



REPUBLIC OF KENYA



**Nyae & 2 others v Ebrahim (Miscellaneous Application 17 of 2021)  
[2023] KEELC 16371 (KLR) (13 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16371 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
MISCELLANEOUS APPLICATION 17 OF 2021**

**LL NAIKUNI, J  
MARCH 13, 2023**

**BETWEEN**

**NYONDO NGAO NYAE ..... 1<sup>ST</sup> APPLICANT**

**HAMISI MOTO ..... 2<sup>ND</sup> APPLICANT**

**SAJADI KAZI KIRUMBI ..... 3<sup>RD</sup> APPLICANT**

**AND**

**ABDUL HAMID EBRAHIM ..... RESPONDENT**

**RULING**

**I. Introduction**

1. The Applicants, Nyondo Ngao Nyae, Hamisi Moto and Sajadi Kazi Kirumbi moved this Honorable Court by instituting a suit through an originating summons dated April 19, 2021 against the Respondent herein. Through the said suit, they sought for the Court to make its determination on the following issues reproduced herein verbatim:-
  - a. Whether the Applicant be declared to have become entitled by virtue of adverse possession of all that piece of land known as Plot Number 674/I/MN suite in Bombolulu, Mombasa Municipality in Mombasa District containing by measurement four nought three seven (4.37) Acres or thereabouts (hereinafter “the property”) registered under the name of the Respondent.
  - b. Whether the Honorable Court be pleased to direct that the Chief of Lands Registrar to issue a Provisional Certificate of Title in favor of the Applicant’s.
  - c. Costs be in the cause.



2. Upon service, the suit was opposed by the Respondent vide an affidavit sworn by him dated 8<sup>th</sup> March 2022 that deponed “inter alia” that there was a similar pending suit in “the Chief Magistrates Court, ELC CASE Number 147 of 2019. Further, the Respondent held that the suit property was also subject to proceedings in “the Probate and Administration Cause No.164 of 1984 Mombasa” where the Public Trustee was appointed as the Administrator by the Court. By virtue of this the Respondent argued the suit property cannot be subject to operations section 7 (d) of the Land Act Cap No.6 of 2012 as a mode of acquisition of property through adverse possession/ prescription.
3. The matter was heard on the 23<sup>rd</sup> of June in the absence of counsel for Respondent and it was ordered that it be struck out for being frivolous, scandalous vexatious.

## **II. The Applicant’s case through the application**

4. Vide a Notice of Motion application dated 1<sup>st</sup> August 2022, the Applicants moved the Court under Sections 1A, 1B and 3A of the Civil Procedure Rules, 2010. The Applicants sought for the following orders:-
  - a. Spent.
  - b. That the Honorable Court be pleased to set aside, vacate and or discharge the orders and directions issued on 23<sup>rd</sup> June 2022.
  - c. That this Honorable Court be pleased to reinstate the entire claim/ suit ex - debito justitiae.
  - d. That this Honorable Court be pleased to further grant such orders its deems fit and convenient to meet the ends of justice.
  - e. That costs for this application be provided for.
5. The application is premised on the grounds, testimonial facts and averments made out under the 13 Paragraphed Supported Affidavit of DONALD OBINJU of the even date and the annextures marked as Exhibit “A”. In a nutshell, he deponed that he was an Advocate of the High Court of Kenya practicing in the law firm of Messrs. Obinju Rondo & Co. LLP Advocates. On 9<sup>th</sup> May 2022 their Law firm accepted service of the Notice of Motion application dated 8<sup>th</sup> March 2022 from the Respondents Advocates who indicated the hearing for the application would be coming up for hearing on 23<sup>rd</sup> June 2022. Unfortunately, the Deponent erroneously diarized coming up for hearing on 28<sup>th</sup> July 2022 instead. On 28<sup>th</sup> July 2022 on realizing the matter was not in the Cause list, they checked from the ELC Registry, when they noted the error. On the same date, they received instruction from their client to seek more time to file a response.
6. On 1<sup>st</sup> August, 2022 they were however served with a copy of the Court order dated 23<sup>rd</sup> June 2022 and issued on 29<sup>th</sup> June 2022 stating that the suit had been struck out. They wondered the reason the Counsels for the Respondent took more than a month to have served them said Court order. He deponed that the omission on his part in not attending Court was inadvertent and not intentional the court should give Applicants an opportunity to be heard at a full trial and fair hearing of their land claim through Land Adverse possession.
7. He argued that striking out of suits was a draconian remedy that ought to be exercised in exceptional circumstances. They should not be condemned unheard. They had a reasonable cause of action and if the orders sought were not granted they would be prejudiced.



