Kibiwott v Tanui & 4 others (Environment & Land Case 50 of 2020) [2025] KEELC 4341 (KLR) (9 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4341 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 50 OF 2020

CK NZILI, J

JUNE 9, 2025

BETWEEN

SANIAKO N KIBIWOTT ..... PLAINTIFF

AND

STANLEY TANUI ..... 1ST DEFENDANT

JOHN TANUI KOSGEI (SUED AS THE ADMINISTRATOR OF THE ESTATE OF KIPTANUI KIMAGET) ..... 2ND DEFENDANT

THE LAND CONTROL BOARD, MARAKWET DIVISION .... 3RD DEFENDANT

THE COUNTY LAND SURVEYOR, ELGEYO MARAKWET ... 4TH DEFENDANT

THE COUNTY LAND REGISTRAR, ELGEYO MARAKWET . 5TH DEFENDANT

RULING

1. The court is asked to set aside its orders issued on 28/6/2022 and all other consequential orders. The grounds are set out on the face of the application dated 24/3/2023, and in a supporting affidavit of Saniako N. Kibiwott, whose swearing date is not indicated. Briefly, the applicant avers that the matter was coming up for hearing on 28/6/2022, only for his advocate on record, who has a medical condition, to be taken ill that morning. It is deposed that the advocate sent a message to the defendants' advocates on record, expressing his sickness and inability to attend court and hoped that he would get the communication re-laid to the court and accommodate him due to indisposition.

2. The applicant deposes that despite the foregoing efforts, the court was not persuaded to believe the state of the said advocate, she fault the advocate for communicating to the plaintiff not to attend court, though she had already partially testified. The applicant deposes that she should have been allowed to finish her testimony and close her case; otherwise, the dismissal of the case for non-attendance was unfair, drastic, and not in the interest of justice, to hear and determine a suit on its merits.

3. In addition, the applicant deposes that the suit is about attempts to be evicted by the 1st respondent, from title LR. Nos. Cherangany/Kapkanyor/33, 54, and 55. She avers that in the previous hearing dates of 7/7/2021 and 28/10/2021, she was present. The applicant deposes that on 20/10/2021, the defendants' counsel sought an adjournment, which was allowed, and the suit was set down for hearing on 17/11/2021, when she also appeared. Equally, the applicant deposes that on 28/6/2022, the advocate on record called her through a nephew, indicating that he was sick and would not be able to proceed, which information he told her had been communicated to the opposite parties' lawyers, as per annexed WhatsApp message marked SNK-5(a) and (b).

4. The applicant deposes that Mr. Bororio advocate was instructed to hold brief and seek for an adjournment, which application, unfortunately, was disallowed. The suit, according to the applicant, was dismissed with costs for non-attendance, paving the way for taxation of the court via a notice dated 9/9/2022, which taxation was done by a ruling dated 13/12/2022, and execution commenced without service of a certificate of costs or notice to show cause as per a proclamation annexed as SNK-7.

5. The application is opposed through a replying affidavit sworn by Stanley Tanui on 18/12/2023 on behalf of all the respondents. It is deposed that while it is true that when the matter came up, Mr. Bororio advocate held brief for Mr. Wanyama advocate, alleged to have been sick and had gone to the hospital, the file was placed aside till 1:00 pm, when the applicant failed to appear in court, hence, the court was asked to dismiss the suit for non-attendance, but not on account of the advocate's sickness.

6. The respondents depose that the court correctly observed that the applicant had not been attending court and had sought for several adjournments on 17/11/2021, 17/12/2021, 5/5/2022, and 6/6/2022, on top of failing to bring someone on board to testify on her behalf or amend the plaint, which are the reasons that had been used to seek for the said adjournments.

7. According to the respondents, the alleged instructions by counsel not to attend court are suspect since an adjournment would not have been obvious; otherwise, Mr. Bororio did not communicate to the court that the applicant had been advised not to attend court. The respondents depose that their advocates on record had not received any email or WhatsApp message explaining the predicament of Mr. Wanyama, advocate.

8. The respondents deposed that from 28/6/2022 to 27/11/2023, a period of one year and five months, the applicant did not do anything, did not contact her lawyer after 28/6/2022, to know the outcome, and has not, therefore, explained such an inordinate delay of 17 months; otherwise, it is apparent that the proclamation notice prompted her.

