Wainaina v Ngugi (Enviromental and Land Originating Summons E004 of 2022) [2023] KEELC 20393 (KLR) (5 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20393 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ENVIROMENTAL AND LAND ORIGINATING SUMMONS E004 OF 2022

LN GACHERU, J

OCTOBER 5, 2023

BETWEEN

SAMMY MBURU WAINAINA ..... APPLICANT

AND

PETER KIMANI NGUGI ..... RESPONDENT

RULING

1. By an application dated 30th May, 2023, and filed on the even date, the Applicant – Sammy Mburu Wainaina moved this Court for orders:

    1. That the Honourable be pleased to set aside and vary its orders dismissing the Plaintiff/ Applicant's Originating Summons dated 4th March 2022, and order the reinstatement of the same for hearing and disposal

    2. That costs of this Application be in the cause.

2. The application is premised on six grounds set out on the face of the application and the Supporting Affidavit of the Applicant. The Applicant attributes his non-attendance to diabetes and stroke which he says his advocate failed to divulge to the Court. He adds that the illness caused him some immobility and he only learnt about the fate of his case when he sent his wife to his advocate's office to follow up on the suit. He further deponds that his previous advocate failed to attend Court or notify him about his case and as such the mistake of his advocate should not be visited on him.

3. The application was not opposed and the Court upon satisfaction of service on the Defendant/ Respondent directed that the Application be dispensed with by way of written his submissions.

4. On 18th July, 2023, the Respondent appeared in Court and was given 14 Days to file and serve his written submissions. By the time of this Ruling, there were no submissions on record by the Respondent.

5. The Applicant filed his submission on 17th July 2023, detailing the facts leading to the dismissal of his case. He blames his previous advocate for the events that befell him. He urged this Court to invoke the provisions of order 12 rule 7 of the *Civil Procedure Rules*. He urged this Court to consider the pronouncement of the Court in the case of *Gideon Mose Onchwati v Kenya Oil Co. Limited & Another* {2017} eKLR, where the Court held that a litigant should not bear the default of his advocate unless he is privy to the default.

6. The Plaintiff/Applicant filed the instant suit against the Defendant/ Respondent vide Originating Summons filed on 8th March, 2022, for a claim for adverse possession. The matter was in Court on several occasions for compliance with order 11 of the *Civil Procedure Rules*, but the Applicant took so long before complying. On 14th December 2022, the Plaintiff/ Applicant fixed the matter for hearing, but failed to attend Court for hearing on 7th February 2023, resulting in dismissal of the suit.

7. This Court takes note of the conduct of the Plaintiff/ Applicant to the proceedings of this Court. It took so long for the Plaintiff/Applicant to comply with the pre-trial directions. At one point, 22nd September 2022, the Applicant's counsel told the Court he intended to file witnesses statement and which this Court notes compliance in his bundle of documents. There was a delay in setting down the matter for hearing and which this Court attributes it to the Plaintiff/ Applicant.

8. The Plaintiff/ Applicant wants this Court to exercise discretion in his favour and set aside the dismissal order on account of illness and an erstwhile advocate. The Plaintiff/ Applicant has attached copies of treatment notes which this Court observes that indeed the Plaintiff/Applicant was undergoing treatment. As per the letter attached and dated 3rd May, 2023, from Mitumbiri Health Centre it is evident that the Plaintiff/ Applicant has been doing a follow up for the illness which occurred before the filing of the suit.

9. The main issue for determination by this Court is whether the Orders issued on 7th February 2023, dismissing the Plaintiff's suit can be set aside.

10. Order 7 rule 3 of the *Civil Procedure Rules*, gives this Court the power to dismiss a suit where there is non-attendance on the part of the Plaintiff as it was in the case here. Where a suit is dismissed on this ground no fresh suit can be filed as dictated under rule 6(2) of the same order. However, rule 7 of the same order allows this Court when moved may set aside or vary its dismissal orders. The Applicant has invoked this provision and now wants the Court to exercise the discretion in his favour.

11. The Court of Appeal in the case of *Pithon Waweru Maina v Thuka Mugiria* [1983] eKLR on matters setting aside;

> The principles governing the exercise of the judicial discretion to set aside an *ex parte* judgment obtained in the absence of an appearance or defence by the defendant or upon the failure of either party to attend the hearing are:
>
> a) Firstly, there are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just ... The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 at 76 C and E
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> b) Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. *Shah v Mbogo*

[1967] EA 116 at 123B, *Shabir Din v Ram Parkash Anand* (1955) 22 EACA 48.

c) .....

