



**Bargoge & another v Karuiru & another (Environment & Land Case
292 of 2018) [2024] KEELC 4007 (KLR) (2 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4007 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 292 OF 2018**

LA OMOLLO, J

MAY 2, 2024

BETWEEN

RONALD ROTICH BARGOGE 1ST PLAINTIFF

CAROLINE JEMUTAI KIPTOON 2ND PLAINTIFF

AND

JOHN NDUNGU KARUIRU 1ST DEFENDANT

ELIUD MUGO KARUIRU 2ND DEFENDANT

RULING

1. This ruling is in respect to the Applicants Chamber Summons application dated 7th September, 2023. The said application is expressed to be brought under Article 159 (2) (d) of *the Constitution*, Section 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Order 51 rules 1 and 15 of the Civil Procedure Rules 2010, Rule 3 of the High Court (Practice and Procedure) Rules, Rule 16 and 17 of the High Court (Organization and Administration) (General) Rules, 2016 and all enabling provisions of the Law.
2. The application seeks the following orders:
 - a. Spent
 - b. That this Honourable court be pleased to set aside its orders made on 27th July 2022 dismissing the Plaintiff's suit with costs and reinstate the same for hearing and determination on merit.
 - c. That this honourable court be pleased to stay the taxation of the party and party bill of costs scheduled on 14th September 2023 pending the hearing and determination of this application.
 - d. That upon reinstating the Plaintiff's suit, the same be set for hearing on priority basis.
 - e. That costs of the application be provided for.



3. The application is based on the grounds on its face and supported by the affidavit sworn on 7th September 2023 by one of the applicants, one Caroline Jemutai Kiptoon.

Factual Background.

4. The suit was instituted vide a Plaint dated 10th September, 2018. The Plaintiffs seek the following orders:
 - a. A declaration that the Defendants' alterations of the boundaries of those parcels known as Njoro/Ngata Block 8/167 (Karuiru) and Njoro/ Ngata Block 8/168 (Karuiru) and amendment of the Registry Index Map is illegal null and void.
 - b. An Order reversing the alterations of the boundaries of those parcels known as Njoro/Ngata Block 8/167 (Karuiru) and Njoro/Ngata Block 8/168 (Karuiru) and amendment of the Registry Index Map.
 - c. A permanent injunction restraining the Defendants either by themselves, their agents, servants, employees, or otherwise howsoever from dealing with all or any portion of those parcels of land known as Njoro/Ngata Block 8/167 (Karuiru) and Njoro/Ngata Block 8/168 (Karuiru) in any manner whatsoever detrimental to the interests of the Plaintiffs.
 - d. General damages for trespass.
 - e. Ksh 220,000/= being the costs of reinstating the perimeter wall.
 - f. Mesne profits.
 - g. Costs of this suit with interest.
 - h. Any other orders that the court may deem just and fit to grant.
5. This suit first came up in court on 23rd October, 2023 and the Court directed that the application be heard by way or written submissions.
6. On 27th November, 2023, both parties confirmed having filed submissions and the matter was then reserved for ruling.

Applicants' Contention.

7. The 2nd Plaintiff/Applicant deposes that on 12th October, 2018, they filed this suit against the Defendants seeking various reliefs and orders and that on 15th November, 2018, the Defendants filed their defence.
8. She deposes that it is within her knowledge that on 20th February, 2019, the matter was referred to mediation having been served with a notice of referral to mediation. She deposes that it is within her knowledge that the mediation failed to solve the issues between the parties herein and the matter was referred back to the trial court. She deposes that the mediator was to file a report to the trial court.
9. She deposes that since then, they have been waiting for further communication from the court which has not been forthcoming. It is her further deposition that on 29th August, 2023 their advocate on record was served with an order that the Plaintiffs' suit had been dismissed for want of prosecution with costs to the Defendants.



