissions on May 31, 2022 and identified the following issues for determination:

    a. Whether the court is *functus officio*

    b. Whether the court can sit on its own appeal

    c. Whether an order for dismissal for want of prosecution can be set aside by the same court.

    d. Whether the mistake of an advocate can be relied upon as a lawful ground.

28. On the first issue, they rely on the Court of Appeal decision in *Njue Ngai v Ephantus Njiru Ngai & Another* [2016] eKLR and submit that the court on March 15, 2022 issued judgment against the plaintiff it became *functus officio*. They further submit that the judgment cannot be set aside by this court and that the proper avenue is for the plaintiff to file an appeal against the judgment issued. They also submit that the decision made on March 15, 2022 was final and functus and the only avenue for the same court to touch its own judgment is by virtue of section 99 of the *Civil Procedure Act*.

29. On the second issue, they rely on the Court of Appeal decision in *Okello & another v Osonga* [1988] eKLR and submit that once the court is functus, it cannot rehear an application to reinstate a suit or set aside its own judgment. They further submit that it would amount to the same court sitting on its own appeal. They also submit that the instant application must fail and that an application for review or an appeal is filed.

30. On the third issue, they rely on order 17 of the *Civil Procedure Rules* and submit that the said order is silent on setting aside judgment on dismissal for want of prosecution. They submit that the applicant's actions in seeking repeated adjournments can only be construed as an act delaying hearing of the main suit which this court should frown upon.

31. On the fourth issue, the 1st – 3rd defendants relied on the case of *Charles Omwata Omwoyo v African Highlands & Produce Company Ltd* [2002] eKLR and submit that the blame game and act of hiding behind advocates should be and is frowned upon by courts as not all mistakes are redeemable. They submit that the mistake by counsel on record should not be overlooked by court and neither should the court allow it to be shifted back to previous advocates on record.

32. Upon perusal of the application, supporting affidavit, replying affidavit and submissions filed in respect of this application, it is my considered view that the following issues arise for determination:

    a. Whether this court is *functus officio* and whether, therefore, the plaintiff can only appeal against the order of dismissal

    b. Whether this suit should be reinstated.

    c. Who should bear the costs of this application.

Analysis And Determination

A. Whether this court is functus officio and whether, therefore, the plaintiff can only appeal against the order of dismissal

33. The 1st, 2nd and 3rd respondent are of the view that this court is *functus officio* and that the order for dismissal of the suit for want of prosecution can only be reviewed or an appeal filed against it. They are further of the view that an order for of dismissal for want of prosecution is a judgement.

34. *Black's Law Dictionary* 11th edition at page 815 defines the word functus officio thus;

> Without further authority or legal competence because the duties the duties and functions of the original commission have been fully accomplished.

35. Section 25 of the *Civil Procedure Act* provides as follows;

> 25. Judgment and decree
> The court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow:
>
> Provided that it shall not be necessary for the court to hear the case before pronouncing judgment—
>
> i. where the plaint is drawn claiming a liquidated demand, and either—
>
> (a) the defendant has not entered such appearance as may be prescribed; or
>
> (b) the defendant, having entered such appearance, has failed to file a defence within the time prescribed; or
>
> (ii) in such cases as may be prescribed under section 81(2)(f).

36. Section 2 of the *Civil Procedure Act*

> " decree" means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include (Emphasis is mine)—
>
> (a)) any adjudication from which an appeal lies as an appeal from an order; or
>
> (b) any order of dismissal for default:
>
> Provided that, for the purposes of appeal, "decree" includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;
>
> Explanation. — A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such

adjudication completely disposes of the suit. It may be partly preliminary and partly final.

37. My understanding of these provisions of the law is that there is a very thin line between a judgment and a decree. Ordinarily, after judgment, a decree is extracted. However, a decree may be preliminary or final or partly preliminary and partly final. A preliminary decree means that further proceedings have to be taken before the suit can be completely disposed of.

38. Importantly. A decree does not include

    a. any adjudication from which an appeal lies as an appeal from an order; or

    b. any order of dismissal for default:

39. The foregoing is intended to dispel the submissions by the plaintiff that this court is *functus officio* and that the order of March 15, 2022 is a judgment. A judgment comes into existence as a final determination of the rights and liabilities of parties to a suit after hearing the parties. A judgment can be subjected of review by the same court that rendered it and the same court can also set it aside.

40. An order dismissing a suit for default is not a decree and by extension a judgement. The *Black's Law Dictionary* 11th edition at page 526 defines default thus;

    To be neglectful; esp., to fail to perform a contractual obligation; To fail to appear or answer.

41. My understanding is that when a party fails to do that which the court has ordered him to do, or that which is expected of him as set out in the *Civil Procedure Act* and/or rules, that party is said to be in default and the court may issue an order to their detriment. Such an order is not a judgement.

42. Having said that, I must also state that even where judgement has been rendered, the Act and rules give discretion for setting aside such judgement.

43. The 1st -3rd defendants have made reference to the decision in of *Njue Njagi v Ephantus Njiru Njagi & another* [2016] eKLR. I wish to distinguish this decision form the circumstances in this case, in the case of *Njue Njagi* (supra), The judges of appeal at paragraph 18 and 21 states as follows;

    18. Another issue may arise as to whether a dismissal of a suit for non attendance of the plaintiff or for want of prosecution, amounts to a judgment in that suit. The predecessor of this court answered that issue in the affirmative when considering the dismissal of a suit for failure by the plaintiff to attend court...

