**Kiema v Ngugi & another (Environment & Land Case 680 of 2012) [2024] KEELC 566 (KLR) (6 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 566 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ENVIRONMENT & LAND CASE 680 OF 2012**

**OA ANGOTE, J**

**FEBRUARY 6, 2024**

**BETWEEN**

**GEORGE MUTUA KIEMA ........................................................................ PLAINTIFF**

**AND**

**EMBAKASI RANCHING COMPANY LTD .................................. 1ST DEFENDANT**

**JOSEPH MWAURA NGUGI .......................................................... 2ND DEFENDANT**

**RULING**

1. Vide the Motion dated 17th May, 2023, brought pursuant to the provisions of Articles 50 and 159 of the *Constitution*, Sections 1A, 1B, 3A, 3B, and 63 (e) of the *Civil Procedure Act* and Order 12 Rule 7 of the *Civil Procedure Rules*, 2010, the Applicant/Plaintiff seeks the following reliefs;

    i. That the Honourable Court be pleased to set aside the orders made on the 17th May, 2023 dismissing the suit for want of prosecution.

    ii. That the Honourable Court be pleased to reinstate the suit herein for hearing on its merits.

    iii. That the costs of this Application be in the cause.

2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of George Mutua Kiema, the Plaintiff/Applicant herein of an even date, who deposed that when the suit came up for hearing on 7th July, 2022, he was ready to testify but his previous Counsel informed him that it would be better if he pursued an out of Court settlement.

3. The Plaintiff deposed that the Counsel agreed to an out of Court settlement without his instructions leading to a fall out and him engaging new counsel; that his change of representation due to suspected collusion and insufficient representation has been a major cause of delay in the matter and that he is aware that a substantial amount of time passed before his Counsel on record received his file from his previous Counsel because they were still reconciling the outstanding legal fees that were unclear.

4. Mr Kiema deponed that he has always been skeptical about pursuing out of Court negotiations for fear of getting a raw deal; that his Counsel on record persuaded him to give negotiations a chance and it took a while before he issued instructions in this regard; that further, he preferred to be present during negotiations; that although he works and resides in Canada, he eventually got an opportunity to come to Kenya on 19th May, 2023 and that he was shocked when the Court dismissed his matter for want of prosecution.

5. According to Mr Kiema, he filed the suit in 2012 with the knowledge that he has an arguable case with high chances of success; that he has for this reason committed a lot of resources in legal representations in the hope of getting justice; that the dismissal of his suit has affected him both psychologically and emotionally and has left him exposed to losing his property; and that notwithstanding the lapse of time, he is willing and ready to prosecute the suit to its logical conclusion.

6. The 1st Defendant filed a Replying Affidavit in which he deponed that the Applicant has consistently shown indolence and lack of interest in prosecuting his case herein which had stayed in court for over 11 years before its dismissal.

7. It was deposed by the 1st Defendant that to the best of his knowledge, the Plaintiff/Applicant did not appear in Court for the several times the matter came for hearing and, therefore, he has not been ready to prosecute his case as he alleges in the application.

8. It was deponed that it is true that the 2nd Defendant had engaged him to settle the matter out of court and that on three occasions, they agreed to have a tripartite site visit involving all the parties with the Plaintiff being required to point out the property he was alleging to have been allocated by the 2nd Defendant.

9. According to the deponent, on the said occasions, the Applicant failed to honour the meeting or to send a representative causing the site visit to be called off; that on one occasion, the Plaintiff sent a representative and when parties went for a site visit, he was unable to point out the property he was allegedly allocated by the 2nd Defendant.

10. In response to the Application, the 2nd Defendant, through its Director, Walter Waireri Kigera, deposed that since the inception of the suit, the Plaintiff has been indolent and uninterested in prosecuting the same; that the matter was in Court for over 11 years before its eventual dismissal and that as informed by his Counsel, the Plaintiff migrated to Canada several years ago and has not appeared in court to prosecute his case since he re-located.

11. He deponed that the Plaintiff has changed advocates on several occasions and that at the 2nd Respondent's instance, the parties herein were requested to attempt an out of court settlement as they were keen to ensure both the Plaintiff and the 1st Defendant got their entitlement to land.

12. According to Mr Kigera, the suit property legitimately belongs to the 1st Defendant who has already been issued with the title documents, namely, the Lease and the Certificate of Lease by the Ministry of Lands and Physical Planning and that if the dismissed suit is reinstated, the 1st Defendant will suffer unnecessary prejudice which he has already suffered for 11 years. Parties filed submissions which I have considered.

**Analysis and Determination**

13. Having considered the Motion, responses and submissions, the sole issue for determination is whether there are sufficient reasons to warrant the reinstatement of the suit. Order 12 Rule 7 of the *Civil*

*Procedure Rules*, 2010 gives this Court discretion to reinstate a suit that has been dismissed and stipulates as follows;

> " Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."

14. It is trite that the exercise of this discretion is not intended to aid a person who deliberately seeks to obstruct justice but to avoid hardship resulting from an accident, or excusable mistake or error. This position was stated in the case of *Shah vs Mbogo & Another* (1967) EA 116, where the East African Court of Appeal stated as follows:

> " The discretion to set aside an exparte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice."

15. It has been held that when a Court is called upon to exercise discretion, it must do so judiciously. The Court of Appeal expressed this in *Patriotic Guards Limited vs James Kipchirchir Sambu* [2018] eKLR stating thus;

> " ...It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit."