10. It is her deposition that they have since learnt that on 27th July, 2022 the matter came up for Notice to Show Cause why the suit should not be dismissed in the presence of the counsel for the Defendants and in the absence of the counsel of the Plaintiffs.
11. She deposes that it is within her knowledge that they have never and were nor served and neither has their advocate on record served with the said Notice to Show Cause why the suit should not be dismissed.
12. She deposes that had they been served with the Notice to Show Cause why the suit should not be dismissed, they could have attended and their matter could not have been dismissed.
13. It is her deposition that it is unfair for their suit to be dismissed without them being issued with a Notice to Show Cause and that this denied them a chance of being heard.
14. She deposes that the Defendants have the order dismissing the Plaintiffs suit, they have embarked on fencing on a portion of the Plaintiffs land based on the Defendants alterations of the boundaries of the suit parcels of land and they have started dealing with the parcels of land in a manner that is prejudicial to them.
15. She deposes that based on the impugned order dismissing their suit with costs, the Defendants have drawn and filed a party and party bill of costs dated 25th August, 2023 which has been fixed for taxation on 14th September, 2023.
16. She also deposes that it is against the principles of natural justice for a party to be driven out of the seat of justice unheard and that it is only fair that the order issued by this honourable court on 12th August, 2022 be set aside, the matter reinstated for trial and the taxation set on 14th September 2023 be stayed pending the hearing and determination of this application.
17. It is her deposition that the application has been brought timeously after being served with the order and party and party bill of costs and the respondents will not suffer any prejudice if the orders sought are granted.

Respondent's Response.

18. In response to the application, the Respondent filed a replying affidavit sworn by Naftali Rubua Ngure. He deposes that he is an advocate of the High Court of Kenya in conduct of this matter on behalf of the Defendants.
19. He deposes that the application lacks merit and it is an abuse of the process of court. He deposed that after mediation failed, the matter was referred back to court on 14th January, 2020.
20. He further deposes that the Plaintiffs did not take any steps to prosecute the matter thereafter and the court on its own motion on 15th June, 2022 served them with a Notice to show Cause why the matter should not be dismissed. He deposes that as at 15th June, 2022, the file had remained dormant for at least two and a half years.
21. It is his deposition that the suit was dismissed for want of prosecution on 27th July, 2022 and the present application has been brought one year and two months after the dismissal. He deposes that the total time that the Plaintiffs have remained indolent with no steps taken to prosecute the matter is therefore three years and eight months.
22. He deposes that no plausible reason has been given to explain why a party that purports to be interested in prosecuting the suit remained indolent for such a lengthy period of time. He also deposes that



although they appear for the Defendants, they had always taken a pro-active role in having the matter prosecuted as the Plaintiffs either failed to fix dates or failed to attend court both in this matter and in mediation proceedings.

23. He deposes that it is also strange to suggest that the court process server chose to serve only them with the Notice to show cause but failed to serve the Plaintiffs' counsel.

Issues for Determination.

24. The Plaintiffs/Applicants filed submissions on 10th November, 2023 and they identify the following issues for determination:
- a. Whether the Plaintiff's application dated 7th September, 2023 is merited?
 - b. Who should bear the cost?
25. They submit that the application before the court seeks to have the orders issued on 27th July, 2022 dismissing the Plaintiffs' suit to be reinstated and consequently set aside the taxation that arose from the orders therein.
26. They rely on the judicial decisions in *Wachira Karani v Bildad Wachira* [2016] eKLR, *Philip Chemowolo & Another v Augustine Kubende* [1986] KLR, *David Bundi v Timothy Mwenda Muthee* [2022] eKLR, *Gold Lida Limited vs NIC Bank Limited & 2 others* [2018] eKLR, *Harrison Wanjohi Wambugu vs Wairimu Chege & Another* [2013] eKLR and *Abdirahman Muhumed Abdi vs Safi Petroleum Products Limited & 6 others* [2011] eKLR.
27. The Applicants submit that they were not served with a Notice to Show Cause why their suit should not be dismissed. They submit that it is against the principles of justice for a party to be condemned unheard.
28. They submit that when mediation failed to solve the issues between the parties, the matter was referred back to court and the mediator was to file a report to the trial court. They submit that the Plaintiffs waited for further communication from the court concerning the matter which never came. They further submit that their advocate on record was never served with the said Notice to Show Cause.
29. They submit that the failure of the Plaintiffs to attend court on the date fixed for hearing of the Notice to Show Cause was not attributable to the Plaintiffs but rather was due to failure to effect service of the said Notice to Show Cause to the Plaintiffs and their advocates on record.
30. They further submit that dismissing the suit is tantamount to contravention of the Applicants constitutional right to a fair hearing anchored in Article 50 (1) of *the Constitution* of Kenya 2010. They submit that it is a right that cannot be taken away under any circumstances irrespective of the nature of the matter under consideration and it cannot be sacrificed at the alter of procedural technicalities regardless of the situation or the hopelessness of the matter at hand.
31. The Applicants submit that it is also evident from the court records and from the replying affidavit of the Respondents that it was only the Respondents who were served with the Notice to Show Cause. They submit that at paragraph 11 of Respondents replying affidavit, they admit that it was only them who were served with the notice to show cause. They submit had they been served with the said Notice to Show Cause, they would have attended court and responded accordingly.
32. The Applicants submit that the Plaintiffs' delay to move forward with the case was attributable to the delay for further communication from the court which was not forthcoming. They submit that on



