



**Kisanya v Simwa & 2 others (Environment & Land Case 1 of 2014)
[2022] KEELC 15118 (KLR) (5 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15118 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 1 OF 2014
DO OHUNGO, J
DECEMBER 5, 2022**

BETWEEN

JACOB NDAMA KISANYA PLAINTIFF

AND

ZADOCK MARK SIMWA 1ST DEFENDANT

PATRICK SAIDIA BUSHURU 2ND DEFENDANT

JULIUS BUSHURU 3RD DEFENDANT

RULING

1. By notice of motion dated May 16, 2022, the second and third defendants seek the following orders:
 1. [Spent]
 2. [Spent]
 3. [Spent]
 4. That this honourable court be pleased to review and/or set aside its orders for dismissal of the 2nd and 3rd defendants' application dated October 8, 2021 for non-attendance on the November 2, 2021 and all the consequential orders and proceedings made thereto.
 5. Reinstate the 2nd and 3rd defendants' application dated October 8, 2021 and hear it on priority basis.
 6. That the costs of this application be in the cause.
2. The application is supported by an affidavit sworn jointly by the applicants who deposed that on December 9, 2020 this court delivered judgment in this matter in favour of the plaintiff when it ordered



the second and third defendants to vacate from parcel of land No Kabras/Bushu/3132 (suit property) within ninety days from the date of the judgment and that in default eviction orders do issue. The applicants further deposed that the court also ordered a permanent injunction to issue restraining the 2nd and 3rd defendants from ever laying claim, trespassing and or interfering with the plaintiff's peaceful occupation of the suit property. That being aggrieved by the judgment, they instructed the firm of Ms Athung'a & Co Advocates to seek review of judgment and or it's setting aside to allow them to adduce some crucial evidence that had been inadvertently left out during the trial.

3. The applicants further deposed that following their instructions, Ms Athung'a & Co Advocates filed an application dated October 8, 2021 under certificate of urgency and that the court scheduled it for inter parte hearing on November 2, 2021 on which date no parties turned up whereupon the court dismissed the application for non-attendance. That Mr Athung'a informed them that he had attended court on November 2, 2021 and that the matter was pending for ruling. That at around noon on May 13, 2022, the OCS Malava police Station alongside other police officers visited the applicants' homes and served them with an eviction order dated March 28, 2022 warning them that they would execute the order on May 17, 2022. That they then tried to contact Mr Athung'a in vain and that they then decided to seek the services of Omwando Mbaka & Co Advocates. The applicants therefore urged the court to allow the application.
4. The plaintiff/respondent opposed the application through a replying affidavit in which he deposed that the applicants never vacated the suit land at the expiry of the ninety days grace period which expired in March 2021. That one year after delivery of the judgment the applicants filed an application for review which they did not serve upon the plaintiff/respondent and failed to attend court at its hearing. That after the dismissal of the application, the applicants never took any steps until five months later when the respondent secured security orders for eviction. The respondent further deposed that the applicants are intent on ensuring the respondent does not enjoy the fruits of the judgment in a timely manner and urged the court to dismiss the application.
5. The application was canvassed through oral submissions. Counsel for the applicants argued that failure to attend court was due to Mr Athung'a's fault and that a mistake of that nature should not keep the applicants from the seat of justice. Reliance was placed on *Bakari Shaban Gakere v Mwana Idd Gichu & 3 Others [2022] eKLR*. In response, counsel for plaintiff/respondent relied entirely on the plaintiff's replying affidavit sworn on June 21, 2022 and argued that the applicants seek to keep the plaintiff from enjoying his judgment. He urged the court to dismiss the application with costs.
6. I have considered the application and the response thereto. The issue for determination is whether the orders sought should be granted.
7. The applicants seek setting aside of the order made on November 2, 2021 dismissing notice of motion dated October 8, 2021 for non-attendance. The applicants were aware of the hearing date of November 2, 2021. When dealing with such an application, the court is called upon to exercise discretion pursuant to the principles laid down in *Mbogo & Another v Shah [1968] EA 93* which were reiterated in *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR*. Simply put, the court has unfettered discretion and will consider such factors as the reason for the failure to attend court, the length of time that has elapsed since the dismissal, the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to grant setting aside. The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not meant to assist a party who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.



8. The application under consideration was filed on May 16, 2022, slightly over six months after the dismissal of November 2, 2021. There was thus a delay of at least six months. The applicants have sought to explain that their advocate informed them that he had attended court on November 2, 2021 and that the matter was pending for ruling. No affidavit by the advocate was filed to verify such claims. If the applicants' advocate misled them, and that is a serious allegation that must be subjected to proof as between the advocate and the applicants, the applicants would have recourse against the advocate.
9. I bear in mind that this is a concluded matter. Judgment was delivered on December 9, 2020 wherein the court ordered the applicants to vacate the suit property within ninety days from the date of the judgment and that in default eviction orders would issue. The applicants were aware of the default clause. Time was of the essence. I find that the delay of six months was inordinate. Equally, from a consideration of the entire circumstances of the application, the failure to attend court cannot be blamed on any accident, inadvertence, or excusable mistake. Instead, the applicants are demonstrably keen to keep the plaintiff from the fruit of his judgment and thereby delay the cause of justice. That much is confirmed by the fact that despite knowing the terms of the judgment delivered on December 9, 2020, the applicants sat back and waited for ten months until October 13, 2021 when they filed notice of motion dated October 8, 2021.
10. In view of the foregoing discourse, the applicants have not persuaded me that I should exercise discretion in their favour. I find no merit in notice of motion dated May 16, 2022 and I therefore dismiss the application with costs to the plaintiff.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 5TH DAY OF DECEMBER 2022.

D O OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the plaintiff

No appearance for the first defendant

Mr Mbaka for the second and third defendants

Court Assistant: E Juma

