



REPUBLIC OF KENYA



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**Magendo & another v Miningwo & 3 others (Environment and Land Case
Civil Suit 13 of 2021) [2022] KEELC 2563 (KLR) (5 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2563 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE CIVIL SUIT 13 OF 2021**

LL NAIKUNI, J

JULY 5, 2022

BETWEEN

MWANAMISI ALI MAGENDO 1ST PLAINTIFF

STEPHEN MUTHOKA JAMES 2ND PLAINTIFF

AND

KIPLANGAT CHRISPTOPHER MININGWO 1ST DEFENDANT

JOAN JEPTOO NG'ENO (ALIAS) 2ND DEFENDANT

**SHIMAKA NECHEZA LEONARD T/A MARENDE NECHEZA
ADVOCATES 3RD DEFENDANT**

LANDS REGISTRAR, MOMBASA 4TH DEFENDANT

RULING

I. Preliminaries

1. What is before this Honorable Court for determination is a Notice of Motion application filed by the Plaintiffs/Applicants. The application is dated 16th November 2021. It is brought under the provisions of Section 13 of *Environment and Land Court Act* 2011, Sections 1A, 3A, 5, 63(e) *Civil Procedure Act* Cap. 21 of the Laws of Kenya, Order 22 Rule 22, Order 10 Rule 11, Order 51 Rule 1 of the *Civil Procedure Rules* 2010, Articles 2, 3, 10, 12, 19, 20, 21, 22, 23, 24, 25, 27, 28, 39, 40, 43, 47, 48, 50, 60, 66, 73, 159, 162 and 165 of *the Constitution* of Kenya 2010.

II. The Plaintiff/Applicant's case

2. The Plaintiff/Applicant seeks for the following orders:-
 - a) Spend;



- b) That pending “the Inter Partes” hearing of this application:
 - i. There be stay of execution of the Order of this Honourable Court given on October 28, 2021 dismissing the Plaintiffs’ suit for non-attendance.
 - ii. There be stay of any further/ alternative proceedings.
 - c) the Orders subject of Prayer/Item No. 2 hereinabove do persist until the hearing and determination of this application.
 - d) That the Honourable Court be pleased to set aside ex debito justitiae the Orders given herein on October 28, 2021, dismissing the Plaintiffs’ suit for want of prosecution.
 - e) That the Honourable Court be pleased to reinstate the Plaintiffs’ suit in its entirety.
 - f) That consequently, the Honourable Court be pleased to allocate a hearing date for this cause.
 - g. That the costs of this application be provided for.
3. The Notice of Motion application which was brought under a certificate of urgency by the Plaintiffs is founded on grounds, testimony and averments in the 19 Paragraphed Supporting Affidavit of Daniel M. Ngonze ESQ., the Plaintiffs’ advocate on record sworn and dated on 16th November 2021. He deposed that there was no provision in law that provided for dismissal of a cause for non - attendance when a matter was slatted for and at a mention. That vide a Plaint lodged on 25th January, 2021, the Plaintiffs sued the Defendants, jointly and severally seeking inter alia:
- i. A Declaration that the Totality of Acts and/or omissions of the 1st and 2nd Defendants in respect of the transfer and/or registration of parcel reference Title No. Mombasa/Block 2/ MN/264 in the name of Stephen Muthoka James was, is and remains irregular and/or un procedural and/or unlawful and/or illegal and/or fraudulent and/or an engagement in a fraudulent scheme;
 - ii. A Declaration that the said Acts and/or Omissions of the 1st and 2nd Defendants in respect of the transfer and/or registration of parcel reference Title No. Mombasa/Block 2/MN/264 in the name of Stephen Muth Oka James were wholly and/or partially sanctioned and/or condoned and/or acquiesced to and/or contributed to and/or facilitated by the 3rd and/or 4th Defendant;
 - iii. A Declaration that consequently the 1st and/or 2nd and/or 3rd and/or 4th Defendants was and/ or are wholly liable, jointly and/or severally for the costs awarded to the Plaintiff in Mombasa ELC Case No. 43 of 2016; *Joan Jeptoo Ng’eno vs Stephen Muthoka & Anor.*;
 - iv. A Declaration that consequently the 1st and/or 2nd and/or 3rd and/or 4th Defendant is and/or are wholly liable, jointly and/or severally for the costs incurred by the Plaintiffs herein, as pleaded;
 - v. An Order do issue directing that the costs subject of prayer 3 above be wholly paid by the 1st and/or 2nd and/or 3rd and/or 4th Defendants was and/or are wholly liable, jointly and/or severally, in default whereof execution do issue against the said Parties;
 - vi. An Order do issue directing that the costs subject of prayer 4 above be wholly paid by the 1st and/or 2nd and/or 3rd and/or 4th Defendant is and/or are wholly liable, jointly and/or severally, in default whereof execution do issue against the said Parties;
 - vii. Costs of this suit;