- 29th August, 2023, the Plaintiff's advocate on record was served with an order that the Plaintiff's suit was dismissed for want of prosecution with costs.
33. They submit that they came to learn of the Notice to Show Cause and also learnt that in the presence of counsel for the Defendants and in the absence of counsel for the Plaintiffs the matter was mentioned for Notice to Show Cause on 27th July, 2022.
 34. They submit that had the Plaintiffs/Applicants been served immediately with the order dismissing their suit, they could have moved accordingly. They submit that they were condemned unheard and that is prejudicial to their rights as envisaged in *the Constitution* under Article 50. The Applicants also submit that there is need to reinstate the suit so that the Plaintiffs' case may be heard and determined and also add that the Defendants/Respondents stand to suffer no harm on the reinstatement of the suit.
 35. The Applicants submit that they are desirous of prosecuting their suit and have it determined on merit as the issues raised in the plaint have not been determined.
 36. In their submissions, the Applicants reiterate that they became aware of the said orders of dismissal when they were served with the orders on 29th August, 2023 and a taxation notice on 6th September, 2023 and that these prompted them to file the instant application on 8th September, 2023.
 37. They submit that that the application is merited and there is no reason why they should be denied costs of this application.
 38. The Defendants/Respondents filed submissions on 23rd November, 2023. They submit that the court served notice upon counsel for the Applicant. They submit that that it is not a requirement in law that a notice of dismissal of suit is served, but rather it suffices if notice is given for example through the cause list as was in the case herein.
 39. The Respondents rely on the judicial authority of *Fran Investments Limited vs G4S Security Services Limited* [2015]. They submit that they have demonstrated that the total time that the Plaintiffs have remained indolent with no steps taken to prosecute the matter is three years and eight months and that the delay is inordinate and inexcusable and no sufficient reasons has been advanced for the delay.
 40. The Respondents submit that the court's discretion should not assist a person who deliberately seeks to obstruct or delay the course of justice. They rely on the decisions of *Richard Nchapai Leiyangu vs IEBC & 2 Others* and *Ronald Mackenzie v Damaris Kiarie* [2021] eKLR.
 41. The Respondent also submits that it is in doubt that the prayers sought are discretionary in nature and that the conduct of a party is key in determining whether the court will exercise its discretion in his favour. On this point they rely on the judicial decision of *Ferruz Omar Mahendan & 4 others v Ahmed Mohamed Honey* [2016] eKLR.
 42. The Respondent submit that in the unlikely event that the court is inclined to allow the application, they pray for throw away costs of at least Ksh 50,000/= to be paid to the Respondents. They buttress this by relying on the judicial authority of *Catherine Kigasia Kivai v Ernest Ogesi Kivai & 4 others* [2021] eKLR and pray that the court finds that the application is without merit and dismiss it with costs.

Analysis and Determination.

43. I have considered the application and the affidavit in support of it, the replying affidavit and the submissions filed. In my view, the following issues arise for determination:



- a. Whether the Application dated 7th September, 2023 is merited?
- b. Who should bear the cost?