9. Similarly, the respondents depose that whereas the relief sought by the applicant is discretionary, her conduct before and after the dismissal order would not justify a favorable excise of discretion; otherwise, it is apparent that the she never intended to prosecute the suit. The respondents depose that the applicant has since subdivided the subject land title LR. No. Cherangany/Kapkanyor/54 into 12 subplots as per annexures JT-2 – 5, for parcel LR. Nos. Cherangany/Kapkanyor/336, 339, 341 and 345.

10. The issue calling for my determination is whether sufficient cause has been established for no-attendance to entitle the applicant to reinstatement of the suit for hearing on merits. This matter was commenced on 17/8/2020, regarding parcel LR. No. Cherangany/Kapkanyor/23, later subdivided into LR. Nos. Cherangany/Kapkanyor/54 and 55, where the plaintiff sought a permanent injunction and a declaration that the subdivisions and resultant parcels were fraudulently and illegally done. The 1st and 2nd defendants filed a joint statement of defense dated 21/10/2020, terming it as res judicata

due to ELC No. 16 of 2012 (OS), whose judgment was delivered on 17/9/2015, dismissing it. The defendants also termed the suit as time-barred.

11. The 3rd and 4th defendants filed a preliminary objection dated 6/11/2020 that the suit was time-barred and the plaintiff was guilty of laches. Through a ruling dated 21/3/2021, the court said the suit was not res judicata and the preliminary objection on time limitation was premature.

12. The court is now asked to set aside its ruling of 28/6/2022. The record shows that Mr. Bororio advocate told the court that Mr. Wanyama advocate, had called to inform him that he had been rushed to hospital and the file should, therefore, be placed aside. There was no request for an adjournment on account of sickness or non-availability of the applicant, since counsel had notified her that the matter would not proceed.

13. At 1.00 pm, the record shows that Mr. Kiarie advocate, told the court that both counsel and the applicant were not in court. Learned counsel Ms. Ghati for the 3rd and 4th defendants also echoed those sentiments. Learned counsel Mr. Bororio advocate told the court that his instructions were limited and urged that Mr. Wanyama advocate, who was unwell; be given a last chance. Learned counsel said that the applicant had not communicated on her absence, and that Mr. Wanyama should have known better.

14. The court, in its brief ruling, held that the case belonged to the applicant and not her counsel and she should have therefore; attended court to prosecute the suit. Given that there were no reasons for non-attendance and the history of the applicant not fulfilling the conditions set, the suit was dismissed on account of the absence of the applicant since the respondents were present and ready to proceed.

15. In Shah v Mbogo & Another [1957] EA 116, the court held that the discretion to set aside is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but not to assist a party who has deliberately sought whether by evasion or otherwise, to obstruct or delay the cause of justice.

16. In Julius Kibiwott Tuwei v Reuben Argut & 7 others [2022] eKLR, an adjournment had been sought on account of sickness of the plaintiff's counsel, Mr. Musungu advocate. The matter was placed aside for a medical report to be availed. It was not availed. There was also no communication that the advocate had informed his client not to attend court. In the absence of both, the suit was dismissed for non-attendance. The court said that sufficient cause or reason to warrant setting aside and reinstating the suit has to be given. The court cited Parimal v Veena as quoted in Wachira Karani v Bildad Wachira [2016] eKLR, that "sufficient" means adequate, enough, and that the party had not acted negligently or there was want of bona fide on its part, in view of facts and circumstances of the case, or the party cannot be alleged to have been acting diligently or remaining inactive.

17. The court said that in assessing whether or not there is sufficient cause, regard must be had that the object of the court is to do substantive justice to all parties concerned; the test being whether the applicant honestly and sincerely intended to remain present during the hearing. The court held sufficient cause is the cause for which the party could not be blamed for his absence. Again, it was observed that sufficient cause is a question of fact, and a party applying must demonstrate that he was prevented from attending court for a sufficient cause.

18. In Kibiwott (supra), the court observed that the applicant had relied on misinformation during the day of the dismissal and also in the application, which was a line of untruth, yet it is good practice to live by the truth and accept it even when it bites painfully. Just like in the instant case, in the Kibiwott case, no indication had been made that the learned counsel Mr. Wanyama advocate, due to sickness, had instructed his client not to attend court.