- viii. Any other/further relief the Honourable Court may deem fit and just to award, in the circumstances.
4. He deponed that, apart from the 3rd Defendant, of all the Defendants had entered appearance vide unconditional memorandum of appearance lodged on 15th February, 2021 that none of the Defendants' had lodged any defence to any portion of the Plaint. He averred that the case was therefore virtually undefended save for the 3rd Defendant's Preliminary Objection dated 12th February, 2021. The matter was scheduled for mention virtually on 28th October, 2021 for purposes of taking Hearing directions on the undefended claim.
5. The Applicants' advocate deponed that owing to internet connectivity challenges, the Learned Counsel on record for the Plaintiffs was unable to access the virtual platform in good time, and by the time such access materialized at around 0945 Hours, there was no activity thereon. On inquiry into the outcome of proceedings through the Court Assistant revealed that the Honourable Court had already concluded her call over for the said day and retreated for other business. Upon perusal of the court records revealed that court recorded that the parties were absent and that the case had been dismissed on grounds of non- attendance.
6. The Applicants' advocate averred that they were keen on ventilating their claim at a hearing hereof in the usual manner, it being notable that the said claim included serious allegations of fraud on, inter alia, senior state officers as well as members of the bar. He prayed that the Honorable Court grants the orders sought herein with the urgency they merit.

III. The 3rd Defendant/Respondent's Case

7. The application was opposed by the 3rd Defendant through a seven (7) points Grounds of Opposition dated 14th January 2022. The opposition have been summarized thus:-
- a) That the application was a waste of Court's time and an abuse of the Court process.
 - b) That the Plaintiff lost interest in prosecuting the matter as neither them nor their advocates appeared before the Court on two consecutive dates.
 - c) That the application lacked merit and was bad in law *ab initio* as no sufficient reason had been given for the explanation for not appearing in court on two consecutive dates nor complying with the court orders issued on 5th July 2021.
 - d) That the application is frivolous, vexatious and lacks merit and brought in bad faith as it seeks to sink the defendants in unending litigation;
 - e) That the applicants' advocate had not demonstrated to court that he took any actions to remedy their errors from 5th July 2021 and comply with Court Order to pay Court Adjournment Fees (CAF) before 28th October 2021 which led to its dismissal.
 - f) The Applicants and their advocate have been indolent in their action and have totally lost interest in prosecuting their case.
 - g) The Applicants had approached the court with unclean hands having failed to comply with Court's Orders of 5th July 2021 of paying CAF that led to its dismissal and seek to reinstate it while in contempt of the Orders.

The 3rd Defendant urged Court to dismiss the said application with Costs.