A. Whether the Application dated 7th September, 2023 is merited?

44. The Plaintiffs/Applicants seek orders of reinstatement of the suit that was dismissed for want of prosecution and further seek orders staying taxation of party and party costs.
45. Plaintiffs/Applicants claim that the matter was referred to mediation and that they subsequently waited for communication from the court and that that communication was not forthcoming.
46. It is also the Plaintiffs/Applicants claim that the matter came up for Notice to Show Cause why the suit should not be dismissed on 27th July, 2022 in their absence and in the presence of the counsel for the Defendants/Respondents. The Plaintiff's/Applicants claim that they were never served with the said Notice to Show Cause why the suit should not be dismissed thus they did not attend court when the Notice to Show Cause came up.
47. The Defendants/Respondents on the other hand state that after mediation failed, the matter was referred back to court on 14th January, 2020 and the Plaintiffs/Applicants did not take any steps to prosecute the matter.
48. The Defendants/Respondents state that the court on its own motion on 15th June, 2022 served them with a Notice to show Cause why the matter should not be prosecuted. They further state that as at 15th June, 2022, the file had remained dormant for at least two and a half years. The Defendants/Respondents state that the suit was dismissed for want of prosecution on 27th July, 2022 and the present application has been brought one year and two months after the dismissal.
49. The decision of whether to or not to allow an application for setting aside judgment or an order for dismissal of a suit due to non-attendance of a Plaintiff is within the wide discretion of the court. This discretion has to be exercised judiciously, as was stated the judicial decision of Shah vs Mbogo (1979) EA 116 and quoted with approval in John Mukuha Mburu v Charles Mwenga Mburu [2019] eKLR, where that court held thus:

“.....this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.”

50. For the Court to exercise its discretion in favour of the Applicants, they have to satisfy the court that there is sufficient cause or reason to warrant it to exercise the discretionary powers in their favour. In this case that is the discretionary power to set 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 judicial decision of Wachira Karani v Bildad Wachira [2016] eKLR. In the judicial decision, 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." (Emphasis is mine) 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"

51. The court takes cognisance that the Plaintiffs dragged the Defendants to court yet it appears that the Defendants have been more interested in following up on the progress of the matter. The Plaintiffs/Applicants inaction subsequent to the mediation outcome cannot be attributed to the court.
52. Once a matter is referred to mediation, parties are required to attend mediation. The outcome of mediation is either that the mediation is successful in which case the mediation settlement agreement is adopted as an order of the court. Should it fail, the matter is referred to court and proceeds to hearing.
53. I am unable to make sense of the report that they Plaintiffs/Applicants were waiting to receive from court. Supposing that there was indeed a report to filed by the mediator, whose duty was it to find out the progress of such report?
54. It is indeed true that mediation failed and the court record shows that it was referred back to court on 15th January, 2020. It is also true that the Plaintiffs did not take any steps to prosecute the suit and as a result, the court on its own motion on 14th and 15th June, 2022 served parties with a Notice to show Cause why the matter should not be dismissed. It is also true that as at 15th June, 2022, this suit had remained dormant for at least two and a half years.
55. It is important to add that the notice to show cause is dated 27/5/2022. It gave notice for hearing of the notice to show cause on 27/7/2022. The firm of Konosi and Company Advocates who were on records for the plaintiffs received the notice on 15/6/2022.
56. The court record shows that on 27/7/2022. Counsel for the Plaintiffs was absent during the hearing of the notice to show cause while counsel for the Defendants was present. The court on being satisfied that counsel for the plaintiff had been duly served with the notice to show cause, proceeded to dismiss the suit for want of prosecution.
57. This court is not convinced that the Applicants/Plaintiffs were not aware that the matter was coming up in court for Notice to Show Cause. The plaintiffs/Applicants were represented by Konosi and Company Advocates which law firm received the notice.
58. As it were, the plaintiffs/Applicants have failed to demonstrate that they are deserving of the discretionary powers of this court. It is unfair to have a suit looming over the head of a party who has been dragged to court by another while that other party remains disinterested. Justice delayed is justice denied. This holds true for all parties to a suit.

B. Who should bear the cost?

59. On the question of costs of the application, the general rule is that cost shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court for good reason, directs otherwise. This was the holding in *Hussein Janmohamed & Sons vs Twentsche Overseas Trading Co. Ltd* [1967] EA 287.



Disposition.

60. Consequently, I issue following orders:

- a. The Plaintiffs/Applicants application dated 7th September, 2023 is hereby dismissed.
- b. The Defendants/Respondents shall have costs of this application.

61. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 2ND DAY OF MAY 2024.

L. A. OMOLLO

JUDGE

In the presence of: -

No appearance for the Plaintiffs/Applicants

No appearance for the Defendants/Respondents

Court Assistant: Mr. Joseph Makori.

