Mtile & 2 others v Mwamburi & another (Land Case 62 of 2019)
[2025] KEELC 1105 (KLR) (7 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1105 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

LAND CASE 62 OF 2019

LL NAIKUNI, J

MARCH 7, 2025

BETWEEN

ALI CHARO MTILE ..... 1ST PLAINTIFF

HARON TETE ..... 2ND PLAINTIFF

CHARO DZONGO MTILE ..... 3RD PLAINTIFF

AND

SAMUEL DANSON MWAMBURI ..... 1ST DEFENDANT

REGISTRAR OF LANDS ..... 2ND DEFENDANT

RULING

I. Introduction

1. This Honourable Court was called upon to determine the Notice of Motion application dated 4th November, 2024 by Ali Charo Mtile, Haron Tete and Charo Dzongo Mtile, the Plaintiffs/ Applicants herein against the 1st and 2nd Defendants/Respondents herein. It was brought under the provision of Sections 3, 3A & 63(e) of the *Civil Procedure Act*, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law.

2. Upon service, the 1st Defendant/Respondent while opposing the application by filing a Replying Affidavit dated 27th November, 2024.

II. The Plaintiffs'/Applicants case

3. The Plaintiffs/Applicants sought for the following orders:-

    a. Spent.

b. That this Honourable Court be pleased to set aside the orders and proceedings of the 4th November 2024, where the Plaintiffs case was dismissed and closed without the Plaintiffs being heard to enable the Plaintiffs to present their case as required.

c. That this Honourable Court be fix this matter for Hearing afresh.

d. That costs of this Application be provided for.

4. The application was premised on the grounds, facts and testimony on the face of the application and the averments made out under the 15 Paragraphed supporting affidavit of Paul W. Magolo, an Advocate of the High Court of Kenya practicing in Mombasa and having the conduct of this matter on behalf of the Plaintiffs herein. The Deponent averred that:-

a. The Plaintiffs/Applicants had always had the desire to litigate this matter to its logical conclusion.

b. This matter was thereafter scheduled for hearing on 4th November, 2024.

c. On the said 4th November, 2024, he was present in to teams virtual proceedings before the trial court at 9:00am and took time indication of 12:00pm in the absence of the 1st & 2nd Defendants.

d. At the time of taking time indication, he indicated to the court that he had four witnesses who were present with him in his office.

e. At exactly 11:50 AM, the said 4th November 2024, the Paul W. Magolo, counsel for the Plaintiff logged back in the platform ready to proceed with the hearing in the company of his witnesses.

f. By around 12:15 pm, the deponent together with his witnesses were still at the lobby and had not yet been let in.

g. Subsequently, he decided to go to physical court to find out why he was not being let in.

h. Unfortunately he found out that the matter had already been dealt with in physical court in his absence and the Plaintiffs' case dismissed.

i. Failure by the Applicant's representative to participate was not intentional but he was of the impression that the hearing was to proceed virtually.

j. The Applicants had always been keen and/or desirous to have this matter heard and determined.

k. The Applicants stood to suffer substantial loss and damage, unless the orders and proceedings of the 4th November, 2024 were set aside.

l. The Respondents would not be prejudiced if the orders sought were granted as they would have the opportunity to present their case.

III. The 1st Defendant's response

5. The 1st Defendant responded to the Application through a 7 paragraphed Replying Affidavit sworn by G.N. Gakuo, an Advocate of the High Court of Kenya and in conduct of this suit on behalf of the 1st Defendant on 27th November, 2024 where he averred that:-

a. The Plaintiffs' advocates together with the Plaintiffs have failed to provide a justifiable reason for their non – attendance on 4th November, 2024 for hearing, despite the fact that time indication was given.

b. The excuse provided is inexcusable for reasons that the Plaintiff's advocates themselves took time indication for 12:00 pm and was well aware that the hearing was to be conducted in open court given the fact that this was a land matter and it was common knowledge that these matters were heard in open court.

c. The Plaintiff's advocates were well aware of the practices of this Court that land matters were done in open court.

d. The general principle that a mistake by the advocate should not be visited on a client did not apply in this case since no justifiable reason had been adduced to warrant this reinstate the suit.

e. The Plaintiffs' application was unmeritorious, bad in law and was an utter abuse of the court process and the same ought to be dismissed with costs to the 1st Defendant . in addition to the above, no evidence had been tendered to confirm that the Plaintiffs were indeed in Court.

IV. Submissions

6. On 11th December, 2024 while the Parties were present in Court, they were directed to have the Notice of Motion application dated 4th November, 2024 be disposed of by way of written submissions and all the parties complied. Unfortunately, at the time of penning down this Ruling, the Honourable Court was not able to access the written submission from neither the file nor Judiciary CTS. Pursuant to that on 7th March, 2025 a ruling delivered accordingly.