IV. The 4th Defendant's Grounds of Opposition

8. The application was opposed by the 4th Defendant through a five (5) Grounds of Opposition dated 28th February 2022. They are condensed as follows:-
- a) That the application was misconceived, frivolous, vexatious and an abuse of the process of the court.
 - b) That the application was guilty of material non – disclosure;
 - c) That the orders sought were untenable and a nullity in that there was lack of proper service by the Plaintiffs upon the 4th Defendant contrary to the provision of Sections 12 and 13 of the Government Proceedings Act Cap 40 Laws of Kenya which provides that proceedings against the government shall be instituted by or against the Attorney General and that no proceedings instituted in accordance with this Part of this Act by or against the Attorney General shall be affected by any change in the person holding the office of Attorney General.
 - d) That the application was tainted as their Advocate was neither served with the hearing notice of this matter.
 - e) That they raise a preliminary objection that the suit was “Res Judicata” as the issue of cost was determined in “ELC (Mombasa) Case No. 43 of 2016 Joan Jeptoo Ngeno – Versus - Stephen Muthoka JAMES & Another and the Notice of Motion application dated 26th January 2021 in the same suit seeking review of the costs amongst other prayers.

V. Submissions

9. On 10th February 2022 while all parties were present in Court, the Honorable Court directed that the Notice of Motion be canvassed by way of written submissions. Pursuant to that they all complied and on 23rd March 2022, court indicated it would deliver its the ruling on 31st may, 2022.

A. The 3rd defendant's written submissions

10. On 8th February 2022, Learned Counsel for the 3rd Defendant the Law firm of Messrs. Marende, Necheza and Company Advocates filed their written submissions in opposition of the filed Notice of Motion. Mr. Ondieki Advocate holding brief for Mr. Shimaka Advocate submitted that it is trite law that the courts have jurisdiction to set aside a ruling or judgment. However, the discretion should be exercised in a manner that would not cause injustice to the opposite party. He relied on the case of “Bilha Ngunyo Isaac- Versus - Kembu Farm Limited 7 Another [2018] eKLR where the court stated as follows;

“In the case of “Shah Versus - Mbogo & Another (1967) EA 1116, the court stated on the matter of discretion that

“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 deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”

11. It was the contention of the Learned Counsel that reinstatement of a suit was not automatic but purely at the discretion of the court upon demonstration by ab Applicant of good faith and giving good cause explaining why at the first instance the suit was dismissed. It was their submission that reinstatement



of the suit was not a matter of right but it is purely on the discretion of the court and on condition that the party gives sufficient and plausible reasons as to why the court should exercise it in their favor.

12. The Learned Counsel argued that the Plaintiff alleges that the matter had a mention day of 28th October 2021 when the matter was dismissed and prior to that date was mentioned on 5th July 2021 when the Applicants were not present, and in their supporting affidavit they state that they realized that the matter was dismissed for non-attendance and for want of prosecution on 28th October 2021 when they were perusing the court file at the registry. On this point, he relied on the case of “*South Empire Traders – Versus - Nakuru Players Theatre Club* [2018] eKLR the court held that:-

“The reinstatement of nay application or suit that has been dismissed for non-attendance and/or for failure to prosecute ought not be considered to be automatic. Cogent reasons must be given for the non - attendance, for failure to attend court is a serious issue, and any person dialing to attend court must be ready to bear the consequences which may arise therefrom. No applicant should imagine that all he/she needs to do is file an application for reinstatement and that the same will be allowed as a matter of course and indeed, if courts adopt that stance, it will greatly prejudice the administration of justice for all that a person will need to do is fail to appear, and sit in the comfort zone, that he can always file an application for reinstatement which will be allowed. In this instance, I am afraid that I am not persuaded by the reasons tabled.”

13. The Learned Counsel submitted that what the Applicant has not said or stated to the court is that the date prior to 5th July 2021 the advocate was present and he knew of the date of 5th July 2021 but chose not to attend court on that day. He was also condemned to pay Court Adjournment Fees (CAF) for the 5th July 2021 by the court, an order which to date has not been complied with and the applicant is seeking Court’s equity with unclean hands having not complied with the court’s orders issued on 5th July 2021 actions which should deny the applicant audience until he complies with Court’s orders.
14. The Learned Counsel concluded that the Plaintiff has not advanced any valid reasons for non-attendance of Court on the two consecutive dates in Court (5th July 2021 and 28th October 2021) nor why they have not complied with the Court’s Orders of 5th July 2021 to date. The Plaintiff have a duty at all times to faithfully attend court and follow up on the progress of their matter and even follow up at the registry and look for the file but failed to do the same. It was heir submission that this Honourable Court disallow the Plaintiff’s supplication with costs to the 3rd Defendant.

