



**M'Ikiao v M'Kiambati & another (Environment & Land Case
06 of 2020) [2023] KEELC 673 (KLR) (8 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 673 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 06 OF 2020**

CK NZILI, J

FEBRUARY 8, 2023

BETWEEN

JOHN MUTUMA M'IKIAO APPLICANT

AND

ISAYA M KIRERA M'KIAMBATI 1ST DEFENDANT

DANIEL KUNGA M'KIAMBATI 2ND DEFENDANT

RULING

1. By an application dated August 29, 2022, the court is asked to stay the execution of the decree dated July 27, 2022, set aside the dismissal order of the plaintiff's suit and allow the applicant to defend respondent's counterclaim. The grounds of the application as set out on its face and the supporting affidavit of John Mutuma M'Kiara sworn on the even date are that the plaintiff attended the hearing on March 17, 2022 and during the call over was told to come back with his advocate. That he was unable to trace his lawyers but when he came back, he was told that his suit had been dismissed and judgment for the counterclaim reserved for July 27, 2022. That he attended court on July 27, 2022 and was told the counterclaim had been allowed. That he was always eager to have the matter heard on merits; his witnesses on the material day were ready to proceed; he stands to be evicted from his land; it is in the interest of justice to grant the orders sought and that the setting aside would outweigh the injustice of being condemned unheard and that his lawyer was engaged in Meru HC Succession Cause No 26 of 1998 and 526 of 2010.
2. The application was opposed through a replying affidavit of Isaya M'Kirera M'Kiambati sworn on October 18, 2022. The grounds being that the plaintiff and his witnesses were not present when the matter was called out for a second time for hearing, yet he had been served on time with a hearing notice with no protest. That thereafter, a judgment notice was served and received. That it is not true that all the three lawyers in the law firm were engaged in an online virtual hearing; that the plaintiff was



- only a trespasser on the land and has never worked therein since it is exclusively under the respondent's control.
3. Further, the respondent averred that the 2nd defendant died on December 19, 2020 hence the plaintiff's claim abated on December 19, 2021 after he failed to substitute the deceased. That the respondent is aged 95 years, suffers from chronic illnesses and a loss of memory as per the medical report attached as annexure IMM "1" and that to re-open the suit shall occasion an injustice to him. The respondent attached copies of affidavits of service, the decree, eulogy, medical report and an authority in support of the replying affidavit as annexures marked I MM "1 – 8" respectively.
 4. By oral submissions, Mr Muriira counsel for the applicant urged the court to allow the application since the advocate on record was engaged in another court, the plaintiff was present in court therefore should be given an opportunity to be heard.
 5. On the other hand, the 1st defendant by written submissions dated November 23, 2022 took the view that the replying affidavit remained uncontroverted; the permanent injunction issue should not be stayed; the suit against the 2nd defendant had abated under Order 24 Rule 4 (3) of the Civil Procedure Rules, justice delayed was justice denied, the plaintiff is out to obstruct the cause of justice. That at the age of 95 years, the 1st defendant should not be dragged back to court, otherwise there will be a grave injustice and prejudice. Reliance was placed on *Shah v Mbogo & another* [1967] EA 118.
 6. Order 12 Rule 7 Civil Procedure Rules grants the court powers to set aside or vary a judgment or order on such terms as may be just. Further, Order 12 Rule 3 of the Civil Procedure Rules provides that if a plaintiff fails to attend the day fixed for hearing and the respondent attends the suit shall be dismissed except for good cause to be recorded by the court. Sub Rule 3 (2) thereof provides that the defendant may prove his counter claim so far as the burden of proof lies on him.
 7. In this suit the plaintiff attended court in the morning and the matter was placed for hearing at 10 am. The court informed the plaintiff to notify his lawyers and come ready to proceed. The plaintiff never came back by 10.50 Am when the matter was called out. The 1st defendant proceeded to seek for the dismissal of the suit and for a judgment on account of the counterclaim since the 1st defendant had previously testified de bene esse. The court acceded to the request under Order 12 Rule 3 of the Civil Procedure Rules, gave a judgment date and ordered a notice be served upon the plaintiff's lawyers for March 17, 2022. This was done as per the received copy and the affidavit of service filed on March 17, 2022.
 8. The judgment was delivered on July 27, 2022 in the presence of the plaintiff's advocates on record. It was only after close to two months that this application was filed. This inordinate delay has not been explained at all. The court's discretion to set aside an order dismissing a suit was discussed in the case of *Peter Gitahi Kamaitha v Nyeri Municipal Council* [2014] eKLR. The court cited with approval *Shah v Mbogo (supra)* & *Municipal Council of Meru v National Housing Corporation and 54 others* and *Karatima Garments Ltd v Nyandarua* [1976] KLR 94. The court took the view that a court in considering whether there was proper service it ought to examine the evidence and the reason advanced for non – attendance.
 9. In *Patel v East Africa Cargo Handling Service Ltd* [1974] EA 75, Sir William Duffins VP took the view that the main concern for a court was to do justice to the parties. What the applicant has to do is to give a sufficient reason for non-attendance. Sufficient cause means that the applicant did not act negligently or that there was want of bona fide on his part in view of the facts and circumstances of a case. In *Richard Ncharpi Leiyangu v IEBC & 2 others* [2014] eKLR, the court held that the discretion to set aside exparte judgment is intended to avoid injustice or hardship resulting from an accident,



inadvertence or excusable mistake but not to assist a person who deliberately seeks to obstruct or delay the course of justice. The court went on to say that a right to be heard was at the cornerstone of the Constitution and the rule of law. and thus, the courts have powers to dismiss suits to protect the integrity of the court process from being abused and that at the end of the day there must be proportionality.

10. In CMC Holdings Ltd v James Mumo Nzioki [2004] eKLR, it was held that it would not be a proper use of discretion to turn the court's back on a litigant who clearly demonstrates such an inexcusable mistake, inadvertence, error or accident.
11. In this application, the advocate who was held up in the virtual court has not been indicated. The cause list for that court has not been attached. The reasons why the plaintiff did not come back on time or at all have not been given. The witnesses before court at the time the matter was mentioned at 9.00 Am and later at 10.50 Am have not been indicated. The plaintiff as per the court record shows out he never mentioned that he had any witnesses before court on that day.
12. Similarly, the court had other matters until 12.30 Pm and there is no indication that the plaintiff came back that morning alongside his advocate on record and brought it to the attention of the court that they were late. Similarly, after the plaintiff's lawyers were served with the judgment date on March 17, 2022, they waited until July 27, 2022 for the judgment to be delivered and thereafter for another month and 15 days or so to file the current application. To my mind, there are no good reasons given for non-attendance and the non-prosecution of the suit given the suit also abated against the 2nd defendant for lack of action on the part of the plaintiff.
13. On the issue of stay of execution the plaintiff has not demonstrated any substantial loss suffered or to be occasioned if the application is not allowed. No security for costs has been proposed or provided. The delay to come to court is also inordinate. Lastly, it is not in the interest of justice to grant the orders sought. The upshot is that the application dated August 29, 2022 is dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 8TH DAY OF FEBRUARY, 2023

In presence of:

C/A: Kananu

Koeh for 1st defendant

Muriira for Mwenda Mwarania for applicant

HON. C.K. NZILI

ELC JUDGE