V. Analysis and Determination

7. I have carefully read and considered the pleadings and the submissions herein and the relevant provisions made by the by the Learned Counsels. In order to arrive at an informed decision, the Honorable Court has framed the following three (3) issues for determination: -

a. Whether the Applicants have tendered a reasonable explanation for their failure to attend Court on the date their suit was dismissed?

b. Whether there is a basis for the Court to exercise its discretionary power to set aside the orders and proceedings of the 4th November 2024 and reinstate this suit?

c. Who bears the Costs of the Notice of Motion application dated 4th November, 2024.

Issue No. a). Whether the Applicants have tendered a reasonable explanation for their failure to attend Court on the date their suit was dismissed.

8. Under this Sub – heading, the Honourable Court will decipher on the substratum of the matter is whether the Applicants have tendered a reasonable explanation for their failure to attend Court on the date their suit was dismissed. The court has carefully considered the grounds on the application, the Plaintiff/Applicants' affidavit evidence, his Learned Counsel's submissions, the superior court's decision cited, the record and come to the following findings;

a. Order 12 Rule 3 of the Civil Procedure Rules sets out the consequences of non-attendance to court by a party to a suit. In particular, Rule 3(1) is specific that where only the defendant attends, and admits no part of the claim, the suit shall be dismissed except for good cause to

be recorded by the court. That under Rule 3(2), where the defendant is the only one who attends and admits any part of the claim, the court is obligated to enter judgement against such a defendant upon such admission, and dismiss the remainder of the suit that has not been admitted, unless for good cause to be recorded by the court. That Rule 3(3) provides for situations where a defendant who had counterclaimed, is the only one who attends court. That such a defendant may be allowed to prosecute their claim after the plaintiff's case has been dismissed, so far as the burden of proof lies with him. That further, Rule 6(1) & (2) provides that where a suit is dismissed under Rule 3, the plaintiff is precluded from bringing a fresh suit in respect of the same cause of action. However, Rule 7 provides a saving clause, that the plaintiff may make an application before court for an order to set aside the dismissal of the suit, and the court may exercise its discretion in their favour, upon the plaintiff presenting sufficient cause or explanation for his/her non-appearance, at such terms as may be just in the case.

b. Section 3A of the *Civil Procedure Act* gives the court inherent power to make such orders as may be necessary for the ends of justice to be met, while Order 51 Rule 15 of the Civil Procedure Rules gives the court power to set aside any order made ex parte. The court's discretionary power should, however, be exercised judiciously, with the overriding objective of ensuring that justice is done to all the parties. That the court's discretion to set aside an ex parte ruling/ judgment is not restricted, but should be so exercised not to cause injustice to the opposite party. It is incumbent upon the party seeking the court's favor or discretion to adduce sufficient and plausible reasons that are demonstratable, and persuasive to the court. It is therefore necessary for party seeking reinstatement to show that there were sufficient reasons preventing them from appearing in court.

c. In the case of "Shah – Versus - Mbogo & Another [1967] 6A U7" the Eastern Africa Court of Appeal laid down the guiding principle in the exercise of this judicial discretion. The court's discretion to set aside an ex-parte order of the nature of a dismissal order is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error. That conversely, this discretion is not intended to assist a litigant who deliberately seeks to obstruct or delay the course of justice.

9. In the instant application, the Plaintiffs/Applicants contended that the matter was scheduled for hearing on 4th November, 2024. On the said 4th November, 2024, he was present in to teams virtual proceedings before the trial court at 9:00am and took time indication of 12:00pm in the absence of the Defendants. At the time of taking time indication, he indicated to the court that he had four witnesses who were present with him in his office. At exactly 11:50 AM, the said 4th November 2024, the Paul W. Magolo, counsel for the Plaintiff logged back in the platform ready to proceed with the hearing in the company of his witnesses. By around 12:15 pm, the deponent together with his witnesses were still at the lobby and had not yet been let in. Subsequently, he decided to go to physical court to find out why he was not being let in. Unfortunately he found out that the matter had already been dealt with in physical court in his absence and the Plaintiffs' case dismissed.

10. The 1st Defendant on the other hand argued that the Plaintiffs' advocates together with the Plaintiffs have failed to provide a justifiable reason for their non – attendance on 4th November, 2024 for hearing, despite the fact that time indication was given. The excuse provided is inexcusable for reasons that the Plaintiff's advocates themselves took time indication for 12:00 pm and was well aware that the hearing was to be conducted in open court given the fact that this was a land matter and it was common knowledge that these matters were heard in open court.

11. The Plaintiff's advocates were well aware of the practices of this Court that land matters were done in open court. The general principle that a mistake by the advocate should not be visited on a client did not apply in this case since no justifiable reason had been adduced to warrant this reinstate the suit.

12. I find that it is probable that the Applicants was telling the truth that his Counsels were logged into the Micro – soft teams virtual proceedings and that the Advocate also came to court. A bona fide mistake that is not unreasonable is a sufficient excuse within the meaning of Order 12 Rule 3(1) of the Civil Procedure Rules, and the mistakes of counsel ought not be visited upon the client.

Issue No. b). Whether there is a basis for the Court to exercise its discretionary power to set aside the orders and proceedings of the 4th November 2024 and reinstate this suit.

