Marete v Pitchcare Marketing Divisions Ltd & 2 others (Environment & Land Case E013 of 2021) [2024] KEELC 5084 (KLR) (3 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5084 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT & LAND CASE E013 OF 2021

CK NZILI, J

JULY 3, 2024

BETWEEN

JOSEPH KAIMENYI MARETE ..... PLAINTIFF

AND

PITCHCARE MARKETING DIVISIONS LTD ..... 1ST DEFENDANT

FAMILY BANK LTD ..... 2ND DEFENDANT

VIEW LINE AUCTIONEERS ..... 3RD DEFENDANT

RULING

1. On 26.1.2022, this court issued interim orders topping the respondents from selling, auctioning, trespassing into, or in any way disposing of the suit land, pending hearing and determination of the suit. At the same time, the court declined to review the orders issued on 19.7.2021, sought by the 2nd defendant. As to the preliminary objection on jurisdiction, the court dismissed the same and directed that parties comply with Order II of the Civil Procedure Rules within 45 days.

2. The plaintiff failed to attend court on 1.3.2022 and a notice to show cause was issued for 6.4.2022. Eventually, the court registry issued a notice for mention on 15.2.2024. The plaintiff, again, despite service with the notice failed to show up in court. As of 15.1.2024, one year had elapsed without the applicant taking action in the matter. So, the 2nd respondent sought dismissal for want of prosecution and discharge of the interim orders. The court acceded to the request and marked the suit as dismissed for want prosecution and non-attendance. Interim orders were also vacated.

3. Following these developments, the plaintiff' appointed a new law firm by a notice of change of advocates dated 25.4.2024, who filed an application dated 29.4.2024 seeking to reinstate the suit and grant of temporary orders of injunction. The reasons given were that the applicant had substituted the former advocates on record, parties were engaged in out of court negotiations, he had fallen sick until

early 2024 when he realized the suit had been dismissed, and that grave injustice would be occasioned if the suit was not heard on merits.

4. The application was certified urgent on 6.5.2024 and listed for hearing on 15.5.2024. Come 15.5.2024, the plaintiff failed to attend court. The application was dismissed for non-attendance. The applicant now filed the instant application dated 20.5.2024 seeking to review the orders made on 15.5.2024, reinstatement of the suit and a temporary injunction. The reasons given are that the applicant was not aware of the hearing of 15.5.2024; he has been sickly for two years, suffering from a mental disease; directions issued by the court were not communicated to him; administration errors should not have been used to dismiss his suit and that he was entitled to a fair hearing and right to property.

5. The applicant deposes in the affidavit dated 20.5.2024, that it is the norm of the judiciary to send an email or short message service soon after the outcome of any matter and, in this case, none was sent to his advocates on record until he sent a letter dated 8.5.2024 and eventually obtained a report from a court clerk on 20.5.2024, only to be told of the events of 15.5.2024.

6. The judiciary rolled out the e-system on 1.3.2024. Afterward, all matters, once certified urgent directions and orders issued, are accessible in the individual lawyer's e-filing account. The cause list is also accessible from the cause list portal.

7. The applicant relies on written submissions dated 6.6.2024. Regarding Order 17 Rule 2 (1) of the Civil Procedure Rules, the applicant submitted that his former lawyer failed to appear in court or file an application to cease acting until it was replaced on 25.4.2024. He terms the acts of his former lawyers on record as negligent, deliberate and that he failed to communicate to him.

8. The applicant submitted that he has substantiated the allegations of negligence on the part of his former lawyers in court and that he was also disadvantaged and had been suffering from mental sickness. The applicant relied on Belinda Murai & others v Amos Wainaina [1978] eLLR 2182, Richard Ncharpi Leiyagu v I.E.B.C. and others [2013] eKLR, Samvir Trustee Ltd v Guardian Bank Ltd [2007] eKLR and Mwangi S. Kiamenyi v A.G. Misc Suit no. 720 of 2009.

