



Busienei & another v County Government of Uasin Gishu & another (Environment & Land Case 342 of 2017) [2024] KEELC 6395 (KLR) (3 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6395 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 342 OF 2017**

**JM ONYANGO, J
OCTOBER 3, 2024**

BETWEEN

ELISHA BUSIENEI 1ST PLAINTIFF

TILMWAI LOGISTICS LIMITED 2ND PLAINTIFF

AND

COUNTY GOVERNMENT OF UASIN GISHU 1ST RESPONDENT

NATIONAL BANK OF KENYA 2ND RESPONDENT

RULING

1. By an oral Application made on 23rd September, 2024, the 1st Plaintiff/Applicant sought compliance with the orders made vide a ruling dated 11th April 2019 on status quo and leave to reopen the plaintiff's case.
2. Counsel for Applicant confirmed that the applicant has neither deposited the payable rent due nor availed the necessary documentations for the opening of the joint bank account as directed by the court vide the orders of 11th April, 2019. He attributed the failure to fully comply with the said orders to the inaction of the applicant's former advocate; that the former advocate never informed the plaintiff/applicant of the payments or the account opening.
3. On the reopening of the plaintiff's case; it was his contention that the plaintiffs have a proprietary right to the suit property arising out of the sale; that they have a right to be heard before a decision is made. He urged the court in the interest of justice to allow the application and allow the case to be heard on merit and not to visit the mistake of counsel on the litigant.
4. He further stated that the applicant is ready and willing to pay the rent going forward and to deposit the rent arrears into the joint account within a period of 6 months.



5. The 1st defendant/ respondent opposed the application; she stated that the outstanding rent arrears was Kshs.2,887,500/-. It was her contention that the status quo order was conditional; that the plaintiff would remain in the house as long as he continues paying rent, the same has however never been deposited in the joint account as directed.
6. She averred that the plaintiff has failed to give an explanation for his failure to deposit the rent; consequently, she asked the court to discharge the injunction under Order 40 Rule 7 and for the 1st Defendant to be granted vacant possession of the premises pending the determination of the main suit.
7. She further maintained that the plaintiff's case was closed procedurally after several adjournments when the plaintiff failed to attend court.
8. Counsel for the 2nd defendant did not object the application for reopening the plaintiff's case; it was further his contention that granting vacant possession at the interim stage would be tantamount to granting orders of eviction before the issue of ownership is determined.
9. I am of the considered view that the main issue arising for determination is whether the 1st Plaintiff/ Applicant has demonstrated reasonable and justifiable basis to warrant the reopening of his case;
10. This Court retains unfettered discretion in determining whether or not to allow the reopening of the plaintiff's case. However, in exercising such discretion, the court must do so judiciously taking into account the circumstances of the case.
11. The court in the case of Samuel Kiti Lewa –vs- Housing Finance Co. of Kenya Ltd & Another [2015] eKLR in determining an application to re-open a case held as follows: -

“The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence.”

12. The Applicant avers that he has proprietary rights over the suit land arising out of the sale, where he paid 7 million and a right to be heard. He urged the court not to visit the mistakes of the counsel on the plaintiff.
13. This court marked the plaintiff's case closed on the 21st September 2023 while the instant application was made on 23rd September 2024; which period is over one year since the case was marked closed. Counsel for the plaintiff/applicant has argued that the application has been made timeously but has not given any reasons for the 12 months delay in making the same. I do however note that the present counsel came on record on the 5th June 2024 and made the application 3 months later.
14. Counsel for the applicant has also blamed the plaintiff's former advocate and urged the court not to visit the mistakes of the counsel on the litigant. On this regard, I seek to echo the sentiments made by Odunga J. (as he then was) in the case of Dilpack Kenya Limited v William Muthama Kitonyi [2018] eKLR where the court held as follows: -

“33. In this case the applicant has not expounded on the nature and quality of the inadvertence alluded to. This seems to be a case of mere inaction and as was held in Berber Alibhai Mawji vs. Sultan Hasham Lalji & 2 Others [1990-1994] EA 337, inaction on the part of an advocate as opposed to error of judgement or a slip is not excusable. Therefore pure and simple inaction by counsel or a



refusal to act cannot amount to a mistake, which ought not to be visited on the client.”

15. In determining this application, this court must take into account the circumstances that led to the closing of the plaintiff’s case and consider whether the same was a deliberate design to obstruct and delay the hearing of the case or whether the same was an inadvertent and excusable reason.
16. The matter had been set down for hearing on three different occasions and was adjourned on account of the plaintiff; on 15th March, 2023 for the reason that the plaintiff’s advocate had failed to diarize the matter; on 20th June 2023 and 21st September 2023 for the reason that plaintiff was ill. This court however noted that no document was submitted to the court to prove the allegations of illness. It is for that reason that the plaintiff’s case was closed.
17. The plaintiffs have since changed their advocate on record and now contends that they have a right to be heard before an adverse decision is made against them. It is imperative to note that this is a 2017 matter and the same has never taken off for hearing 7 years later.
18. Justice applies to both parties; both the plaintiffs and the defendants have a right to be heard, to be afforded an opportunity to present their case and the right to have a case heard and determined in a timely manner. The plaintiffs herein were given three opportunities to prosecute their case but they continuously sought adjournments. To this day, I must state, no documentation has been availed before this court to prove the alleged illness of the 1st plaintiff.
19. Even though I sympathize with the plaintiffs whose case was closed without having called any witnesses or adduced any evidence, I do also acknowledge the laxity and indolence on his part in prosecuting his claim. He has been enjoying orders of temporary injunction since the year 2019 but he has confirmed that he has never complied with the said conditional orders by depositing rent as directed.
20. This court will not delve into the issues touching on the sale and/or ownership of the suit property at this stage as the same would amount to delving into the merits of the main suit.
21. Consequently; it is the finding of this court that find that the Applicant has not given a reasonable and justifiable basis to warrant the re-opening of the plaintiffs’ case.

Conclusion

22. In view of the foregoing, I find that the application made on 23rd September, 2024 is not merited and I accordingly dismiss the same with no orders as to costs.
23. However, the plaintiff is hereby ordered to pay all the pending rent as ordered in the ruling of 11th April 2019 in the joint account in the name of the advocates within a period of 4 months. Further, he is directed to pay all the outstanding court adjournment fees and defendants’ counsels fees that is due and owing before the next hearing date.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 3RD DAY OF OCTOBER, 2024.

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J. M. ONYANGO

JUDGE

In presence of; -



1. Mr. Mbugua for the Plaintiffs/Applicants
 2. Ms. Sang for Miss Chesoo for the 1st Defendant
 3. Mr. Langat for the 2nd Defendant
- Court Assistant -Brian