19. It is unfortunate that other than stating the nature of the medical condition, Mr.Wanyama advocate had, as in the grounds on the face of the application, not sworn an affidavit to confirm that or state that what he had informed Mr. Bororio advocate that morning was incomprehensive. Learned counsel listed the grounds on the face of the application but failed to add at the very least, as an officer of this court, valid details not on his sickness, but the events of the whole morning and after, especially on whether Mr. Bororio advocate notified him of dismissal and if he communicated the same to his client immediately and if so, why it took over 17 months to move the court. Having failed to do so, I find the explanation given by the applicant not convincing at all.

20. The applicant, instead of owning up to the mistake, is laying the blame on the court. The basis of faulting the court has to be laid. The court acted on the information and material laid before it by Mr. Bororio advocate. Learned counsel did not seek adjournment in the morning but asked that the file be placed aside. Learned counsel at 1:00 p.m, did not state that he had learnt that Mr. Wanyama advocate, had been put on sick leave by his doctors and was unable to attend court. Learned counsel could not as well explain where the applicant was.

21. Subsequently, the applicant has not attached the short message service or a printout showing that on 28/6/2022, he was called by her counsel and told not to attend court. A case belongs to the party. Not all mistakes of parties should be shouldered by advocates. A party must therefore follow up on her case. Evidence of a follow-up on the following day and or immediately has not been adduced. It took 17 months to move the court. Prior and past conduct of the applicant comes into play. It shows that she sat pretty for 17 months until a proclamation was served upon her. She behaved like a traffic beacon that only shines when there is light.

22. In Utalii Transport Co. Ltd v NIC Bank Ltd & Another [2014] eKLR, the court observed that it is the primary duty of a plaintiff to take steps to progress their case, since they are the ones who dragged the defendant to court. Expeditious disposal of court cases is a shared responsibility of both the court, parties and their advocates, as held in Gedion Sitelu Konchella v Daima Bank Ltd [2013] eKLR and Mobil Kitale Service Ltd v Mobil Oil (K) Ltd [2004] eKLR. A party cannot simply blame a lawyer without a reason. The applicant, as soon as it was practically possible, was expected to call her advocate to check on his health condition, inquire about her case and then plan on the next step but not take a whole 17 months as she did.

23. The conduct of the applicant shows that she was not diligent enough. The case was not dismissed on account of Mr. Wanyama advocate's indisposition. The case turned on why the plaintiff was not in court. The court cannot solely set aside the dismissal on an alleged sickness, which was not the reason for non-attendance by the applicant. The applicant's failure to constantly check the progress of her case, as held in Savings & Loan Ltd v Susan Wanjiru Muritu Nairobi HCC 397 of 2002, is what could cause the court to determine if to exercise the discretion based on sufficient cause shown.

24. In the circumstances, I agree with the respondents that the discretion to set aside the dismissal order must be based on sound reasons, grounds and judicial principles. The delay in seeking the reversal is not only inordinate but unexplained. The court is there to do justice to the parties. Therefore, I have to consider if justice can still be done to the parties despite the delay if I were to set aside the dismissal order.

25. The respondents have sworn on oath that the substratum of the suit has changed at the instance of the applicant during the pendency of the suit. They have attached official searches crtificates showing the subdivision of parcel LR. No. 54. That cannot be a mistake of counsel, but the applicant. The applicant has not refuted those grave allegations.

26. As held in Lucy Bosire v Kehancha Div. Land Dispute Tribunal & 2 others [2013] eKLR, a party has to respond to the blame placed on its doorstep. The delay of the case seems to work in favor of the plaintiff and to the detriment of the defendants. The sword of justice cuts both ways! He who comes to equity must come with clean hands. Delay defeats equity. From the pleadings, the parties herein and the subject matter have been before other courts. Litigation has to come to an end. The defendants' rights to a fair trial and expeditious disposal of their defense are equally sacrosanct.

27. I find no sufficient cause shown to disturb the dismissal order. It is confirmed. The application dated 24/3/2023 is dismissed with costs.

28. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 9TH DAY OF JUNE 2025.

In the presence of:

Court Assistant - Laban

Wanyama for the plaintiff present

Kiarie for the 1st and 3rd defendants

Chelagat present for A.G. for 3rd - 5th defendants present

HON. C.K. NZILI

JUDGE, ELC KITALE.