



Mahfudh & another v Muhaji & 3 others (Environment & Land Case 246 & 363 of 2016 (Consolidated)) [2023] KEELC 440 (KLR) (1 February 2023) (Ruling)

Neutral citation: [2023] KEELC 440 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 246 & 363 OF 2016 (CONSOLIDATED)
SM KIBUNJA, J
FEBRUARY 1, 2023**

BETWEEN

MOHAMED MAHFUDH PLAINTIFF

AND

AMINA SHEYUMBE MUHAJI 1ST DEFENDANT

MOHAMED OMAR SALIM 2ND DEFENDANT

**AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 363 OF 2016**

BETWEEN

MOHAMED OMAR SALIM PLAINTIFF

AND

AMINA SHEYUMBE MUHAJI 1ST DEFENDANT

MOHAMED MAHFUDH SAAD 2ND DEFENDANT

COUNTY LAND REGISTRAR 3RD DEFENDANT

RULING

1. Mohamed Omar Salim, who is both the 2nd defendant in ELC No 246 of 2016 and plaintiff in ELC 363 of 2016, and hereinafter referred to as the applicant, filed the notice of motion dated the June 27, 2022, seeking for the following orders;
 - a. Varying or setting aside of the order dismissing his application dated the April 21, 2022.



- b. Reinstatement of the said application for hearing and determination on merit.
- c. Upon the application being reinstated, leave to amend it be granted.

The application is based on the six (6) grounds on its face marked (1) to (6), and supported by the affidavit of Dr John M. Khaminwa advocate sworn on the June 27, 2022.

- 2. The application is opposed by Mohamed Mahfudh, the plaintiff in ELC No 246 of 2016 and 2nd defendant in ELC No 363 of 2016, and hereinafter referred to as the plaintiff, through the grounds of opposition dated the July 8, 2022 that was filed through his counsel.
- 3. The court issued directions on filing and exchanging written submissions on the July 12, 2022 and October 12, 2022. Thereafter, the learned counsel for the applicant and plaintiff filed their submissions dated the October 11, 2022 and November 29, 2022 respectively.
- 4. The following are the issues for the court's determinations;
 - a. Whether the applicant has made a reasonable case for setting aside the dismissal order, and reinstating the dismissed application for hearing.
 - b. Whether the applicant has established a case for leave to amend the application if reinstated.
 - c. Who pays the costs of the application.
- 5. That upon considering carefully the grounds on the application, affidavit evidence, grounds of opposition, submissions by counsel for the two parties, the superior courts decisions cited thereon and the record, the court has come to the following determinations;
 - a. The record shows that on the June 9, 2021, the court made the following order after hearing the counsel for the parties present;

“On May 27, 2020, counsel for the 1st defendant mentioned that the 1st defendant is deceased. Although the date of death is not clear, it is apparent it is now more than one since he died. There has been no substitution. Given that position, I must mark this suit as abated following the provisions of *order* 24 rule 4 (3). There is liberty to revive an abated suit which to me is the only available option available (sic) to the plaintiff and other defendants. With the abatement of the suit against the 1st defendant, there is no subject matter that can proceed for trial. I will therefore order that the file be marked as abated and be closed. I make no orders as to costs.”

The notice of motion dated the April 21, 2022 was then filed on the April 22, 2022. The application seeks for 1st defendant, Amina Sheyumbe Muhaji, be substituted with Habib Mohamed Ali and Mohutar Mohamed, suit against 1st defendant that abated on March 5, 2021 be revived and reinstatement of the order of April 5, 2019. The court gave directions on service of the application on the April 25, 2022, and fixed it for interparties hearing on June 20, 2022.

The record shows that on that date, the following advocates attended the court; Ms Mooraj for the plaintiff, Mr Ondieki h/b Shimaka for 1st defendant, Mr Yose for 2nd defendant, and Ms Gathua for intended interested party. The record further shows that Ms Gathua informed the court that the application dated the August 20, 2018 was the one coming up for hearing. Ms Mooraj disagreed and pointed out that the application coming up was the one dated the April



21, 2022 for reinstatement. Mr Yose indicated that he did not have concrete information on the matter. The court then directed as follows;

“From the record of April 25, 2022, the matter is for the hearing of the application dated April 21, 2022.”

The court then posed the question; “Is there any one to move the motion? (court notes that there is no response)”. The court then proceeded to direct as follows;

“I have no option but to dismiss the application dated April 21, 2022 as there is no one present to move it. Costs to any party who had replied to it.”

The current application dated the June 27, 2022 was then filed seeking for among others to have the above order set aside, application dated the April 21, 2022 be reinstated and for leave to amend it.

