



Muchena v Nkando Farmers Co-operative Society Limited & another (Environment & Land Case 12 of 2019) [2023] KEELC 17265 (KLR) (3 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17265 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 12 OF 2019**

**CK NZILI, J
MAY 3, 2023**

BETWEEN

ESTHER MPANDI MUCHENA PLAINTIFF

AND

NKANDO FARMERS CO-OPERATIVE SOCIETY LIMITED ... 1ST DEFENDANT

THOMAS KINOTI 2ND DEFENDANT

RULING

1. Through an application dated February 7, 2023, the court is asked to review or set aside its orders made on February 2, 2023 dismissing the suit for non- attendance and proceeded to reinstate it for hearing and determination on merits. The grounds as set out on the application and a supporting affidavit by Samson Karika of the even date are that counsel for him was unable to log in the virtual court out of a malfunctioning gadget and it was only fair and just that the orders be granted. Additionally, counsel averred that efforts to raise his virtual hand or for the court to locate him were fruitless until 9.24 a.m. when he got a breakthrough only to find that the court had already dwelt with his matter. Furthermore the applicant avers that he is of advanced age and shall stand prejudiced if the said is dismissed without being heard on merit. Lastly counsel for the applicant averred that he takes full responsibility for the turn of events which was not deliberate, he apologized to the court for the inconvenience caused and urged the court to find that it is in the interest of justice that the suit be reinstated for its determination on merits.
2. Though served upon the defendants the application appears unopposed. In written submissions dated February 23, 2023, the applicant submitted that he has always been ready and willing to prosecute this suit he has filed the application without inordinate delay and that based on Orders 12 Rule 7 & Order 45 Rule 1 of the *Civil Procedure Rules* this court can review the orders made on February 2, 2023. Since his counsel was present only that his gadget failed him. That it was not intentional and there was an error apparent on the face of the record. Sufficient reason has been shown for review and that the



- court guided by Articles 47 & 50 of the Constitution as read together with section 1A & 1B of the CPA should safeguard his rights to be heard and open the doors on wider interest of justice in his favour.
3. Reliance is placed on *NBK v Nduiga Njau* (1997) eKLR, on the proposal of sufficient ground for review based on error or omission, *Philip K. Chemwolo & another v Augustine Kubende* (1986) eKLR on the proposition that a party should not suffer over his blander which can be put right by paying of costs unless there was intention to over reach and *Re Jokai Tea holdings Ltd* (1993) 1 ALL ER 630 as cited with approval in *Moffat Nzyusyo Matolo v Joshua Mutaiti Somba* (2019) eKLR on the proposal that if there was no intention to ignore or flout the order, the failure should not be treated as contumacious to disentitle a party of his rights.
 4. The applicant came to court through an originating summons dated March 28, 2019 filed against the 1st and 2nd defendant alleging the right to adverse possession of LR No. Timau/Timau Block 7/581. He did not attach any copy of records over the alleged ownership by the defendants in line with the Limitation of Actions Act. Alongside the originating summons the applicant sought for interim orders of injunction as per his application dated 28.3.2019 which were issued on April 9, 2019. In response to the originating summons the 2nd defendant filed a replying affidavit sworn on May 27, 2019 raising a preliminary objection that the suit was defective in law, since the 1st defendant was placed under liquidation through gazette notice No. 2946 dated September 14, 2007 whose liquidator was Francis Mambo Gatumo under the Cooperative Societies Act No. 12 of 1997.
 5. Further the 2nd defendant/respondent attached the appointment letter dated November 20, 2012 extending the term of the liquidation.
 6. The applicant in her subsequent further affidavit filed on August 29, 2019 did not dispute those facts leading to the 2nd defendant filing further affidavit sworn on September 3, 2019 reiterating that the suit was defective in law.
 7. As a consequence, the applicant filed an application dated January 23, 2020 seeking for leave to allow the originating summons which had been dismissed for non- prosecution on February 10, 2020, but was later on reinstated through a ruling delivered on February 3, 2021. Additionally, orders of status quo were granted on December 14, 2020. Since the reinstatement of the said application, the applicant has not prosecuted until it was withdrawn on December 6, 2023.
 8. The applicant blames technology misfortune and the court for failing to hear or notice the presence of his advocate on record despite raising a virtual hand. His advocate admits that he had that his gadget and internet had challenges but only after the suit had been dismissed for non-attendance that he realized it.
 9. In Philip Kiptoo Chemwolo (Supra) the court held it had unlimited discretion to set aside or vary orders upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties.
 10. In *Kenyatta University of Agriculture and Technology v Musa Ezekiel Oebah* (2014) eKLR the court said that the discretion is aimed at avoiding injustice or hardship resulting from accidents, inadvertence or excusable error, but not to aid a party who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.
 11. The court also in *Habo Agencies Ltd v Wilfred Odhiambo Musingo* (2015) eKLR, held it was not enough to blame the advocate for all manner of transgression in the conduct of litigation.
 12. Even though in *Patel v EA Cargo Handling service Ltd* (1994) EA 75 the court said its discretion was unfettered, the court in *Rayat Trading Co. Ltd v Bank of Baroda & Tetezi House Ltd* (2018) eKLR said that justice is to be weighed on a scale that must balance and protect both parties.



