Gatimu & another v National Lands Commission & 2 others (Environment & Land Case 23 of 2018) [2022] KEELC 12717 (KLR) (5 May 2022) (Ruling)

Neutral citation: [2022] KEELC 12717 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ENVIRONMENT & LAND CASE 23 OF 2018

A KANIARU, J

MAY 5, 2022

BETWEEN

CHARLES MUNENE GATIMU .... 1ST APPLICANT

KELLEN WARIARA MUNENE .... 2ND APPLICANT

AND

NATIONAL LANDS COMMISSION .... 1ST RESPONDENT

KENYA AIRPORTS AUTHORITY .... 2ND RESPONDENT

ATTORNEY GENERAL .... 3RD RESPONDENT

RULING

1. Before me for determination is a notice of motion dated June 30, 2021 and filed on July 1, 2021. The motion is expressed to be brought under order 12 rules 6 & 7 of the *Civil Procedure Rules*, article 50(1) of the *Constitution*, sections 1A, 1B of the *Civil Procedure Rules* and order 51 rule 1 of the Civil procedure Rules.

Application

2. The parties in the application are Charles Munene Gatimu and Kellen Wariara Munene who are the applicants in the application and plaintiffs in the suit while national lands commission, the kenya airports authority and the hon. attorney general are the respondents in the application and defendants in the suit.

3. The motion came with three (3) prayers but prayer 1 is now moot. The prayers therefore for determination are 2 and 3, which are formulated thus:

> Prayer 2: That the honourable court be pleased to set aside its order issued on the 29th of June 2021 dismissing this suit for non-attendance and reinstate the case.

Prayer 3: Thatcosts of this application be in the cause.

4. The application is anchored on grounds that on the date the suit was scheduled for hearing on June 29, 2021 counsel for the applicants was unable to personally attend court. He instructed another advocate to hold brief on his behalf but was informed that the suit had been dismissed for non-attendance.

5. It is said that the applicants would be prejudiced as a result of the mistake not of their own whilst they are entitled to a fair hearing, including presenting their case before a court of competent jurisdiction. It is deposed that the applicants are willing and ready to prosecute the matter to it's conclusion and have it determined.

6. In support of the application, the applicants filed a supporting affidavit on July 1, 2021 sworn by Mr. Duncan O'kubaso, their advocate on record. The advocate deposed that the suit was dismissed on June 29, 2021 due to non-attendance on his part. He contends that he was unable to attend court as he was appearing before the Court of Appeal on instructions of the honourable attorney general in the building bridges initiative Case Appeal no E219,E292,E293 and E294. He claims to have instructed one Ms Nyawira (advocate) to hold his brief and request for another hearing date and that the said advocate was not in Embu but was to instruct another advocate to hold his brief. It is his case that he was later informed that the matter had been dismissed for non-attendance.

7. The application was opposed by the 2nd respondent via a replying affidavit filed on September 21, 2021 and sworn by David Chege, the counsel on record for the 2nd respondent. He deposed that the application was devoid of merit and one that ought to be dismissed. He confirmed that the suit was scheduled for hearing on June 29, 2021 and that counsel for the applicants was aware of the hearing date. According to him, the claim by the applicant's counsel that the building bridges initiative case was being heard on June 29, 2021 was not true. He said that instead what was happening on the said day was a meeting for the said case and he referred to the annexure by the applicants as proof of this. It is argued that the counsel was lax in prosecuting the case as he had delayed in setting the matter down for hearing. It is further deposed that initially the matter had been set down for hearing on May 5, 2021 and counsel failed to attend court on the said date. The 2nd respondent lamented that the suit was causing them undeserved anxiety and expense and was of the view that the applicants had failed to show good cause as to why the suit should be reinstated. The court was urged to deny the orders sought in the application.

8. The application was canvassed by the parties by way of written submissions. The applicants filed their submissions on November 5, 2021 and dated November 4, 2021. The applicants gave a synopsis of the suit which was to the effect that the 1st respondent had acquired the applicants land through compulsory acquisition and the 2nd respondent had taken possession of the land but the respondents had failed to pay the applicants for acquisition of the suit parcels of land.