12. The Plaintiff/Applicant filed the instant application on 30th May, 2023 while the suit was dismissed on 7th February, 2023. This was about 2.2 Months apart. It is common knowledge that once a matter is in Court, parties to a suit have a duty to expeditiously dispense with the matter. A delay even for a day is delay and a Court cannot entertain a delay without sufficient explanation. This calls on litigants to be vigilant on their cases. The Court of Appeal in the case of *Pyramid Hauliers Limited v James Omingo Nyaanga & 3 others* [2019] eKLR declined to allow an application for extension of time to file a Notice of Appeal where the Applicant blamed his erstwhile advocate. The Court held that the Applicant had a duty to show interest in his suit.

13. Similarly, the Court in the case of *Savings and Loans Limited v Susan Wanjiru Muritu* Nairobi (Milimani) HCCS No. 397 of 2002 expressed itself thus: -

> Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates failure to attend Court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant.

14. It can only be in glaring circumstances that a litigant will not be allowed to bear the brunt of an indolent counsel. A Court must balance the interest of the Applicant and Respondent and the provisions of the *Constitution*. The Court in the case of *John Nahashon Mwangi v Kenya Finance Bank Ltd (in Liquidation)* [2015] eKLR held:

> The fundamental principles of Justice are enshrined in the entire Constitution and specifically in article 159 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. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of Judgement. Such acts are comparable only to the proverbial "sword of the Damocles" which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit of course after

considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the plaintiff will suffer if the suit is not reinstated."

15. The Plaintiff/Applicant furnished this Court with copies of evidence that he was attending follow up for his illness. This Court empathizes with the Applicant but is also alive to the fact that the Applicant owes some fidelity to the *Constitution*. As such he must ensure the right to fair hearing is achieved through expeditious and just disposal of cases.

16. Beneficial to the Applicant's predicament was his option of appointing an advocate who was to ventilate his case on his behalf. The Applicant, deponed that his counsel never informed the Court that he was ailing and this is evident from the record since there was no mention of his ailment. But even so, the Plaintiff/Applicant's previous counsel had some high degree of laxity towards the proceedings of this Court. It is disturbing that despite having taken dates, counsel failed to appear in Court.

17. Sadly, as per attachment "SMW4" indicated Court Attendance Docket for the Law Firm of Muturi Njoroge, who this Court takes note was the Plaintiff/ Applicant' previous Advocate, there seem to be untrue allegations of Court attendance. It appears counsel misled his client into believing that he attended Court and even intimated that the matter had been given a further mention for 14th February, 2023. This in all honesty was a deliberate and blatant disregard of counsel's duty to his Client.

18. The Court of Appeal in *Murai v Wainaina (No. 4)* [1982] KLR 38 where it was held that:

> A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by Senior Counsel. Though in the case of Junior Counsel the Court might feel compassionate more readily. A blunder on a point of law can be a mistake. 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 mistakes which are politely referred to us erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule."

19. The Plaintiff/Applicant's previous advocate was being dishonest to his client. Having noted their oversight if that was the case, it was only fair that counsel moves Court at the soonest. In finding that the mistake of the Applicant's previous advocate should not be visited on him, this Court associates itself with the pronouncement in the case of *Wachira Karani v Bildad Wachira* [2016] Eklr where the Court held:

> Although it is an elementary principle of our legal system, that a litigant who is represented by an advocate, is bound by the acts and omissions of the advocate in the course of the representation, in applying that principle, courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequences of the advocates default, unless the litigant is privy to the default, or the default results from failure, on the part of the litigant, to give the advocate due instructions"

20. The Plaintiff/Applicant seem to this Court to be a party interested in prosecuting his case to the logical end. Driving him out of the seat of justice, at the behest of his advocate's conduct will cause a miscarriage of justice which this Court is keen on avoiding. The upshot of the foregoing is that the Plaintiff/Applicant's application is allowed.

21. On matters of costs, while it is true the successful litigant is entitled to costs, this Court is alive to the circumstances that led to the filling of this application. As well, the Court notes that the Respondent

did not take part in the application. This Court in exercise of its discretion donated by section 27 of the *Civil Procedure Act* shall direct that each party to bear their own costs.

22. In a nutshell, the Court allows the Application dated 30th May 2023, with an order that each party bear his/her own costs.

23. The Instant Originating Summons to be set down for hearing the soonest. Failure to prosecute the said Originating Summons within the next 90 days, will render the orders issued herein automatically vacated.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 5TH DAY OF OCTOBER, 2023.

L. GACHERU

JUDGE

Delivered online in the presence of; -

M/s Waigwa H/B Njoroge Kugwa for the Plaintiff/Applicant

Mr Mwangi H/B M/s Ngugi for the Defendant/Respondent

Joel Njonjo - Court Assistant

L. GACHERU

JUDGE

5/10/2023