### III. The Responses by the Respondent

8. On 20<sup>th</sup> September, 2022, while opposing the matter, the Respondent filed a 10 Paragraphed Replying Affidavit, sworn by Abdul Hammid Ebrahim dated 19<sup>th</sup> September 2022 and two (2) annexures marked as “AHE - 1”. He deponed “inter alia” that the Applicants admitting to receiving their application on 9<sup>th</sup> May, 2022 which clearly indicated 23<sup>rd</sup> June, 2022 as the hearing date. Hence, he held that the hearing notice dated 8<sup>th</sup> March 2022 was duly served and its the Applicant who failed to filed to respond nor attend Court. They annexed a copy of the affidavit of service by a Court Process server called Titus Munyao sworn on 13<sup>th</sup> May, 2022 and filed in Court on 17<sup>th</sup> May, 2022 and an extract of the Notice of Motion application dated 8<sup>th</sup> March, 2022 bearing the official stamp of the Applicants Advocates showing receipt on 9<sup>th</sup> May, 2022.
9. He averred that in light of the allegation that he erroneously diarized the hearing date was not an excusable mistake but gross professional negligence on the part of the Advocate for the Applicants by merely upon receiving the application, they filed it away. Indeed, he noted that despite receiving the application, they never filed any responses to it. Thereafter, on 23<sup>rd</sup> June, 2022, the application was heard and was found with merit and hence the suit by way of Originating Summons filed on 24<sup>th</sup> April, 2021 by the Applicants was dismissed.
10. Nonetheless, the Deponent held that the Applicants alleged that on 28<sup>th</sup> July, 2022 upon realizing that the matter was not listed he sent his Court Clerk to peruse the Court file. However, the Applicant never disclosed what was the findings upon perusal of the file. He held that if indeed he had perused the file, he would have established the Courts direction given on 23<sup>rd</sup> June, 2022.
11. From the above, it was deponed that the Applicant was guilty of laches and application was an afterthought and should be disallowed with costs.

### IV. Analysis and Determination

12. Having read the application dated 1<sup>st</sup> August 2022 and annexures thereto and the Response dated 19<sup>th</sup> September the two (2) issues that arise for determination are; -
  - a. Whether the Notice of Motion application dated 1<sup>st</sup> August, 2022 seeking for the varying of Court’s orders granted on 23<sup>rd</sup> September, 2022 and the reinstatement of the suit herein upon its dismissal.
  - b. Who should bear costs of application?

#### **ISSUE a). Whether the Notice of Motion application dated 1<sup>st</sup> August, 2022 seeking for the varying of Court’s orders granted on 23<sup>rd</sup> September, 2022 and the reinstatement of the suit herein upon its dismissal.**

13. The orders sought from the filed application by the Applicants, are at the discretion of the Court to grant or not. The discretion is exercised judicially. The inherent powers are founded under several provisions of the law. These include but not limited to sections 1, 1A, 3 & 3A of the Civil Procedure Act, cap. 21 on what is now termed the Overriding Oxygen Objective Rule, sections 3 and 13 of the Environment and Land Court Act, No. 19 of 2011 and article 159 (1) and (2) of the Constitution of Kenya, 2010. They provides the Court with inherent power to make orders that are necessary for the ends of justice to be met.



