Buba v Saunyilila & another (Environment & Land Case 160 of 2001) [2023] KEELC 465 (KLR) (2 February 2023) (Ruling)

Neutral citation: [2023] KEELC 465 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 160 OF 2001

LN MBUGUA, J

FEBRUARY 2, 2023

BETWEEN

WILLY BUBA ..... PLAINTIFF

AND

NAYIAN SAUNYILILA ..... 1ST DEFENDANT

SAMUEL NDUNG'U KIHARA ..... 2ND DEFENDANT

RULING

1. This suit was commenced by a plaint dated January 26, 2001. The ensuing litigation history is aptly captured in a ruling delivered by this court on November 12, 2018. In summary, on March 17, 2004, judgement was entered against the 2nd defendant after an ex parte hearing which followed service of summons through a notice published in the Daily Nation Newspaper.

2. The 2nd defendant (current applicant) had filed an application dated September 26, 2011 seeking orders inter-alia, the setting aside of the aforementioned judgment. In the said ruling of November 12, 2018, the court indulged the applicant with the following rider; "That the 2nd defendant was granted leave to file his statement of defence and counterclaim within 15 days and to pay the plaintiff throw-away costs of ksh.50,000/= within 60 days of the ruling and in default, the orders given would stand as vacated".

3. The court records indicate that the 2nd defendant failed to comply with the conditional orders of November 12, 2018, hence the same were vacated by the court on 10.12.2019 and the plaintiff was granted liberty to enforce the judgement of March 17, 2004.

4. The 2nd defendant has now brought the notice of motion application dated June 17, 2022 seeking orders that this Honourable Court be pleased to review and vacate the ruling and orders granted on December 10, 2019 and allow him to prosecute his defence and counterclaim. The application is based on grounds on its face and on the 2nd defendant's supporting affidavit sworn on June 17, 2022.He deposes that following this court's ruling of November 12, 2018, he instructed his previous counsel,

Enonda & Associates Advocates to file and serve his statement of defence and counterclaim. He adds that he visited his previous Advocates' offices on November 21, 2018 and signed all the necessary documents including his verifying affidavit and witness statement. He further deposes that he paid the said Advocates ksh.75,000/= through M-pesa on November 23, 2018 to one Dickson Enonda of Enonda & Associates Advocates to cater for costs of filing and service of the defence and counterclaim and to pay ksh.50,000/= throw away costs as ordered by the court. He annexed a copy of mpesa statements showing the said transaction.

5. The 2nd defendant also deposes that he believed that the matter was proceeding on well but since he became weary of the delay in the matter, he decided to peruse the court file for himself in June 2022 and discovered that his defence and counterclaim was not filed in time and neither was the throw-away costs of ksh.50, 000/= paid as per this court orders of November 12, 2018.

6. He pleads with the court to allow him to defend himself and blames his previous Advocates for failing to comply with the orders of November 12, 2018.

7. The application was served but no response was filed.

8. The issue for determination is whether this court should set aside the orders of December 10, 2019 and allow the 2nd defendant to defend the suit.

9. In the Supreme Court of Kenya case of *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others* [2018] eKLR, the court stated that;

> " Be that as it may, as a court of Law, we have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed application, the Court will as a matter of cause grant the sought orders. It behooves the Court to be satisfied that prima facie, with no objection, the application is meritorious and the prayers may be granted".

10. Guided by the above case law, I find that this court has a duty to look into the merits of the current application, even if the same is unopposed.

11. In the ruling delivered by this court on November 12, 2018, the court set the condition that the 2nd defendant was to file his defence and counterclaim within 15 days and pay the plaintiff throw away costs of kshs.50,000/= .The applicant had 60 days from the said date to comply therewith which would have been by December, 2018. It is now the 5th year since the said order was made. The instant application was made almost 4 years after due date.

12. The delay is clearly inordinate and the reasons advanced for the delay is that it was a mistake of the applicant's counsel. However courts have held that suits belong to litigants and not their Advocates and a litigant has a duty to pursue the prosecution of his or her case; See- *Teacher Service Commission v Ex-parte Patrick M Njuguna* [2013] eKLR, *Tana and Athi Rivers Development Authority vs. Jeremiah Kimigho Mwakio & 3 others* (2015) eKLR, *Mwangi Gachiengu & 2 Others –Vs- Mwaura Githuku & another* – [2019] eKLR.

13. In the present case, it was incumbent upon the 2nd Defendant to ascertain the position of his suit. That he did not follow up his case until June 2022 shows negligence and indolence on his part.

14. One of the cardinal principles in our Constitution is "the expeditious delivery of justice" –see article 159 (2) (b) of *the Constitution* of Kenya, which in effect codifies the 17th century maxim of "Justice delayed is justice denied". This means that if justice is not provided in a timely manner to the parties, it loses its importance and it violates the human rights of the litigants and their families. That is precisely

why rights to speedy trials are incorporated in law worldwide, hence in Law and in Equity, delayed justice is abhorred.

15. The people of Kenya have for decades cried out to the justice system to embrace the aforementioned principle of expeditious delivery of justice. In response thereof and to align itself with the Constitutional tenements, the Judiciary has formulated three blue prints, one succeeding the other namely; Judicial Transformation Framework (JTF), Sustaining Judiciary Transformation - (SJT) and the current one Social Transformation through Access to Justice (STAJ). One strategic area of concern standing out in these blue prints is the issue of "case Backlog". The judiciary has therefore embarked on clearing old cases which have clogged the justice system for ages years.

16. This case was filed over 21 years ago on February 1, 2001!, and judgment was entered against the applicant in year2004. The application to set aside the said judgment was filed in year 2011 but prosecuted 7 years later in year 2018. Even with this kind of history, the applicant remained in slumber land only awakening 4 years in year 2022 to file the current application. The conduct of the applicant in the entire litigation history paints a grim picture on his part. Thus it would be a travesty of justice for this court to exercise its discretion in favour of such a litigant.

17. The upshot herein is that the application dated June 17, 2022 is found to have no merits. The same is hereby Dismissed with no orders as to costs. The file is hereby marked as Closed.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF FEBRUARY, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

E. Mutua for plaintiff

Court assistant: Eddel