9. The 2nd respondent has opposed the application through written submissions dated 5.6.2024. It is submitted that the suit was dismissed fairly on 15.2.2024, for lack of diligence, effort and indolence on the part of the applicant to pursue the necessary legal action for close to two years. Reliance was placed on Rose Makokha Mteka v Oserian Development Co. Ltd [2022] eKLR on the proposition that the court record shows that the applicant has been disinterested, casual and exhibited a laid-back approach in prosecuting the claim.

10. The 2nd respondent submitted that justice delayed is justice denied and to assist in clearing the backlog as held in Thathini Development Co. Ltd v Mombasa Water & Sewerage Co & another [2022] eKLR litigation must be expedited by the plaintiff; otherwise, any delay shall occasion injustice to the opposite side and erode public confidence and trust on the judiciary.

11. The 2nd respondent submitted that Order 17 Rule 2 of the Civil Procedure Rules grants the court powers to dismiss matters where there is no action in one year. In this instance, the applicant failed to attend court despite their having been given adequate notice including the modernized judiciary e-filing public kiosk and cause list portal. Reliance was placed on Josphat Oginda Sasia v Wycliffe Wabwile Kiiya [2022] eKLR, that publishing notices in the cause list websites and court notice boards was enough as held in Fran Investments Ltd G4s Security Services Ltd [2015] eKLR and Jim Rodgers Gitonga Njeru v Al-Husnain Motors Ltd & 2 others [2018] eKLR.

12. The 2nd respondent submitted that the applicant's delay in advancing the case was inordinate, unreasonable, inexcusable, and, as explained for almost two years, taking into account that the applicant had been issued with interim orders of injunction.

13. On reinstatement of the suit, the 2nd respondent submitted it was a discretionary one aimed at avoiding injustice or hardship resulting in an inadvertence or excusable mistake or error but was not designed to aid a party who has deliberately, whether by evasion or otherwise to obstruct or delay the cause of justice. Reliance was placed on Bilha Nyonyo Isaac v Kembu Farm Ltd and another [2018] eKLR and Mobile Kitale Service station v Mobil Oil (K) Ltd & another [2004] eKLR.

14. Regarding injunctive orders, the 2nd respondent submitted that the applicant had not demonstrated any of his rights, which the respondents have infringed on, as held in Giella v Cassman Brown [1973] E. A 358, Mrao Ltd v First American Bank of Kenya & others [2003] eKLR and Joseph Thuo Kiarie vs Kenya Women Finance Trust & another [2021] eKLR.

15. The record shows that the applicant approached this court under a certificate of urgency on 19.4.2021. The hearing was slated for 5.7.2021. Interim orders to maintain the status quo were issued.

16. Parties were also directed to pursue Alternative Dispute Resolution and report to the court on 28.9.2021. The applicant did not show up on 28.9.2021, save for the 2nd respondent. A mention was fixed for 3.11.2021. An application by the 2nd defendant dated 27.9.2021, was filed and given a hearing date of 3.11.2021. The plaintiff was duly served with a hearing notice by the court process server, Mr. Onderi Julius; as per several affidavits of service, Mr. Msafiri advocate appeared on 3.11.2021.

17. Interim orders were extended till 29.11.2021, when Mr. Ogwoka Ndege advocate, appeared for the applicant. A ruling date was taken for 26.1.2022. Counsel for the applicant failed to show up to pick the ruling, whose effect was to grant the applicant an interim order of injunction till the hearing and determination of the case.

18. The matter was fixed for the case conference on 1.3.2022.No appearance was made for the applicant or compliance with Order 11 of the Civil Procedure Rules. A notice to show cause was issued against the applicant for 6.4.2022. Mr. Gichangi's advocate appeared for the 2nd defendant on 1.3.2022 and 15.2.2024. The notice for 15.2.2024 had been duly served upon the parties vide emails, under their use as per the pleadings on 11.1.2024 at 9:13 am. The email used were info@gammadvocates.com, wilfred(@ndegeorokoadvocatesup.co.ke and dismas@ndege orokoadvocatesup.co.ke.

19. The court had duly served the notice to show cause to the applicant's advocate on record then. After obtaining interim orders on 26.1.2022, the applicant went to sleep. So, as of 15.2.2024, two years had elapsed with the applicant enjoying interim orders of injunction and not taking any steps to list down the matter for hearing.