14. The provision of order 51 rule 15 of the Civil Procedure Rules, 2010 gives the court power to set aside any order made “ex - parte”. As stated above, its trite law that the court's discretionary power should, however, be exercised judiciously, with the overriding objective of ensuring that justice is done to all the parties. This was well stated in the now famous case of “ *Mbogo & Another – Versus - Shab* EALR 1908 where the Court opined:-

“The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”

15. Critically, the principles governing reinstatement of suit were well discussed in the cases of “*John Nabashon Mwangi – Versus - Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR where the Court provided as follows:- “The fundamental principles of justice are enshrined in the entire Constitution and specifically in article 150 of the Constitution. Article 50 coupled with article 159 of the Constitution on right to be heard and the constitutional desire to serve substantive justice to all the parties respectively, constitutes the defined principles which should guide the Court in making a decision on such matter of reinstatement of a suit which has been dismissed by the Court.”
16. In the case of “*Belinda Murai & Others – Versus - Amoi Wainaina* (1978), Madan J the Courts opined:-“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 if the interests of justice so dictate. It is known that courts of justice themselves make mistake which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule.....”
17. In the present suit, the Applicant’s Advocate position is that upon being served with an Notice of Motion application by the Respondent dated 8<sup>th</sup> March, 2022 whereby they were seeking to strike out the Applicants’ suit for being vexatious and an abuse of Court process, he wrongly diarized the matter due to work related stress and thought the matter was to be heard on 28<sup>th</sup> July 2022 instead on 23<sup>rd</sup> June 2023. He only realized of this directions after they were served with orders on 1<sup>st</sup> August 2022 for dismissal of the suit. They immediately sent their Court Clerk to peruse the Court file. However, the Respondent however, pointed out that the Applicant’s Clerk upon being sent to peruse the file ought to have noted that dismissal orders had been given. He further argued the matter was dismissed on merit taking that the Applicants had not even bothered to file a responses to the application by the Respondent dated 8<sup>th</sup> March, 2022 and not merely for non-attendance.
18. Fundamentally, the Honorable Court fully concurs with the submissions by the Respondent to the effect that the said mistake by the Counsel are myriad and from the face of it may appear not to be excusable ones but of gross professional negligence. I hold that position based from the following three (3) reasoning. Firstly, the issue of service of the application and hearing date of 23<sup>rd</sup> June, 2022 is not a dispute at all. This is supported by the averments made out under Paragraph 4 of the Supporting Affidavit of the Counsel whereby the Counsel for the Applicants admits by stating that:

“On 9<sup>th</sup> May, 2022, our Law firm accepted service of the Notice of Motion application dated 8<sup>th</sup> march, 2022 from the Respondents Advocates which indicated that the said application was coming up for hearing on 23<sup>rd</sup> June, 2023.....”

Further to this, the Court has read the affidavit of service and the attached hearing notice.



Secondly, even upon noticing that the matter was not listed on 28<sup>th</sup> July, 2022 and sending their Court Clerk to peruse the Court file, the Counsel fails to inform Court what was the outcome and the directions of this Court on 23<sup>rd</sup> June, 2022. They only took action after being served with the Court order on 1<sup>st</sup> August, 2022. I am left to conclude they never perused the Court file at all and that their application is indeed an afterthought.

Thirdly, the Honorable Court has taken judicial notice that, to date, the Applicants have never bothered to file any replies to the Notice of Motion application dated 8<sup>th</sup> March, 2022 by the Respondent. Instead, the Applicants have been engaging the Honorable Court with a series of correspondences urging Court to grant them an opportunity to amend their pleadings prior to delivery of this Ruling. As the English saying goes, two wrongs do not make a right, I discern that all that energy should have been expended on a more positive approach to the matter of penning down replies to the application by the Respondent which from the face value seem to be raising such serious issues being an attack to the main suit and wishing to have it dismissed altogether.

19. From the Court's records and proceedings, on 20<sup>th</sup> September, this Court while in the presence of all parties, the Honorable Court directed with strict timeframe, directed that the application be canvassed by way of written Submissions and a ruling be delivered on 2<sup>nd</sup> November, 2022. In between, there appears that the matter stalled for one reason or the other.

However, on 23<sup>rd</sup> June, 2022 while the matter came up for hearing of the Notice of Motion application dated 8<sup>th</sup> March, 2022 by the Respondents, while all parties present, it will be noted that although having been served as evidenced from an Affidavit of Service by a Court Process Server sworn and dated on 13<sup>th</sup> May, 2022 and filed in Court on 17<sup>th</sup> May, 2022, the Applicants had not filed any responses to the application by then. The application was allowed for being unopposed. For three reasons alone, the Court would proceed to dismiss the said application by the Applicant seeking for setting aside its orders of 23<sup>rd</sup> June, 2022 and reinstatement of the suit thereof.

