



Ruunci (Suing as administrator of the Estate of M’Ikiao M’Thiriombe – Deceased) & another v Land Adjudication & Settlement Officer (Karama Adjudication Section); Makena (Interested Party) (Judicial Review Application 19 of 2018) [2022] KEELC 15278 (KLR) (7 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15278 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
JUDICIAL REVIEW APPLICATION 19 OF 2018
CK NZILI, J
DECEMBER 7, 2022
IN THE MATTER OF THE LAND CONSOLIDATION ACT CAP 283,
LAND ADJUDICATION ACT CAP 284 LAWS OF KENYA, LAND
REGISTRATION ACT CAP 3 AND LAND ACT CAP 6 LAWS OF
KENYA
AND
IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR
JUDICIAL REVIEW FOR CERTIORARI, MANDAMUS AND
PROHIBITION

BETWEEN

STNALEY RUUNCI (SUING AS ADMINISTRATOR OF THE ESTATE OF M’IKIAO M’THIRIOMBE – DECEASED) 1ST APPLICANT

KITHELA M’IKIOO M’THIRIOMBA 2ND APPLICANT

AND

LAND ADJUDICATION & SETTLEMENT OFFICER (KARAMA ADJUDICATION SECTION) RESPONDENT

AND

MARY MAKENA INTERESTED PARTY



RULING

1. By an application dated June 3, 2022, the court is asked to set aside and or vacate the orders made on October 21, 2021 and reinstate the case for hearing on merits. The application is based on the grounds on its face and a supporting affidavit of Mercy Kaume advocate sworn on June 3, 2022.
2. The reasons given are that the advocate on record and the applicants were not aware of the hearing date of October 21, 2021, the subject land is family land, the parties are willing to have the matter heard and that it is in the interest of justice or fair trial to allow the application.
3. In the supporting affidavit, the deponent stated the suit was lastly in court on July 29, 2021 but were never served with a hearing notice for October 21, 2021 under order 17 rule 4 Civil Procedure Rules. Therefore, counsel could not inform her clients, the applicants whose subject property belongs to their late mother. Further the deponent stated that the interested parties who had started selling the suit property to third parties but have never opposed the subject suit would not be prejudiced if the same was reinstated.
4. It is not in dispute that the court has wide discretion to recall and or set aside its orders. The principles guiding the court in setting aside *ex parte* orders was expounded in CMC Holdings Ltd v Nzioki [2004] 1 KLR 173. The court said thus;

“That discretion must be exercised upon reasons and must be exercised judiciously. In law, discretion that a court of law has in deciding whether or not to set aside *ex parte* orders was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error”.
5. In Republic v University of Nairobi (ex parte) Lazarus Wakoli Kunani & 2 others [2017] eKLR, the issue before the court was an application for judicial review struck out for non-compliance with the court’s directions regarding the filing and service of the notice of motion.
6. The reason for non-compliance was naivety as to matters law. The court invoked article 159 of the Constitution to cure such procedural missteps. The court cited with approval John Onger Mariaria & 2 others v Paul Matundura [2004] 2 EA 163, on the proposition that legal business can no longer be handled sloppily or carelessly and that to set aside or not must be done based on reasons but not on caprice or sympathy.
7. Further, the court cited with approval Savings and Loans Ltd v Susan Wanjiru Murutu Milimani (NRB) HCCs No 397 of 2002 where the court held that a case belongs to a litigant and not his advocate on record and the duty is on a litigant to pursue the prosecution of his case by constantly checking with his lawyer the progress of the case.
8. In this matter leave to institute judicial review was granted on December 6, 2021. The applicants were ordered to file and serve the substantive motion within 21 days. Stay of the proceedings was to last only for 6 months. The court had also directed that the matter be mentioned before the Deputy Registrar on January 17, 2019 for pre-trial directions.