20. The applicant now heaps the blame on his erstwhile advocates and the court for taking drastic measures without giving him a fair hearing. He explains that his lawyers on record then were not communicating with him and that he was also sickly. The treatment note is illegible and does not show any hospital admission for the two years. There is no medical report to show that the applicant has a mental sickness that impaired him from attending court or visiting the offices of his former lawyers on record.

21. The applicant says that the suit was unfairly dismissed and communications as the norm by the judiciary were not received or sent. The applicant has not explained to this court why he or his lawyers on record failed to comply with Order 11, attend court, follow up on the matter, or take action for two years.

22. The last service of the notice to show cause was sent through the email used before the suit was dismissed, belonging to the former lawyers. The court had no knowledge that the applicant had issues with his former lawyers on record. The suit belonged to the applicant and not his lawyers on record. The obligation was on the applicant to visit either the court, electronically monitor the progress of his case, or visit the former lawyer's law firm to establish the progress of his case.

23. Unfortunately, the applicant blames the court for administrative errors without pointing them out or owning up lack of action on his part. Fair hearing including being diligent and taking up measures to expedite the hearing of the suit. The court issued an interim order in favor of the applicant and made directions to expedite the hearing of the suit.

24. As soon as the applicant obtained interim orders of injunction, he left the matter at the mercy of the respondents and the court for two years. The sword of justice cuts both ways. The respondents were equally entitled to a fair hearing. The applicant is unable to give an explanation for his inaction, indolence and disinterest in his suit for two years. Evidence of complaints, follow-ups and payments to his former lawyers to carry out his instructions for a period of two years is lacking.

25. Evidence of the alleged out-of-court negotiations in 2022, though Sylvanus Osoro, the director of the 2nd defendant, as alleged in the affidavit filed on 2.5.2024, is lacking.

26. The discretion to set aside dismissal orders or reinstate a suit is to be exercised on sound reasons, rather than caprice or sympathy, but to fulfill the primary concern of the court to do justice to the parties. See Alex Wainaina t/a John Commercial Agencies v Janson Mwangi Wanjihia [2015] eKLR. See Ivita v Kyumbu [1984] KLR 441.

27. In *Vintage Investments Ltd v Amcon Builders Ltd & another (Civil Appeal 45 of 2019)* [2010] KECA 259 (K.L.R.) (3rd December 2021) (Judgment), the court said inordinate delay depends on the facts of each particular case, the delay must be excusable and prejudice to the opposite party must be considered.

28. In Philip Chemollo & another v Augustine Kubende [1982 – 1988] KAR 103, the court said it exists to decide the rights of the parties. In Habo Agencies Ltd v Wilfred Odhiambo Musingo [2020] eKLR, the court said it could excuse a genuine mistake on the part of counsel where it is satisfied that the mistake exists. Further, in Belinda Murai and Others vs Amos Wainaina (supra), the court said that the doors of justice should not be closed out of mistakes by counsel.

29. In this application, the court finds no basis to fault the former lawyers on record. If there were any negligence or a deliberate attempt to obstruct or not communicate the cause of justice, the applicant would have complained to the proper forum. The case belongs to the applicant. In Gloria v Laiburu (E.L.C. Misc Application No. E011 of 2024 [2024] KEELC 4471 (K.L.R.) (29th May 2024) Ruling, the court cited with approval Bi-March Engineers Ltd v James K. Mwangi [2011] eKLR, on the duty of litigants to pursue their lawyers to know the progress of their pending cases.

30. Justice must look both ways as held in Three Ways: Shipping Services Group Ltd v Mitchel Cotts Freighters (K) Ltd [2005] eKLR. The applicant has failed to bridge the gap between 26.1.2022 and 15.2.2024. It is not every time that parties should blame their lawyers for inaction or negligence without disclosing how much input they have put in motion to keep the cogs of the wheels of justice grinding.

31. The upshot is that I find the application lacking merits. It is dismissed with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 3RD DAY OF JULY, 2024

In presence of

C.A Kananu/Mukami

Joseph Marete

Mr. Ndege for the applicant

Gichunge for the 2nd defendant

HON. C K NZILI

JUDGE