



Virani & another v Kenya Pipeline Company Limited (Environment and Land Case Civil Suit 357 of 2015) [2023] KEELC 21261 (KLR) (2 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21261 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT 357 OF 2015
SO OKONG'O, J
NOVEMBER 2, 2023**

BETWEEN

NIZAR HASHAM VIRANI 1ST PLAINTIFF

SHAMSUDIN GULAMHUSSEIN NANJI 2ND PLAINTIFF

AND

KENYA PIPELINE COMPANY LIMITED DEFENDANT

RULING

1. The plaintiffs are the registered proprietors of all that parcel of land known as Kisumu/Kogony/2642 (hereinafter referred to as “the suit property”). The plaintiffs brought this suit against the defendant on 23rd December 2015 through a plaint of the same date. The suit was filed through the firm of Kimanga & Company Advocates. The defendant filed a statement of defence on 22nd February 2016. The plaintiffs filed an amended plaint on 15th March 2019. The defendant filed an amended defence on 19th July 2019. The plaintiffs obtained leave on 3rd September 2021 to file a further amended plaint. The draft further amended plaint that was annexed to the affidavit in support of the application for leave was to be deemed duly filed upon payment of the requisite court fees. I have not seen evidence of payment of additional court fees.
2. In their further amended plaint, the plaintiffs sought compensation from the defendant in the sum of Kshs. 22,400,000/- for the damage alleged to have been occasioned by the defendant to the suit property in the course of laying a second pipeline on the property. The plaintiffs also sought damages for trespass among other reliefs. On 21st October 2021, the plaintiffs fixed the suit for mention for directions before the Deputy Registrar on 2nd December 2021. On 2nd December 2021, both parties did not appear before the Deputy Registrar. The Deputy Registrar fixed the matter for mention on 14th March 2021. On 14th March 2021, once again, there was no appearance by both parties. The Deputy Registrar fixed the matter for mention again on 18th July 2022 on which date both parties



were again absent. On that date, the Deputy Registrar fixed the matter before the court for dismissal on 7th November 2022 and both parties were served with a notice under order 17 rule 2 of the [Civil Procedure Rules](#).

3. On 7th November 2022, only the defendant's advocate appeared. The said advocate had no objection to the plaintiffs' suit being dismissed for want of prosecution. In the absence of the plaintiffs' advocates, no cause was shown why the suit in respect of which no action had been taken since 2nd December 2021 should not be dismissed. The court dismissed the suit for want of prosecution with costs to the defendant.
4. What is now before me is a Notice of Motion application dated 22nd March 2023 brought by the plaintiffs seeking the setting aside of the order that was made on 7th November 2022 dismissing the suit for want of prosecution and the reinstatement of the suit. The application was brought on the grounds set out on the face thereof and on the affidavit of the 1st plaintiff, Nizar Hasham Virani sworn on 22nd March 2023. The plaintiffs averred that the plaintiffs' advocates failed to take action in the matter and to appear in court to show cause why the suit should not be dismissed on 7th November 2022 because the advocate who was handling the suit for the plaintiffs died on 16th January 2022 and the advocate who took over the conduct of the matter from him also died on 7th March 2023 after a long period of illness. The plaintiffs averred that the death of their advocate Mr. Gerald Kimanga and the prolonged illness and subsequent death of the advocate who took over the conduct of the matter, one, Omboga Makori impeded their effective representation in the matter. The plaintiffs annexed to the affidavit in support of the application copies of a letter and a notification from the Law Society of Kenya on the death of Mr. Gerald Kimanga and Omboga Makori both of Kimanga & Company Advocates.
5. The application was opposed by the defendant through a replying affidavit sworn by Gustine Othuro on 9th June 2023. The defendant averred that before the suit was dismissed on 7th November 2022 for want of prosecution the matter had come up severally before the Deputy Registrar where there was also no attendance by the Plaintiffs' advocates. The defendant averred that Omboga Makori advocate who took over the conduct of the matter on behalf of the plaintiffs died on 7th March 2023 after the dismissal of the suit. The defendant submitted that no evidence was placed before the court showing that Omboga Makori advocate was ailing for a long time before he passed on. The defendant averred that the reinstatement of the suit would subject it to additional costs. The defendant averred that if the suit was reinstated, the court should order the plaintiff to pay substantial costs to the defendant.
6. The application was argued on 26th October 2023. I have considered the application together with the affidavit filed in support thereof. I have also considered the affidavit filed by the defendant in opposition to the application. The application was brought under order 45 rules 1 and 2 of the [Civil Procedure Rules](#) which deals with the review of orders and decrees. I am of the view that the said Order is inapplicable. The plaintiffs' suit was dismissed under order 17 rule 2 of the [Civil Procedure Rules](#). The suit was dismissed in the absence of the plaintiffs who failed to appear and show cause why the suit should not be dismissed for want of prosecution. Order 17 Rule 2 of the [Civil Procedure Rules](#) does not provide for the setting aside of the orders of dismissal of suits for want of prosecution. I am of the view however that since the order was made in the absence of the plaintiffs, the plaintiffs could move the court under order 51 rule 15 of the [Civil Procedure Rules](#) which provides as follows:

15. The court may set aside an order made ex parte.”

The power of the court to set aside an ex-parte order is discretionary. The burden was upon the plaintiffs to establish that they deserved the exercise of this court's discretion. The plaintiffs had a duty



to demonstrate that there exist sufficient grounds to warrant the setting aside of the order of this court made on 7th November 2022. The court's discretionary powers must be exercised judiciously. The rationale behind the judicious exercise of discretionary powers was explained in *Patriotic Guards Ltd. v James Kipchirchir Sambu* [2018] eKLR where the court stated as follows:

"It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit."

7. In *Shah v Mbogo* [1967] E.A 116 where the court was dealing with an application to set aside an *ex parte* judgment, the court stated that:

"...the court's discretion to set aside an *ex parte* judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice."

8. In *Richard Nchapi Leiyangu v IEBC & 2 others*, Civil Appeal No. 18 of 2013, the court stated that:

"The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent power to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day, there should be proportionality".

9. Applying the said principles to this case, I am inclined to exercise my discretion in favour of the plaintiffs. From the record, I have noted that the plaintiffs' advocates attended court in this matter regularly from 2015 to 2021. The last action by the Plaintiffs' advocates was on 21st October 2021 when they fixed the matter for mention before the Deputy Registrar for directions. This regular court attendance is an indication that the plaintiffs and their advocates were keen on prosecuting the suit. I am persuaded by the Plaintiffs' contention that their failure to appear in court on the various dates that the matter came up for mention before the Deputy Registrar and subsequently before this court for Notice to Show Cause was as a result of the sickness and death of the advocate who was handling the matter on their behalf, Gerald Kimanga. The said advocate died on 16th January 2022. The Plaintiffs averred that after the death of Mr. Kimanga, the advocate who took over his firm, Joseph Omboga also fell ill and did not recover. He died on 7th March 2023. This averment was not contested by the defendant. I am of the view that a party cannot be blamed for the illness or death of his advocate. It is my finding that the excuse given by the plaintiffs for their failure to prosecute the suit and to attend court on 7th November 2022 to show cause why the suit should not be dismissed for want of prosecution is reasonable and as such excusable.



10. I am of the view that the defendant would not suffer any prejudice which cannot be compensated in costs if the plaintiffs' application is allowed. From the nature of the dispute between the parties, I am of the view that justice can still be done in the matter. For the foregoing reasons, I find merit in the Notice of Motion application dated 22nd March 2023. The order made by this court on 7th November 2022 dismissing this suit with costs for want of prosecution is set aside and the suit is reinstated for hearing on merit. The defendant shall have the costs of the application and thrown away costs assessed at Kshs. 20,000/- payable forthwith.

DELIVERED AND SIGNED AT KISUMU THIS 2ND DAY OF NOVEMBER 2023

S. OKONG'O

JUDGE