9. The applicants reiterated that the suit had been dismissed for non-attendance. He submitted that the decision to reinstate a suit was discretionary and relied on the cases of *Wanjiku Kamau v Tabitha Kamau & 3 others* [2014] eKLR and *Lochab Bros Lts v Peter Karuma T/A Lumumba, Lumumba Advocates* [2003] eKLR. The applicants further submitted that they are desirious in litigating the matter and have been present in court at all times and the failure to attend court was said to be a regrettable mistake.

10. Further reliance was made on the case of *Belinda Murai & Others v Amoi Wainaina Civil Appl No 9 of 1978*, Nairobi [1979] eKLR where the court laid out the approach to be adopted when determining whether to lock a party out of the seat of justice on account of mistake on the same issue, reliance was also made on the case of *Philip Chemwolo & another v Augustine Kubede* [1982-88] KAR 103;

11. It was averred that the applicants have triable issues and that the court should not turn them away on basis of a mistake beyond their control. Reliance was made on article 50(1) of the Constitution regarding the right to fair hearing and the case of *Gold Lida Limited v NIC Bank Limited & 2 others*: Civil Suit No 387 of 2017 [2018] eKLR. The court was ultimately urged to exercise it's judicial discretion to set aside the ex parte order to avert hardship and injustice on the part of the applicants.

12. The 2nd respondent filed it's submissions on March 7, 2022. It relied on the averments in it's replying affidavit and submitted that the delay by the applicants had not been justifiably explained. It is its assertion it has a right to a speedy resolution of the dispute and further that there must be an end to litigation. The court was said to have correctly exercised it's discretion in dismissing the application to prevent an abuse of the court process. The decision to reinstate a suit was equally said to be discretionary upon establishment of reasonable grounds for such reinstatement and consideration of the prejudice to be suffered by the respondent. The 2nd respondent reiterated that it would suffer prejudice in terms of time and legal costs while no prejudice will be suffered by the applicants. It was further argued that reinstatement of the suit would be repugnant to good practice and timely administration of justice.

13. Further, it was denied that the applicants counsel was attending the building bridges initiative case on the hearing date and instead it was submitted that he was merely attending a meeting on the said date. It was reiterated that counsel had failed to set down the suit for hearing from February 2020 and had failed to appear in court in May when the matter was set down for hearing or to give a reason for his absence. It was argued that though mistake of counsel should not be visited on a client, the court should note that the duty of a counsel is not only limited to a client but also to the court. In support of this, reliance was made on the case of *Re Jones* [1870] 6 Ch App 497. The respondent was further of the view that based on the age of the case and the timelines within which the applicants acted then the applicants were not keen litigants deserving of the court's favour.

14. The court was further called upon to rely on the cases of *Eric Oluoch Olele v Kenneth O Obae* [2013] eKLR and the case of *Elosy Murugi Nyaga v Tharaka Nithi County Government & another* [2020]eklr where in both cases the court dismissed an application for reinstatement of suit.

Analysis And Determination

15. I have considered the application before me, the response by the 2nd respondent, the rival submissions by the parties and the court record in general. From the pleadings and submissions by the parties, only one issue commends itself for determination before me, which is whether the suit should be reinstated.

16. As rightly put by counsel reinstatement of suit is discretionary and courts have the powers to determine whether or not to reinstate a suit. However such discretion ought to be exercised judicially. In the case of *Shah v Mbogo & another* [1967] EA 1116, the court stated as follows on the issue of discretion:

> " 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 deliberatively sought whether by evasion or otherwise to obstruct or delay the course of justice."

17. It is trite law that courts have inherent power to make such orders as may be necessary for the ends of justice to be met. Section 3A of the *Civil Procedure Rules* provides as follows; "Nothing in this act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court".

18. On the principles to be considered in an application for reinstatement, the court, in the case of *John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR, stated as follows:

> "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 judgment. Such act 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."

19. The grounds for consideration therefore are whether there are reasonable grounds to reinstate the suit and whether there will be prejudice that will be occasioned to the respondent if the suit is reinstated. The court has to consider also the prejudice to be occasioned to the applicants if the suit is not reinstated.