13. Under this sub title, the Honourable Court shall examine whether there is a basis for the Court to exercise its discretionary powers to set aside the orders and proceedings of the 4th November, 2024 and reinstate this suit. It is now settled law that setting aside the dismissal of suit and its subsequent reinstatement as envisaged under order 10 Rule 11 of the Civil Procedure Rules 2010 rests on the courts inherent powers under the equivalent of the provision of Section 3A of the *Civil Procedure Act*, Cap. 21. The same position was considered in the case of "Rawal while – Versus - Mombasa Hardware Limited [1968] EA 392", by the Court of Appeal of East Africa. The Court of Appeal of East Africa considered such exercise of the court's inherent powers and held that the court has jurisdiction to set aside the dismissal of a suit under that rule and subsequently order its reinstatement.

14. The legal basis for dismissal of suits for want of prosecution is the requirement of expediency in the prosecution of civil suits and can be found in the provision Article 159 (2) (b) of *the Constitution* that justice shall not be delayed. Equally, the provision of Section 3A of the *Civil Procedure Act*, Cap. gives this Honourable Court unlimited power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court.Under the provision Section 63 (e) of the same *Civil Procedure Act*, Cap. 21 which is the statutory basis for all interlocutory applications, this Honourable court is assigned the unfettered discretion where it is so prescribed, in order to salvage justice from defeat, to make such interlocutory orders as appear to the court to be just and convenient.

15. I am further guided by the decision of court in the case of "Belinda Muras & 6 Others – Versus - Amos Wainaina [1978] KLR" wherein Madan JA defined what constitutes a mistake as follows:-

> " A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because of a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate."

16. Similarly, in the case of "Phillip Chemwolo & Another – Versus - Augustine Kubede [1982-88] KLR 103" the court held that: -

> " Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit".

17. Moreover, in the case of "Martha Wangari Karua – Versus - IEBC Nyeri Civil Appeal No.1 of 2017" the Court of Appeal held that: -

> " The Rules of Natural Justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be."

18. The procedural underpinning to the above substantive provisions of *the Constitution* and the law under Order 17 Rules 1, 2 & 3 of the Civil Procedure Rules, 2010 which allows this Honourable Court on its own motion or on notice to the parties, where no action in a suit has been taken for one year to either have the suit set down for hearing or apply to have it dismissed for want of prosecution.

19. Whether in fact there is anything still outstanding in the suit as framed capable of going for trial upon its reinstatement? The answer to the question is equally in the affirmative, the genesis of this suit is hinged on a land brawl where justice can only be delivered if the suit is granted a chance to proceed for trial on its merits.

20. Further to the foregoing, I am of the considered view that the overriding objective of the provision Articles 50 & 159 (2) of Constitution 2010, Sections 1A & 1B of the *Civil Procedure Act*, Cap. 21 is to achieve substantive justice to the litigants. This court is obligated by *the constitution* and statutes to ensure fair hearing to all parties that approach it or come before it. That in light of this, I am of the view that the inconvenience to be suffered by the respondent as a result of reinstatement of this suit can be adequately remedied through an award of thrown away costs. The Court will award the said costs.

Issue No. C. Who bears the Costs of the Notice of Motion application dated 4th November, 2024.

21. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of "Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR" and "Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR", the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of "Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR", the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

22. In the present case, the Plaintiffs/Applicants shall have the costs of the Notice of Motion application dated 4th November, 2024.

VI. Conclusion and Disposition.

23. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, the Court arrives at the following decision and make below orders:-

    a. That the Notice of Motion application dated 4th November, 2024 be and is found to have merit and the same is hereby allowed in its entirety.

    b. That this Honourable Court be and is hereby pleased to set aside the orders and proceedings of the 4th November 2024, where the Plaintiffs case was dismissed and closed without the Plaintiffs being heard to enable the Plaintiffs to present their caser as required.

c. That the Plaintiffs' Advocates to pay a thrown away costs of Kenya Shillings ten Thousand (Kshs. 10, 000.00/=) each to the 1st and 2nd Defendants Advocates respectively before the next Court session.

d. That this matter be fixed for mention on the 24th March, 2025 to fix a fresh hearing date before Hon. Justice Olola.

e. That the costs of the application to be in cause.

It is so ordered accordingly.

RULING DELIVERED THROUGH THE MICROSOFT TEAM VIRTUAL MEANS, SIGNED A ND DATED AT MOMBASA THIS 7TH DAY OF MARCH 2025.

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HON. MR. JUSTICE L. L. NAIKUNI,

ENVIRONMENT AND LAND COURT AT MOMBASA

Ruling delivered in the presence of:

a. M/s. Firdaus Mbula, the Court Assistant.

b. Mr. Paul W. Magolo Advocate for the Plaintiffs/Applicants; and

c. M/s. Gitau holding brief for Mr. Gakuo Advocates for 1st Defendant/Respondent.

d. No appearance for the 2nd Defendant/Respondent.