9. The notice of motion was duly filed on January 14, 2019 leading to grounds of opposition by the respondents filed on February 2, 2021. The interested party were also served with the notice of motion and an affidavit of service filed on March 9, 2021 together with a hearing notice for March 9, 2021.
10. On March 9, 2021 the applicants sought to dispose the notice of motion by way of written submissions. Timelines to do so were set by the court for April 9, 2021. A mention date for May 19, 2021 was issued to confirm compliance. Come May 19, 2021, the applicants sought for more time to comply. The court gave a mention date for July 29, 2021.
11. On July 29, 2021, the court was not sitting and one Pauline from the firm of MG Kaume Advocates took a date for October 21, 2021 before the Deputy Registrar. An order was made to serve the notice to the rest of the parties. On October 21, 2021, neither the ex parte applicant nor their advocates on record attended court. The court therefore proceeded to dismiss the notice of motion for both non-compliance and non-appearance.
12. Counsel for the applicants has sworn on oath several issues. At paragraphs 3 & 4 of the supporting affidavit, she deposes that she never received a notice under order 17 rule 4 of the Civil Procedure Rules or was never aware of the said date. Ground No 2 on the face of the application is that the advocate and the applicants were not aware of the hearing date of October 21, 2021 hence could not attend. That is far from the truth.
13. Counsel is merely out to mislead the court given that the date was taken by the law firm's staff, one Pauline who appended her signature on the court file and was directed to serve the rest of the parties. It is assumed that the staff took the date under the direction and or superintendence of the lawyers on record for the applicants. The law firm has not disowned such employee
14. Instead of owning up the mistake for not complying with court directives by July 29, 2021 and or attending court, the applicants are attributing the same on lack of awareness of the hearing date yet they were the ones who fixed the date and failed to attend.
15. Additionally, the application to set aside was filed on July 15, 2022, which is close to ten months after the dismissal. The inordinate delay has not been explained at all even assuming that the applicants have been diligent in prosecuting their claim. Further, the exported applicants failed to seek for the extension of the stay orders whose expiry was 6 months after the grant of leave. No search or report has been supplied to the court to verify the status of the subject land said to be emotive for this court to gauge whether or not and despite the delay, justice can still be served to the parties.
16. On the issue of service of the application, counsel for the applicants also never bothered to serve the notice of motion upon the interested parties said to have started selling the suit property, so as for this court to form an opinion that there will be no prejudice to them should the case be reinstated.
17. In Republic v Public Procurement Administrative Review Board & 2 others Ex parte Transcend Media Group [2018] eKLR, there was non-compliance in the filing of written submissions and non-attendance on the set date to take a judgment date by the applicants. The court cited with approval Nakumatt Holdings Ltd v Commissioner of Value Added Tax [2011] eKLR on the proposition that a court has residual power to correct its own mistake, by balancing the interest of the parties. The court held that since the respondent and the interested parties had not shown any serious prejudice, there was need to reinstate the notice of motion more so since counsel for the applicant had given a reasonable explanation, had expressed remorse on the matter and undertook to comply with the court's directives.



18. In this matter the applicants unlike in *exparte Transcend Media Group Ltd supra* the applicant has disowned knowledge of the hearing date or given a reasonable explanation of non-compliance with court's directives and or non-attendance after they took the *exparte* mention date.
19. As much as counsel for the applicants has attached copies of the written submissions and or said that land matter is emotive or of high value this court must not act on sympathy but on sound legal principles.
20. Court orders and or directives are not issued in vain. Every lawyer appearing before the court has an overriding duty to help the court to attain the overriding duty under articles 47 and 50 of the *Constitution* as read together with sections 1A, 1B and 3A of the *Civil Procedure Act* on expeditious disposal of disputes. That cannot be attained by litigants or counsels on record acting sloppily, carelessly and making mockery of court directives.
21. The upshot is I find the notice of motion dated June 3, 2022 lacking merits. The same is dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 7TH DAY OF DECEMBER, 2022

In presence of:

C/A: Kananu

Miss Mwiti for the respondent

HON. C.K. NZILI

ELC JUDGE