20. From the averments in the application, the applicants counsel failed to appear in court on June 29, 2021 when the matter was set down for hearing. Consequently the suit was dismissed for non-attendance. Counsel however has given reasons for his non-attendance. According to him, he was attending a hearing before the Court of Appeal in the building bridges initiative on instructions by the attorney general. He had subsequently instructed another advocate to hold his brief on the said day and seek to be issued with another hearing date. It is his case that the advocate he had instructed was also not within Embu and was engaged elsewhere but had promised to get a colleague to hold his brief. He further claims that he was later informed that the matter had been dismissed for non-attendance, hence his application for reinstatement of the suit. In support of his application counsel had attached an email which he avers to have been evidence of his attendance to the court of appeal on the said date.

21. The respondent counsel however opposed the application. According to him, the applicants are undeserving of the orders sought. It is his case that counsel for the applicants had not given a satisfactory reason for failure to attend court. It is said that the claim made by counsel that he was attending to the building bridges matter was untrue and instead what counsel was attending on the said date was a meeting regarding the said matter. It was further argued that the applicants counsel had failed to attend court previously in the month of May when the matter had equally been set down for hearing and further that there had been a lot of laxity on the applicants counsel part to set the matter down for hearing.

22. From my perusal of the file, I have indeed come across an annexure by the applicants' counsel which he has attached before the court to persuade it that indeed he had good reasons for failing to attend court for the hearing. The document attached is an email extract dated June 25, 2021. The subject of the email is the hon. attorney general's BBI appeal team meeting which from my reading was scheduled for June 26, 2021. Counsel had averred that his failure to attend court was due to his attendance of the said hearing.

23. However, from the annexure filed in support of the application, I find that there is no document to prove that indeed counsel was appearing before the Court of Appeal on the said date. With the digitization of the courts and the easy access of cause lists through the Kenya law, i am of the view that it would have been prudent for counsel to have attached a cause list as proof that the matter was indeed set for hearing or mention on the said date. The email extract attached herein only shows that counsel was on record in the BBI. The date even for the meeting in which counsel was being summoned to appear as per the email extract was on June 26, 2021, which was three days before the hearing. The evidence attached herein does not tally with his explanation and I find that counsel had no plausible reason or satisfactory explanation for failing to attend court on June 29, 2021 when the matter was scheduled for hearing.

24. Nevertheless despite my holding as above, I am aware that dismissal of a suit is a draconian act that drives a litigant from the judgment seat. As such, I am mindful of the provision under article 50 of the constitution that guarantees every party a right to a hearing before a court, which right ought to be well safeguarded by courts. Equally courts have a duty to achieve substantive justice to all parties in a suit.

25. In the case of *Lochab Bros Ltd v Peter Karuma T/A as Lumumba, Lumumba Advocates* [2003] eKLR the court observed that:-

> " The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to filter the wide discretion given to it by rules."

26. In view of this, I will proceed to consider whether there will be prejudice that will be occasioned to the respondent if the suit is reinstated and the prejudice to be occasioned to the applicants if the application is not reinstated. I will equally determine whether the application was filed without undue delay and whether justice can still be served despite the delay. On the issue of delay, I note that the present application was filed on July 1, 2021 while the suit was dismissed on June 29, 2021. The application was filed a day after the suit was dismissed and it is my finding that there was no delay whatsoever in bringing the present application.

27. As for prejudice, the applicants have argued that their case has merit and that they are willing to prosecute the matter expeditiously. The respondent has on the other hand argued that it will incur great expense and waste time. I find that the prejudice to be suffered by the applicants is greater considering they instituted a suit to pursue compensation for their land, which they aver was compulsorily acquired by the 1st respondent. It is my considered view that if the suit is not reinstated they stand to lose greatly as compared to the 2nd respondent. They deserve a second chance.

28. I find that it is in the interest of justice to reinstate the suit herein. I therefore make orders that the suit herein be reinstated. Hearing of this suit shall be on a priority basis. In view of the prevailing circumstances, and having found that the applicants indeed had no plausible reason for failing to attend the hearing, I condemn them to meet the costs of this application. They should further pay throw away costs of shs 10,000/= to the 2nd respondent who has vigorously defended this application. The cost of 10,000/- should be paid pronto. I say this because this is an application that could easily have been dismissed but the court has been gracious enough to give the applicant another chance.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 5TH DAY OF MAY 2022.

M/s Muriuki for Okubasu for plaintiff; M/s Masundi for Kiongo for 3{{^rd defendant and in the absence of miller for 2nd defendant.

Court Assistant: Leadys

A.K. KANIARU

JUDGE