- b. That in support of the application, Dr Khaminwa deposed that he had directed his junior, Ms Tabitha Gathua, to hold brief for him in this matter and in case it was called, to ask for the file to be placed aside as he was engaged in another court. That the said Ms Gathua referred to the wrong application as she was not conversant with the matter and was not to prosecute it. The applicant’s position has been challenged by the plaintiff through the grounds of opposition and submissions. The counsel has submitted that the reinstatement order sought is discretionary and an applicant must come to court with clean hands. The counsel cited the decision in the case of *Peter G.N.Nganga v Standard Chartered Bank of Kenya Ltd & another* [2004] eKLR, and submitted that the court should not exercise its discretion to assist an applicant who has misbehaved, is guilty of laches, fails to follow orders of service, is disorganized and dishonest. That the applicant’s counsel was on 12th July directed to file and serve submissions on the application in seven days, and though on the November 7, 2022 the counsel claimed to have served, that was not true. That the plaintiff has had to file their submissions, on the November 29, 2022, without seeing that of the applicant. That the counsel who was in court for the applicant on the June 20, 2022 was not holding brief for another counsel as claimed in the application, but was representing the applicant. That the mistakes of that counsel became the mistake of the Dr Khaminwa. The counsel referred to the cases of *Patrick Kenneth Muthuri & 2 others v Richard Karimi Nderitu* (2015) eKLR, *Loise Wairiga Njoroge v Stanley Manyara & Nancy K. Manyara & 4 others* [2017] eKLR, and *Intex Construction Co Ltd v Flora Marigu & another* [2016] eKLR, in support of that position. That further, Ms Gathua has not sworn an affidavit in support of the application to confirm what has been deposed about her in the supporting affidavit of Dr Khaminwa, who was himself not in the court on the material day.
- c. The learned counsel for the applicant submitted that the court has inherent powers under section 3A of the *Civil Procedure Act* to issue the prayers sought for the ends of justice to be met, and thereby avoid an injustice or hardship resulting from an accident, inadvertence or excusable mistake or error. The counsel relied on the case of “*Belinda Murai & others v Amoi Wainaina* (1978)”, where the court expressed itself as follows;

“The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it in the interests of justice to dictate. It is known that courts of justice themselves make mistakes which is politely referred



to erring in their interpretation of laws and adoption of a legal point of view which Courts of Appeal sometimes overrule ..”

The counsel, also cited the cases of *Philip Chemwolo v Augustine Kubebe* (1982-1988) KAR 103 and *John Nabashon Mwangi v Kenya Finance Bank Ltd (In Liquidation)* (2015) eKLR, and submitted that it is imperative for the ends of justice that the application be allowed as prayed. On their part, counsel for the plaintiff submitted that the application seeks for an omnibus of orders without indicating the specific provisions of the laws that it is invoking. That the nature of the intended amendment has not been disclosed and neither has any new evidence been discovered to come under order 45 of *Civil Procedure Rules*, nor does order 12 of the said Rules been shown to be applicable, then the application is bad in law. The counsel submitted that the provision of “article 159 (d)” [sic] of the *Constitution* and section 3A of the *Civil Procedure Act* should not provide refuge to the applicant, and referred to the case of *Edith Wairimu Njoroge v Brooke Holdings Co Ltd & another* [2018] eKLR, where the court cited the Court of Appeal decision in *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others* [2013] eKLR, and stated that;

“We do not consider article 159 (2) (d) of the Constitution to be a panacea, nay a general white wash, that cures and mends all ills, misdeeds and defaults of litigation”.

The court proceeded to cite the Court of Appeal decision in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* No 290 2012, and held that;

“In our view, it is a misconception to claim, as has been in recent times with increased frequency, that compliance with rules of procedure is anti-ethical to article 159 of the Constitution.”

- d. That having considered the rival submissions and the record, it is clear that when Ms Gathua addressed the court on the material date, the June 20, 2022, she introduced herself as counsel for the intended interested party in respect of an application dated the August 20, 2018. There is nothing on record to indicate that Ms Gathua, or any of the other counsel present indicated to the court to have been holding brief for Dr John M. Khaminwa, the deponent of the supporting affidavit to the application subject matter of this ruling. That when the court clarified that the application for hearing that day was the one dated the April 21, 2022, none of the counsel recorded present, including Ms Gathua, moved to prosecute that application, and it was consequently dismissed. The status upon which Ms Gathua appeared before the court on that date if different from what is recorded in the proceedings, could only have been clarified had she availed a sworn deposition on the matter. That as Ms Gathua has been confirmed to have been a counsel from the same firm as Dr Khaminwa, who is the deponent to the supporting affidavit, the court finds no basis has been laid out to show that she was not well versed with the facts of the matter, when she referred to a different application when addressing the court. If the failure of the counsel to prosecute the application was due to being inefficient, or amounted to negligence, then the affected party is not without recourse in law, but that lies elsewhere, and not through the instant application. The court finds no reasonable explanations have been presented by the applicant to enable the court exercise its discretionary powers of setting aside the orders. That further, no basis has been laid out upon which to consider granting the application for amendment as no draft has been attached.
- e. That having found no merit in the application, it follows that the plaintiff who filed grounds of opposition, submissions and participated in the hearing of the application through counsel,



is entitled to costs in accordance with section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya.

6. That having come to the determination that the notice of motion dated the June 27, 2022 is without merit, the court orders as follows;
 - a. That the said application be and is hereby dismissed.
 - b. The applicant to pay the plaintiff's costs.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 1st DAY OF FEBRUARY 2023.

S.M.Kibunja, J.

ELC MOMBASA.

IN THE PRESENCE OF;

APPLICANT : Absent

PLAINTIFF : Absent

DEFENDANTS : Absent

COUNSEL : Mr. Otieno for Kasamani for 1st plaintiff

Wilson: Court Assistant.

S.M.Kibunja, J.

ELC MOMBASA.

