M'ambutu & 2 Others v Kenya Railways Corporation (Environment and Land Case Civil Suit 605 of 2008) [2022] KEELC 2504 (KLR) (7 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2504 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND CASE CIVIL SUIT 605 OF 2008

SO OKONG'O, J

JULY 7, 2022

BETWEEN

MISHECK GAUKU M'AMBUTU & 2 OTHERS ..... PLAINTIFF

AND

KENYA RAILWAYS CORPORATION ..... DEFENDANT

RULING

1. The plaintiffs who are members and officials of Kenya Railway Golf Club brought this suit against the defendant by way of Originating Summons claiming title to all that parcel of land known as L.R No. 209/11379 (hereinafter referred to as "the suit property") registered in the name of the defendant on the grounds of among others fraud, adverse possession and trust. The parties engaged in several interlocutory applications the last of which was determined on March 19, 2013.

2. The suit was listed for hearing for the first time on February 4, 2006 when the hearing did not take off because the parties had not exchanged witness statements and bundles of documents to be used at the trial. On July 12, 2017, the suit was listed for hearing on February 28, 2018 in the presence of the advocates for the parties. On February 28, 2018, only the plaintiffs' advocate attended court. The plaintiffs' advocate applied for adjournment and prayed for another hearing date. The court allowed the application and adjourned the matter to June 18, 2019 for hearing. The court directed the plaintiffs' advocate to serve the defendant's advocates with a hearing notice.

3. When the suit came up for hearing on June 18, 2019, neither the parties nor their advocates appeared in court. The court having satisfied itself that the hearing date was taken in the presence of the advocate for the plaintiffs dismissed the suit with costs for non-attendance.

4. What is now before the court is the plaintiffs' application brought by way of Notice of Motion dated November 11, 2019 seeking the setting aside of the order made on June 18, 2019 dismissing this suit for non-attendance and for the suit to be reinstated for hearing. The application that was supported

by the affidavit sworn by the plaintiffs' advocate Nelson Havi on November 11, 2019 was brought on several grounds. The plaintiffs contended that they had learnt that this suit was dismissed for non-attendance on June 18, 2019. The plaintiffs averred that their advocates inadvertently failed to attend court on June 18, 2019 when the suit came up for hearing. The plaintiffs averred that the hearing date was fixed by the court in the absence of the plaintiffs' advocates and in the presence of the defendant's advocates who were directed by the court to serve a hearing notice upon the plaintiffs' advocates.

5. The plaintiffs averred that the defendant's advocates failed to serve the plaintiffs' advocates with a hearing notice for the hearing that was to take place on June 18, 2019. The plaintiffs averred that that was the reason why the plaintiffs and their advocates failed to attend court on June 18, 2019. The plaintiffs averred that their failure to attend court was not intentional as they were not aware of the hearing date.

6. The application was opposed by the defendant through grounds of opposition dated October 1, 2021 and a replying affidavit sworn by Stanley Gitari on October 4, 2021. The defendant contended that the reasons given by the plaintiffs for their failure to attend court on June 18, 2019 were not factually correct. The defendant averred that on February 28, 2018 when the suit was fixed for hearing on June 18, 2019 it was the plaintiffs' advocate who was present in court and who was directed to serve the defendant's advocates with a hearing notice. The defendant averred that it was as a result of the plaintiffs' failure to serve the defendant's advocates with a hearing notice and to attend court that led to the dismissal of the suit when it came up for hearing on June 18, 2019 as none of the parties was in attendance. The defendant averred that the plaintiffs' application was brought after a delay of over 5 months which delay was not explained. The defendant termed the application misconceived and an abuse of the process of the court.

7. The application was argued on October 4, 2021 when Mr. Havi appeared for the plaintiffs while Ms. Kavagi appeared for the defendant. In their submissions, the advocates for the parties reiterated the contents of the affidavits and grounds of opposition filed in support of and in opposition to the application which I have highlighted above. Mr. Havi urged the court to exercise its discretion in favour of granting the orders sought. On the other hand, Ms. Kavagi urged the court to dismiss the application.

8. I have considered the plaintiffs' application. I have also considered the affidavit and grounds of opposition filed by the defendant in opposition thereto. Finally, I have considered the submissions by the advocates for the parties. What I need to determine is whether valid grounds have been put forward to warrant the setting aside of the order made herein on June 18, 2019 dismissing this suit for non-attendance.

9. There is no dispute that the court has power to reinstate a suit that has been dismissed for non-attendance. The power is however discretionary. An applicant seeking reinstatement of a suit has to satisfy the court that he deserves the exercise of the court's discretion. I have at the beginning of this ruling given the history of the dispute between the parties and the progress of the suit. From the evidence on record, I am satisfied that the hearing date of June 18, 2019 was fixed in court in the presence of the advocate for the plaintiffs and that the said advocate was ordered by the court to ensure that the defendant's advocates who were not present in court were served with a hearing notice. I am in agreement with the defendant that the version of what transpired in court given by the plaintiffs is the opposite of what took place. That means that the plaintiffs have not given an explanation why they failed to attend court on June 18, 2019. I am also in agreement with the defendant that a delay of 5 months before filing an application for reinstatement of a dismissed suit is inordinate. The plaintiffs did not tell the court when they learnt that the suit had been dismissed. The delay was therefore not explained.

10. That said, I have noted that the plaintiffs' advocates had attended court faithfully on all the previous occasions when the matter was fixed for hearing save for June 18, 2019. This is an indication that the plaintiffs had not lost interest in the suit. There is also no evidence on record that the plaintiffs had attempted at any time in the course of the proceedings in this suit to delay or to frustrate the prosecution of the suit. As I have stated earlier, there is no reasonable explanation given by the plaintiffs for their failure to attend court on June 18, 2019 and why it took them 5 months to file the present application for reinstatement of the suit. These factors alone in my view cannot fetter the court's discretion under Order 12 Rule 7 of the *Civil Procedure Rules*. In *Nchapi Leiyagu v I.E.B.C & 2 others* [2013] eKLR, 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."

11. In *Philip Chemwolo & another v Augustine Kubede* [1982-88] KAR 1033 at 1040, Apaloo J.A. Stated as follows:

> " Blunder will always be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is a fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court is as often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."

12. Due to the nature of the dispute between the parties and the fact that the plaintiffs have demonstrated that they are still interested in prosecuting the suit, I am inclined to give the plaintiffs a chance to prosecute this suit. I am not persuaded that the defendant would suffer prejudice that cannot be put right by payment of costs.

14. In conclusion, I find merit in the Notice of Motion application dated November 11, 2019. The orders made on 18th June 2019 dismissing this suit for non-attendance with costs are set aside and the suit reinstated for hearing on merit. The defendant shall have the costs of the application assessed at Kshs. 20,000/- payable forthwith and in any event before the next hearing date.

DELIVERED AND DATED THIS 7TH DAY OF JULY 2022

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of;

N/A for the Plaintiffs

N/A for the Defendants

Ms. C.Nyokabi-Court Assistant