16. As appreciated by the Court in the case of *Racheal Njango Mwangi (Suing as Personal Representative of the Estate of Mwangi Kabaiku) vs Hannah Wanjiru Kiniti & Another* [2021] eKLR, the threshold for setting aside a Court order such as that of dismissal sought herein is proof of sufficient cause. The Court noted as follows:

> " For the Court to exercise its discretion in favour of the Applicant, he or she has to satisfy it that there is sufficient cause or reason to warrant it to be put into use in setting aside the order of dismissal and subsequently reinstate the suit. Sufficient Cause was defined by the Supreme Court of India in Parimal vs Veena which was cited with approval in the case of Wachira Karani v Bildad Wachira [2016] eKLR. In the case, the said Supreme Court stated that:-
>
> "sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously"

> The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgment impugned before it. The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause."

17. In the present case, the Plaintiff's suit was dismissed on 17th May, 2023. On the aforesaid date, the matter was scheduled for hearing. Counsel for the Plaintiff informed the Court that the parties were pursuing an out of court settlement. Counsel further informed the Court that the Plaintiff was not present in Court.

18. The Court declined to grant an adjournment noting the age of the matter and the fact that the parties had on several occasions intimated that they were undertaking out of Court negotiations. Noting that the Plaintiff was absent, and no good reason had been given for his absence, the Court dismissed the suit for want of prosecution.

19. Considering the Plaintiff's Affidavit, it is noted that he has not given any reason for his failure to attend Court on 17th May, 2023. He only asserts that his Counsel persuaded him to attempt out of Court negotiations. The Applicant states that when the matter was due for hearing on 7th July, 2022, he was ready to proceed but his previous Counsel attempted to persuade him to pursue an out of Court settlement and went ahead and agreed on the same without instructions leading to their falling out.

20. According to the Plaintiff, the laxity in the prosecution of the case was occasioned by change of Counsel and the exchange of the file between the outgoing and incoming Counsel, and the period of time he took to issue instructions with respect to negotiations. Further, he deponed that he preferred to be present during negotiations.

21. The Court has considered the record. This matter was initiated by way of a Plaint filed on 8th October, 2012 wherein the Plaintiff sought, among others, a declaration that he is the lawful owner of Plot 1361 a portion of L.R No 10904/4 Nairobi.

22. The Plaint was filed simultaneously with a Motion seeking injunctive orders. The application partly succeeded vide a Ruling dated 7th June, 2013. The matter was before the Court on 21st April, 2016 wherein the Court directed the parties to take a date for pre-trial conference at the registry.

23. The matter was fixed for mention before the Deputy Registrar on 12th March, 2018. There was no appearance by any party on the aforesaid date. On 9th May, 2019, the parties intimated to the Court that they were pursuing an out of Court settlement and the matter was scheduled for a mention on 26th July, 2018.

24. On 26th July, 2018, Counsel for the Plaintiff indicated that he had just taken conduct of the matter. He sought leave to serve the Defendants who were absent. The matter was mentioned on 20th September, 2018 before the Deputy Registrar where Counsel indicated that the Plaintiff had complied with the pre-trial directions.

25. Taking into account the foregoing narration, there can be no doubt that that the Applicant took a laissez-faire approach to the prosecution of his suit.

26. If indeed the Plaintiff was not keen on negotiating, he should have taken strides to ensure timely prosecution of his suit. Whereas the Plaintiff seeks to lay blame on his Counsel, this is not backed up by any evidence. In any event, a case does not belong to an Advocate but his client.

27. The Plaintiff's admissions of constant change of representation and delay in issuing instructions further points to an attitude of lack of urgency and runs contra to the duty of parties to assist the Court to adjudicate matters expeditiously. This was expressed by the Court in *Gideon Sitelu Konchella vs Daima Bank Limited* [2013] eKLR which cited the case of *Mobil Kitale Service Limited vs Mobil Oil Kenya Limited*, HCCC No. 205 of 1990 (unreported) which stated as stated:

> "It is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice by delay would be a thing of the past. Justice would be better served if we dispose of matters expeditiously."

28. Although dismissal of a suit is a draconian order which has the effect of driving away a litigant from the seat of justice, a litigant is equally expected to be vigilant in pursuing and ensuring that his case is prosecuted without undue delay and with all fairness to the other party. As expressed by the Court in *Ecobank Ghana Limited vs Triton Petroleum Company Limited (in receivership) & Others* Civil Case No. 24 of 2009 (UR) ;

> "Ultimately, it may as well be customary that courts should in the interest of justice lean towards according parties to litigation the opportunity to ventilate their cases before eventual determination as opposed to what has been termed as "draconian" the move to dismiss suits precipitously. However, in the face of a Constitution that expressly advocates for justice to all and which must be dispensed without delay, and in the face of overriding principles alluded to above, the time for change of the customary mind set is here. Litigants should therefore stand guided that they must embrace themselves to up the gear, for speed and vigilance will now be the trend. The wheels of justice will no longer be turning on the thrust of a team engine."

29. The Court is not convinced that sufficient cause has been established warranting its discretion in favour of the Plaintiff. Ultimately, the Court finds that the application dated 17th May, 2023 is unmerited and the same is dismissed with costs.

30. For avoidance of doubt, the suit stands dismissed as ordered on 17th May, 2023.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 6TH DAY OF FEBRUARY, 2024.**

**O. A. ANGOTE**

**JUDGE**

In the presence of;

Mrs Wambui holding brief for Mr. Munduko for Plaintiff/Applicant

No appearance for Defendant

Court Assistant - Tracy