Maina v Gatuguta & 2 others (Environment and Land Appeal E047 of 2023) [2024] KEELC 6673 (KLR) (11 July 2024) (Ruling)

Neutral citation: [2024] KEELC 6673 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL E047 OF 2023

MD MWANGI, J

JULY 11, 2024

BETWEEN

JAMES MUNGA MAINA .... APPELLANT

AND

JOSEPHINE WANJIKU GATUGUTA .... 1ST RESPONDENT

HANNA WAITHERERO GATUGUTA .... 2ND RESPONDENT

PETFRIEND AUCTIONEERS .... 3RD RESPONDENT

(In respect of the Appellant's application dated 21st March, 2024)

RULING

Background

1. The Applicant's application dated 21st March 2024 seeks for orders that;
   a. The Honourable Court be pleased to set aside the orders of 30th November, 2023 and reinstate the application for the enlargement dated 21st November, 2023.
   b. This court be pleased to review and reinstate the application herein and fix the same for mention
   c. Costs of the application be provided for.
2. The application is premised on the grounds on the face of it and is further supported by the affidavit of one Kuria Muchoki, the Applicant's counsel, deponed on the 21st March, 2023. The application was opposed by the Respondents.

Submission by the parties

3. The court directed that parties canvass the application dated 21st March 2024 by way of written submissions. Both parties complied. The Applicant's submissions are dated 28th June, 2024 whereas the Respondents' submissions are dated 27th June, 2024.

4. Parties highlighted their submissions on the 1st July, 2024. The Applicant's counsel submitted that they seek to reinstate the application which was dismissed for want of prosecution for the reasons that the Applicant should not be sent away from the seat of justice for the mistake of counsel. He urged the Court not to visit the mistake of his Advocate on him.

5. The Applicant further argued that under Article 159 of the *Constitution* , this court should strive for substantive justice. It is draconian to deny the Applicant the right to prosecute his application on its merit. Lastly, the Applicant submitted that the Respondents will not suffer any prejudice if the application is reinstated and considered on its merits. He therefore prayed that the application be allowed as prayed.

6. Counsel for the Respondents submitted that the application was an academic exercise since execution has already happened. Again the application was brought many months after the application that is sought to be reinstated was dismissed without any reasonable explanation for the delay.

7. The Respondents vilified the Applicant for abusing the process of Court. He stated that the Applicant had filed numerous applications in a bid to avoid paying the decretal amount.

Issues for determination

8. I have carefully considered the application as presented and the submissions made by counsel for both the Applicant and Respondents. In my view, the only issue for determination is whether the application herein is merited to warrant the exercise of the Court's discretion to reinstate the dismissed application.

Analysis and determination

9. Reinstatement of a suit is at the discretion of the court, which discretion ought to be exercised in a just manner, as was held in *Bilha Ngonyo Isaac v Kembu Farm Ltd & Another & Another* [2018] eKLR, which echoed the decision of the court in *Shah v Mbogo & Another* (1967) EA 116, where the court stated that;

> "The discretion is intended to so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist the person who has deliberatively sought whether by evasion or otherwise to obstruct or delay the course of justice."

10. The factors taken into account or into consideration for the purpose of reinstatement of suits are numerous, and were addressed in the case of *Ivita v Kyumbu* [1984] KLR 441 where Chesoni J (as he then was), stated that:

> "The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the

court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."

11. I find the expressions of the Court in *CMC Holdings Limited v Nzioki* [2004] 1 KLR 173 instructive. The court stated that:

> "In law, the discretion that a Court of law has, in deciding whether or not to set aside ex-parte order... was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would ... not be proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle. We do not think the answer to that weighty issue was to advise the appellant of the recourse open to it, as the learned Magistrate did here... In doing so, she drove the Appellant out of the seat of justice empty handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate."

12. Accordingly, the Court in making a determination whether to allow the application or not would be interested in finding out the Applicant's explanation for not attending Court to prosecute his Notice to Motion application dated 21st November, 2023 and whether any prejudice will be suffered by the Respondents should the application be allowed and the dismissed application reinstated for hearing and disposal on the merits.

13. The Applicant avers that they were in court on the date the application was dismissed but were not aware that the matter had been placed before the Deputy Registrar for directions.

14. From the record of the court, the Applicant moved this court on 21st November, 2021 under certificate of urgency. This Court issued directions for inter partes hearing of the application on 30th November, 2023. On the said date, neither the Applicant nor his Counsel appeared in court. Consequently, the application was dismissed for want of prosecution with no orders as to costs. The file was marked as closed.

15. The record shows that the file was only placed before the Deputy Registrar on 26th January, 2024 for hearing of the application of 16th January, 2024. The assertion that it is the Deputy Registrar who dismissed the initial application is therefore unfounded.

16. On the question of prejudice, it was submitted on behalf of the Applicant that the Respondents would suffer no prejudice that cannot be adequately remedied by costs. On the other hand, counsel for the Respondents submitted that the application is an academic exercise as execution has already ensued. Further, that the Applicant has taken several months before filing the instant application for reinstatement.

17. In the case of *Ivita v Kyumbu* (*supra*), it was stated that it is the duty of the Defendant to demonstrate the prejudice that would be suffered by it. The defendant in this case has not demonstrated the prejudice it is likely to suffer if the application is allowed.

18. Accordingly, I would take the view that, in the circumstances hereof, no prejudice would befall the Respondents which cannot be remedied by an award of costs; and that to the contrary, it is the

Applicant who would be greatly prejudiced by being driven from the seat of justice without a hearing on merit contrary to Article 159 of the *Constitution* , were his application to be dismissed.

19. Consequently, I allow the application dated 21st March, 2024 and set aside the dismissal order of 30th November, 2023 and further order that the application dated 21st November, 2023 be reinstated for hearing and determination on its merits.

20. The costs of this application shall be in the cause.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 11TH DAY OF JULY 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Gode for the Applicant

Mr. Njathi for the Respondents

Court Assistant: Yvette.

M.D. MWANGI

JUDGE