B. The 4th Defendant’s written submissions

15. On 11th March 2022, the Learned Counsel, Nimwaka K. Muema, the Principal State Counsel for the Honorable Attorney General for the 4th Defendant filed its written submissions in opposition of the Notice of Motion application. Mr. Makuto Advocate, submitted that the section 12 and 13 of the *Government Proceeding Act* Cap. 40 Laws of Kenya provides that provides that proceedings against the government shall be instituted by or against the Attorney General and that no proceedings instituted in accordance with this Part of this Act by or against the Attorney General shall be affected by any change in the person holding the office of Attorney General.
16. The Learned Counsel opined that the Plaintiff with knowledge of the above and knowingly that the office of the Attorney General actively participated in Mombasa ELC Case No. 43 of 2016 purposefully did not serve the office of the Attorney General. The matter would have proceeded for taking directions as to hearing of the suit, then the 4th Defendant would have been locked and would have been prejudiced. They relied on the case of “Shah – Versus - Mbogo & Another (*supra*)”.



17. The Learned Counsel argued that the plaintiff is deliberately seeking to delay the course of justice. The 4th Defendant in its grounds of opposition dated 28th February 2022 raised a preliminary objection that this suit was “Res Judicata” as the issue of cost was determined in Mombasa ELC Case No. 43 of 2016 and the Notice of Motion application dated 26th January 2021 in the same suit seeking review of the costs amongst other prayers.
18. The Learned Counsel submitted that courts have rendered many rulings on the doctrine of Res Judicata which essentially frowns upon the use of the courts to abuse processes. The moment the court comes to the conclusion that the suit was “Res Judicata”, then the court should not shy away from pronouncing itself so. They relied on the case of “*Henderson – Versus - Henderson* (1843) 67 ER 313”.

IV. Analysis & Determination.

19. I have read and considered the application herein, affidavit in support and the responses thereto. I have considered the written submission of both parties. The issues before me for determination are: -
 - a. Whether the Honourable Court has discretion to dismiss a suit at any time for non - attendance of the parties and for inordinate delay in prosecution of the suit.
 - b. Whether the Court should exercise its discretion to set aside the said orders and/or reinstate the dismissed suit?
 - c. Who should bear the Costs of the application.

Issue No. a). Whether the Honourable Court has discretion to dismiss a suit at any time for non - attendance of the parties and for inordinate delay in prosecution of the suit.

20. Reinstatement of a suit dismissed for want of prosecution and nonattendance is discretionary. The discretion is couched under Order 12 Rule 7 of the [Civil Procedure Rules](#) 2010 that provides: -

“Setting aside judgment or dismissal.

Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”
21. Order 12 Rule 3 of the [Civil Procedure Rules](#) allows the court to dismiss a suit for a non-attendance while Rule 7 allows the aggrieved party to apply to set aside that order and reinstate that suit. The Notice of Motion herein was filed on 16th November 2021, about 21 days after the suit was dismissed. The same in my view was therefore filed without delay, considering that the Plaintiffs may not have been aware of the dismissal.
22. In the case of “*Shah – Versus - Mbogo* (1967)EA 116, it was stated that the exercise of discretion of the court to set aside ex-parte Orders is to avoid an injustice or hardship from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought by evasion or otherwise to obstruct or delay the course of justice. In this case the Plaintiff has explained that their internet failed that and they were not to log into the virtual platform for the mention. From the affidavits in support of the application, I am satisfied that the failure to attend court was not intentional or deliberate on the part of the Plaintiff and the same should be excused. The Defendants have not demonstrated that they will suffer prejudice if the orders sought are granted. I am persuaded the circumstances of this case justifies giving the Plaintiff another chance which is not only feasible but also the just thing to do. The overriding objective of the court under the provisions of Sections 3 & 13 of the [Environment Act](#). No. 19 of 2011; Sections 150 of the [Land Act](#), of 2012 and Sections 101 of



the Land Registration Act, of 2012 would also come to the aid of the Applicant in order for the case to be decided on merit.