13. In this application, virtual court directions dictates logging in 15 minutes before the court session. The applicant says he has shown sufficient cause which going by *Parimal v Veena* as cited with approval in *Wachira Karaki v Bildad Wachira* (2016) eKLR, must be adequate or enough from the standpoint of a reasonable standard of a curious man.
14. The court in *Augustine Ojiambo v Brinks Security Services Ltd* (2021) eKLR dealt with log in challenges. The same position obtained in *Mark Theophil Odero Odoyo v KCB Group PLC* (2021) eKLR especially on the need to take remedial steps to mitigate the technical challenges. There is no evidence demonstrated that indeed the applicant's counsel faced a system failure. One would have expected a display of a message to that effect including the call logs showing the attempts to get back to court.
15. As to whether the applicant has been eager and willing to prosecute the suit, as indicated above it was brought to the attention of the court and the applicant that the 1st respondent went under liquidation in 2007. This was on May 27, 2019.
16. No leave has since been sought to join the liquidator for the 1st defendant. A suit filed without leave of court is not only a non-starter but a nullity ab ignition. The application seeking to amend was withdrawn on December 6, 2022 and the applicant given more than three months to regularize the suit.
17. In John *Gitbaiga Gachungwa & 3 others v Commissioner for Co-operative Development and 2 others* (2014) eKLR the court cited *Halford v Brookes* (1991) 1WLR 428 on the proposition did knowledge does not mean knowing for certain and beyond possibility of contradiction.
18. Further, the court said cited with approval *Mundia Gateria v Embu County Government & 5 others* Petition 116 of 2013 on the proposition that a gazette notice under Section 85 of the *Evidence Act* was a prima facie evidence as to the existence of the notice or law in question.
19. The court noted that under Section 228 of the *Companies Act* the suit was incompetent for lack of leave to sustain it.
20. In *Lawrence Kituny v James Njuguna Gachanja* (2020)eKLR the court cited Sections 64 and 65 of the Cooperative *Societies Act* on the process to be followed were a liquidation or winding up order has been made, which it termed was mandatory. The same was dismissed in *Sheracco Coop Savings and Credit Society (Under Receivership) v Karaturi Ltd* (2019 eKLR based on Section 432 (2) of the *Insolvency Act*.
21. In this application, the applicant has not invoked Section 432 of the *Insolvency Act* to regularize the said before it can be reinstated for hearing over the suit property said to be registered in the name of the 1st defendant. A nullity is a nullity as held in *Mcfoy v United Africa Co Ltd* (1961) 3 ALL ER.
22. In *Michael Thoya Mbwana v Hussein Kariambhai Anjarwalla & another* (2020) eKLR. The court found no reason in reinstating a suit filed against a dead person. The court said it will simply be a waste of the court's time to reinstate the application for the sake of it.
23. In this application I see no useful purpose to be served by reinstating an already defective suit.
24. It is also not in the interest of justice to grant the application due to the inordinate delay of over 4 years in seeking leave to join the liquidator for the 1st defendant.
25. The upshot is that the application dated February 7, 2023 lacks merit and is hereby dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS / OPEN COURT AT MERU



THIS 3RD DAY OF MAY 2023

In presence of

C.A John Paul

Kirega holding brief for Gachoka for plaintiff

Mutungu for 1st defendant

HON. C.K NZILI

ELC JUDGE