    21. Now, we have seen that a dismissal for want of prosecution was as good as a final judgment (emphasis is mine) in the appeal unless a successful application for setting aside was filed.

44. In my view the use of the words "as good as a judgment" does not mean the same thing as "is a judgment". The judges of appeal qualify the statement by saying that an order of dismissal for want of prosecution may be equated to a judgment if no appeal is preferred or an application made to set it aside. They do not say that it is a judgment.

45. In the instant suit, an application to set aside the order for dismissal has been made and is under consideration. The argument by the 1st- 3rd defendant that this court having dismissed this suit for want of prosecution rendered a judgment and the court, therefore, is *functus officio* is flawed.

B. Whether this suit should be reinstated.

46. This suit was dismissed on March 15, 2022 for want of prosecution. Order 17 does not provide for setting aside of an order for dismissal for want of prosecution. A party wishing to have such an order set aside would have to invoke the provisions of section 3A which provide as follows;

> Nothing in this Act shall limit of otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

47. In *CMC Holdings Limited v Nzioki* [2004] 1 KLR 173, the learned judge held as follows,

> " In law, the discretion that a court of law has, in deciding whether or not to set aside ex-parte order... was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would ... not be proper use of such a discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle. We do not think the answer to that weighty issue was to advise the appellant of the recourse open to it, as the learned magistrate did here... in doing so, she drove the appellant out of the seat of justice empty handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate."

48. Even when a party approaches the court for setting aside of an order of dismissal of a suit for want of prosecution, it should not be forgotten that there is an opposing party whose interests must also be taken into account. In *Josphat Oginda Sasia v Wycliffe Wabwile Kiiya* [2022] eKLR, the learned judge held as follows;

> On the other hand, courts should not be used as fora to breed injustice to parties who have been diligent to proceed with their matters but have been met by inexcusable indolence by the adverse parties. It is a rule of law and equity that justice delayed is justice denied however pure it may look. Thus, where a suit is dismissed for want of prosecution, the onus is on the party applying to reverse the order to explain sufficiently to court as to why his application merits the exercise of the court's discretion.

49. In the case of *Nilesh Premchand Mulji Shah & another t/a Ketan Emporium v M.D Popat and others & another* [2016] eKLR, the court stated as follows:

> Nonetheless, article 159 of the *Constitution* and order 17 rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay.

50. In *Ivita v Kyumbu* [1984] KLR 441 the court laid down principles for issuance of an order of dismissal of suit for want of prosecution. It stated:

> " The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant; so both parties to the

suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time...

The defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time".

51. After hearing submissions of counsel, this court exercised its discretion on March 15, 2022 and dismissed the suit for want of prosecution. There is a reasoned ruling on the court record setting out the circumstances leading to the exercise of that discretion. In my view that discretion was exercised judiciously.

52. The court in it's ruling delivered on March 15, 2022, noted that the plaintiff had not complied with pre-trial directions issued over two years ago. The court also noted that justice delayed is justice denied and points out to the injustice the delay is occasioning to the defendants. The court also noted that the plaintiff sought and was granted several adjournments when the matter came up for hearing including a last adjournment granted on the February 3, 2022. There was no doubt that the delay exhibited by the plaintiff in prosecuting the suit was inordinate, unreasonable, inexcusable.

53. The plaintiff has gone to great lengths in blaming counsel formerly on record for the manner in which his suit has been handled. The Court of Appeal in *Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others* [2015] eKLR considered the duty that advocates owe to the court:

> "From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side. (See. *Halsbury's Laws of England*, 4th Edn, Vol 44 at p 100-101) and also *Re Jones* [1870], 6 Ch. App 497 in which Lord Hatherley communicated the court's expectations this way:
>
> '... I think it is the duty of the court to be equally anxious to see that solicitors not only perform their duty towards their own clients, but also towards all those against whom they are concerned..."

54. The plaintiff/applicant also states that they are also yet to join a 2nd plaintiff who, according to him, is a crucial witness in the case. Witnesses are not joined to proceedings. Witnesses attend court to give evidence. If this application were to be allowed, the court would still be faced with another application for amendment of the plaint. As stated earlier, the list of documents and list of witnesses is yet to be filed.

55. I find that reinstatement of this suit is not aiding the ends of justice. The plaintiff has time, now, to properly organize himself, his pleadings, his documents and approach the court if and when he is ready to prosecute his claim. All evidence points to inertia on his part and this runs contrary to the overriding objectives of the *Civil Procedure Act* as set out in section 1A and 1B and also the overriding objective

of the Environment and Land Court as set out in section 3(1) of the *Environment and Land Court Act* i.e "just, expeditious, proportionate and accessible resolution of disputes governed by it."

Disposition.

56. In view of the foregoing, I find that the application dated March 21, 2022 is without merit and is hereby dismissed with no order as to costs.

57. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 24TH DAY OF NOVEMBER, 2022.

L. A. OMOLLO

JUDGE.

In the presence of: -

Miss Nyasetia for Plaintiff/Applicant.

Mr. Azdak for Kariuki for 1st, 2nd & 3rd Defendant/Respondent.

Miss Wanjeri for Nyambura for 5th Defendant/Respondent

Court Assistant; Miss Monica Wanjohi.