Also, the case of “Racheal Njango Mwangi (Suing as Personal Representative of the Estate of Mwangi Kabaiku) – Versus - Hannah Wanjiru Kiniti & another [2021] eKLR explains it even further.

Issue No. b). Whether the Court should exercise its discretion to set aside the said orders and/or reinstate the dismissed suit?

23. For the Court to exercise its discretion in favour of the Applicant, he or she has satisfy it that there is sufficient cause or reason to warrant it to be put into use in setting aside the order of dismissal and subsequently reinstate the suit. Sufficient Cause was defined by the Supreme Court of India in “Parimal – Versus - Veena” which was cited with approval in the case of “Wachira Karani – Versus - Bildad Wachira [2016] eKLR”. In the case, the said Supreme Court stated that: -

“sufficient cause” is an expression which has been used in large number of statutes. The meaning of the word “sufficient” is “adequate” or “enough”, in as much as may be necessary to answer the purpose intended. Therefore the word “sufficient” embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, “sufficient cause” means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been “not acting diligently” or “remaining inactive.” However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously”

The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgment impugned before it. The test to be applied is whether the Defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the Defendant must demonstrate that he was prevented from attending court by a sufficient cause.”

24. In the instant case the Applicant claimed that the suit was dismissed for want of prosecution for non-attendance on the date of hearing. With due respect, this is a misconception. The Rules do not provide for dismissal of a suit for want of prosecution on a date it is set down for hearing. Instead they provide for dismissal on account of non-attendance of a Plaintiff or a Defendant who has a counter-claim for that matter. Thus, to set the record straight, the way I understand the facts and the record herein is that the suit was dismissed for non-attendance of both the Plaintiff and his learned counsel on the date of hearing (of their case).



Issue No. c). Who will bear the Costs of the application.

25. The issue of Costs which is the end product after any litigation is at the discretion of the Honorable Court. Section 27 (1) of the *Civil Procedure Rules*, 2010 provides that Costs follow the event. The event in this case is the result of the litigation process.
26. In this case the application by the Plaintiffs/Applicants is found to bear merit and therefore the Costs of shall be in the cause.

IV. Conclusion & Disposition

27. For the foregoing reasons, and based on the in depth analysis of all the framed issues herein the Honorable Court on preponderance of probability, fairness, equity and conscience arrives at the following findings:-
- a) That the Notice of Motion application dated 16th November 2021 by the Plaintiff herein be and is hereby found to have merit. Hence, the said application is allowed.
 - b) That the Order made herein by this Honorable on 28th October 2021 dismissing the entire suit instituted by the Plaintiff for non - attendance be and is hereby set aside. Consequently, the suit by the Plaintiff be and is hereby reinstated for hearing and determination on merit.
 - c) That for expediency sake, this suit should be set down for hearing and final determination within the next One Hundred and Eighty (180) days from this date without fail. The Matter to be mentioned on 28th September, 2022 for Pre – trial conference session under the provisions of Order 11 of the *Civil Procedure Rules*, 2010 and hence fixing of a hearing date.
 - d) That costs of this application shall be in the cause.
28. It is so ordered Accordingly

RULING DATED, SIGNED AND DELIVERED AT MOMBASA THIS 5TH DAY OF JULY, 2022.

HON. JUSTICE MR. L. L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT

MOMBASA

In the presence of: -

M/s. Yumnah Hassan, Court Assistant.

M/s. Kegehi Advocate for the Plaintiff/Applicant.

No appearance for the 1st Defendant.

No appearance for the 2nd Defendant.

No appearance for the 3rd Defendant.

M/s. Kiti Advocate for the 4th Defendant.