20. Be that as it, having considered both the application dated 1<sup>st</sup> August, 2022 by the Applicants and responses by the Respondent herein, and based on the inherent powers of the Court, the principles of natural Justice and fair hearing enshrined under the provisions of Sections 1, 1A, 3 & 3A of the Civil Procedure Act, Cap. 21 on what is now termed the Overriding Objective Rule, the provisions of Sections 3 and 13 of the Environment and Land Court Act, No. 19 of 2011, section 101 of the Land Registration Act, No. 3 of 2012, section 159 of the Land Act, No. 6 of 2012 and articles 25 (C), 47, 50 (1) and (2) and 159 (1) and (2) of the Constitution of Kenya, 2010, I find that it would be prudent to reinstate the case on assumption that the Advocate for the Applicant made an excusable mistake. Suffice to say that the Applicants ought not to be punished on account of the mistake by their Counsels. The mistakes of the Counsel should not be visited on the clients (See the case of "Belinda Murai & Others" (Supra)). The Applicant ought to be given an opportunity to be heard under the above provisions of the Constitution of Kenya, 2010 and Statutes but with some penalty upon the Counsel.

#### **ISSUE No. b). Who should bear costs of application?**

21. It is trite law that costs is an issue of the discretion of the Court. Costs means the award a party is granted at the conclusion of a legal action, process and proceedings of any litigation. The Proviso of section 27 (1) of the Civil procedure Act, cap. 21 holds that Costs follow the event after the legal action, process and proceedings hereof.



22. In the case of “*Supermarine Handling Services Limited - Versus - Kenya Revenue Authority* [2010] eKLR (Civil Appeal 85 of 2006) the Court stated inter alia, that:

“Costs of any action, cause or other matter or issue shall follow the event unless the Court of Judge shall for good reason otherwise order ... Thus, where a trial Court has exercised its discretion on costs, an appellate Court should not interfere unless the discretion has been exercised injudiciously or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute “good reason” within the meaning of the rule”.

23. From the instant case, although the application by the Applicants succeeds, but I hold for the scales of justice to equitably attain its balance, the Counsel for the Applicant should bear the thrown away costs entitled to the Respondent’s Advocate for having the dismissed suit reinstated. In the meanwhile the costs of the application will be in the cause since the matter has been reinstated.

## **V. Conclusion & Disposition**

24. Having conducted an indepth analysis of the framed issues herein, the Honorable Court finds that the Notice of Motion application dated August 1, 2022 by the Applicants application is merited subject to the fulfilment of certain pre – conditions and on stringent timelines. These are:-

- a. That the Notice of Motion application dated 1st August, 2022 be and is hereby allowed.
- b. That the Applicants granted an extension of Fourteen (14) days leave to file and serve both replies to the Notice of Motion Application dated 8th March, 2022 and written Submission upon being served by the Respondent with their Written Submissions as directed.  
  
That the Respondent be and is hereby granted fourteen (14) days leave to file and serve further affidavit, is need be, responding to any new issues raised from the responses and written Submissions.
- d. That there be “inter parte” hearing (highlighting of Submissions) on 11th May, 2023 and taking a ruling date thereafter.
- e. That an order be and is hereby made directing the Counsel for the Applicants herein to personally pay the Counsel for the Respondent a throw away costs of Kenya Shillings Twenty Five Thousand (Kshs. 25, 000.00) before any proceedings takes place in this matter.
- f. That failure to adhere with any of these pre – conditions the orders and/or direction made on 23rd June, 2022 to take effect automatically without any further recourse to this Honorable Court.
- g. That the Costs of the application to be in cause.

It Is So Ordered Accordingly

**RULING DELIEVERED THROUGH MICROSOFT VIRTUAL TEAMS, SIGNED AND DATED AT MOMBASA THIS 13TH DAY OF MARCH, 2023**

**HON. JUSTICE L.L NAIKUNI (JUDGE),**

**ENVIRONMENT & LAND COURT AT**

**MOMBASA**



**In the presence of:**

- a). M/s Yumnah, Court Assistant.
- b). M/s. Oweya Advocate holding brief for Mr. Obiju Advocate for the Applicants.
- c) M/s. Umara Advocate holding brief for Mr. Munyithya Advocate for the Respondent.

