



Thube v Njuguna & 2 others (Environment & Land Case 321 of 2018) [2024] KEELC 3621 (KLR) (11 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3621 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 321 OF 2018**

OA ANGOTE, J

APRIL 11, 2024

BETWEEN

HANNAH NJERI THUBE PLAINTIFF

AND

NGUGI NJUGUNA 1ST DEFENDANT

**DORCAS NAMBALANYA NANJERO T/A NANJERO & COMPANY
ADVOCATES 2ND DEFENDANT**

DAVID GIKARIA 3RD DEFENDANT

RULING

Introduction

1. Vide the Notice of Motion dated 13th June, 2023, brought pursuant to the provisions of Sections 1A, 1B, and 3A of the *Civil Procedure Act*, Order 12 Rule 1 and Order 7 and 51 Rule 1 of the Civil Procedure Rules, 2010, the Plaintiff/Applicant seeks the following reliefs;
 - a. This Honourable Court be pleased to set aside the orders of this Court made on 2nd May, 2023 and re-instate the Plaintiff's/Applicant's suit herein filed on the 23rd July, 2018.
 - b. This Honourable Court be pleased to extend the time within which the Plaintiff herein may set down the suit herein for hearing.
 - c. This Honourable Court be pleased to give directions as to an early hearing date for the Plaintiff's suit.
 - d. Costs of this Application be provided for.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavits of Hannah Njeri Thube, the Applicant herein of an even date, who deposed that the suit was dismissed



- on 2nd May, 2023 for non-attendance and want of prosecution and that the non-attendance by herself and her Advocate was un-intentional and was as a result of mis-diarization.
3. The Plaintiff deposed that her Counsel had noted in the Diary and on the file that the matter was coming up for hearing on 12th May, 2023 as opposed to 2nd May, 2023 and that neither she, nor her Advocates were aware of the dismissal and only learned of the same in the cause list of 12th May, 2023.
 4. Ms Thube deponed that she stands to irreparably suffer if the matter is not heard on its merits as it is a land matter; that she is, and has always been willing and ready to prosecute the matter to its full conclusion and that the Defendants will not be unduly prejudiced if the orders are granted.
 5. The Motion was also supported by the Affidavit of Nephath Momanyi Kiboi, the Advocate with conduct of the matter on behalf of the Plaintiff, who deponed that the matter came up for hearing on 12th October, 2022 and was given another date for 2nd May, 2023; that by that time, he had not acquired an office diary for the year 2023 and that when the diary for 2023 was acquired, the clerk entered the date as 12th May, 2012 instead of 2nd May, 2023.
 6. Counsel deponed that when the matter came up on 2nd May, 2023, neither him nor the Plaintiff was available as they were not aware the matter was coming up for hearing; that the mistake was inadvertent and unintentional and that in the previous hearing, the Plaintiff has always been ready to proceed.
 7. There was no response to the Application. No submissions were filed.

Analysis and Determination

8. Having considered the Motion, 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 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.”
9. 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”.
10. 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 as follows;

“...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.”

11. 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 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.”

12. In the present case, the Plaintiff’s suit was dismissed on 2nd May, 2023. On the aforesaid date, the matter was scheduled for hearing. Neither the Applicant nor her Counsel were present. The Court noted that the date was given in Court by consent of the parties.
13. The Court thereafter dismissed the matter for non-attendance and want of prosecution. The dismissal of the Plaintiff’s suit aforesaid triggered the present application. The question that lends itself to the Court is whether the reasons advanced by the Applicant amount to ‘sufficient reason’ to justify the exercise of the Court’s discretion in her favour.
14. The Applicant states that their failure to attend Court was as a result of mis-diarization of the matter by counsel. The Plaintiff’s counsel adduced into evidence an excerpt of the diary for 12th May, 2023 which indicates that the matter had been listed as due for hearing therein. This is not controverted.



15. The Court has also considered the record. This matter was initiated by way of a Plaint filed on 17th July, 2018 seeking among others, a declaration that the Plaintiff is the rightful owner of the suit property and injunctive orders restraining the Defendants from interfering with the suit property. The Plaint was filed simultaneously with a Motion seeking injunctive orders.
16. The Motion was dismissed on 22nd January, 2019 and the matter moved to the pre-trial stage. When the matter came up for directions to confirm if pre-trial directions had been complied with on 22nd February, 2019, the Plaintiff had complied whereas the Defendants had not. The matter was next mentioned on the 7th October, 2019 wherein the Court scheduled the matter for hearing on 29th April, 2020.
17. On 29th April, 2020, none of the parties appeared and the Court rescheduled the matter for hearing on 1st February, 2021. On the said date, the Plaintiff intimated that the 3rd Defendant's Counsel was un-available and he sought for another date. The matter was scheduled for 21st October, 2021. On 21st October, 2021, the matter did not proceed on account of the 2nd Defendant who indicated that he had not filed documents and witness statements. Counsel for the Plaintiff was ready to proceed.
18. The Court granted the 2nd Defendant the last adjournment and leave to file the documents. The matter next came up for hearing on 4th April, 2022 and 12th October, 2022. The matter was adjourned on both occasions. First, at the instance of the 2nd Defendant, and next, at the instance of the Court upon the realization that the 3rd Defendant had not been informed of the hearing date. Counsel for the Plaintiff intimated he was ready to proceed in both instances.
19. The above narrative supports the Plaintiff's assertion that she has always been ready and willing to prosecute the matter. It is further noted that the application was filed within about a month of the dismissal of the suit. The Court does not consider the delay inordinate.
20. In view of the foregoing, the Court finds that this is a matter deserving of its discretion in favour of the Plaintiff/Applicant. The Court is not convinced that any prejudice will be occasioned to the Defendants by the reinstatement of the suit. Indeed, the Defendants did not respond to the application and there is no basis upon which the Court can conclude that they will be prejudiced by the reinstatement.
21. The upshot of the foregoing is that the application dated 13th June, 2023 is found to be merited. The same is allowed in the following terms:
 - i. The Orders of this Court made on 2nd May, 2023 be and are hereby set aside.
 - ii. The Plaintiff's suit is hereby reinstated.
 - iii. Costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 11TH DAY OF APRIL, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Kiboi for Plaintiff/Applicant

Ms Muchocho for Mugalo for 2nd Defendant



Court Assistant: Tracy

