



**Miserez v Hazina Investments Co Ltd & another (Environment & Land
Case 71 of 2021) [2022] KEELC 14536 (KLR) (4 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 14536 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 71 OF 2021**

AE DENA, J

JULY 4, 2022

BETWEEN

JANE NJERI MISEREZ PLAINTIFF

AND

HAZINA INVESTMENTS CO LTD 1ST DEFENDANT

LAND REGISTRAR KWALE 2ND DEFENDANT

RULING

1. This suit was instituted vide a plaint dated May 11, 2011 seeking judgement against the Defendants jointly for a declaration that the title deed to the suit property Kwale/Galu Kinondo/783 issued to the 1st defendant on September 18, 2009 is illegal. The plaintiff sought for an order amending all land registry records in respect of the suit property and an injunction against the 1st defendant restraining them from any dealings on the suit property.
2. The Plaintiff's case is that she is the registered proprietor of the suit property but realised that the same had been registered to the 1st defendant on September 18, 2009 yet she had not transferred the suit property to the 1st defendant. The plaintiff is wary that the same might be transferred to other third parties causing her irreparable harm.
3. The 1st defendant filed its statement of defence on September 27, 2022. It denied the allegations as stated in the plaint and claimed that the suit property had been sold to it by the Plaintiff at a consideration of Kshs 18,000,000/- [read eighteen million]. The court has been subjected to several applications from the parties herein with regards to the suit. On July 21, 2017 the suit was dismissed by the court for want of prosecution. The present application is subject of the said dismissal orders.



The Application

4. 4 The application subject of this ruling is dated March 17, 2020 and was filed under certificate of urgency. It seeks the following orders;
 - a. Spent
 - b. Spent
 - c. That the order issued on July 21, 2017 dismissing the suit herein be set aside and the suit be reinstated to proceed to a full trial on the merits
 - d. That the proceedings in CMCC No 9 of 2020[Kwale]Hazina Investment Company Limited v Jane Njeri & Another] be stayed pending the determination of this application and conclusion of the suit herein.
 - e. That the honourable court do grant further or any other orders that it may deem fit.
5. Briefly the plaintiff alleges in her grounds that she had been unaware that the suit had been dismissed on July 21, 2017. That having been abroad she heavily relied on information from her counsel on record with regards to the suit and the court process. The Plaintiff states that she was only made aware of the dismissal after being served with the temporary orders of injunction granted by the lower court in Kwale PMCC No 9 of 2020 Hazina Investment Co Ltd versus Jane Njeri & Another. She pleaded that she was keen on having the matter proceed and determined on merit.
6. An affidavit sworn by the plaintiff Jane Njeri further supports the application. It is averred that the Plaintiff has been a resident of Switzerland her spouse home country. That while away the firm of Kadima & Co Advocates has been in conduct of the matter and the plaintiff depended on them to prosecute the same. That upon her return to Kenya, she commenced construction on the suit property but was served with injunction orders subject of Kwale PMCC No 9 of 2020. She instructed the firm of Nyokabi Waiganjo Omungala to defend her in the said claim and was shocked to learn that the instant suit had been dismissed on July 21, 2017.
7. The Plaintiff avers that she was unaware of the Notice to Show Cause (NTSC) and the dismissal order as the same were never communicated to her by her then advocate. It is pleaded that the plaint herein demonstrates a prima facie case and that no prejudice will be suffered by any party in the event that the application is allowed. It is alleged that one Stella Samaiyan Seiki fraudulent sold the suit property to the 1st Defendant after forging the Plaintiff's identity. The Plaintiff avers that she is still in possession of the original title to the suit property. That investigations by the DCI led to a request to the PS Lands Ministry asking for the cancellation of the green card illegally prepared in favour of the 1st Defendant and for the land to revert to the plaintiff.
8. It is further deponed that the acts of omission by the plaintiff previous counsel should not be visited upon her. The court is asked to grant the orders sought in order to ensure justice is served.

Response to the application

9. 9 In response to the application the 1st defendant filed a replying affidavit sworn by David Gitonga Muriithi a director of the Company. He deponed that the plaintiff had on several occasions frustrated the hearing of this suit and hence the application to reinstate the same is not merited. The court was referred to its record of September 11, 2012 when the matter failed to proceed for hearing on the basis that the plaintiff had travelled out of the country. That on October 3, 2012 the court ordered the Plaintiff to execute a Ksh.3million bond to cover the 1st defendant security for losses within 7 days



which order has not been honored causing yet another adjournment on September 6, 2013. That thereafter the suit lay dormant for 3 years and was dismissed on July 21, 2017. It is averred that the allegation that the plaintiff resides in Switzerland is a lie, that she is of questionable character having been charged with uttering false documents.

10. It is further averred that the defendant has incurred costs on security for the suit property, loss and damage for non-user of the property on which they had commenced development before these proceedings. It is pleaded that the 1st defendant will greatly suffer prejudice in the event that the suit is reinstated. That in any event the applicant can ventilate her suit in PMCC No 9 of 2020 which is still alive. The court was urged to bring the litigation of this suit to an end.

Applicants further response

11. In rejoinder to the defendants reply above, the applicant filed a further affidavit on March 30, 2022 where she averred that the 1st Respondent has not demonstrated the manner in which the instant application is mischievous and actuated by bad intent. That the same were allegations geared towards diverting the court from the real issues in controversy between the parties hereto. She stated that she was arrested and charged on allegations of forgery of a passport in Criminal Case No 1888 of 2014 but the case was later withdrawn by the prosecution after it was confirmed that she had changed her surname after marriage.
12. The applicant further averred that the record can show for the five years the matter was active, she participated in the proceedings actively. In addition, that since she had instructed an advocate to take conduct of the same, she had hoped that he would zealously pursue the same. That all the time she was residing in Switzerland her advocate had been updating her on the case and at one particular time there were so many applications.
13. The applicants indicate that she has on several occasions taken steps in following up on the criminal suit filed against one Stella Samaiyan Seki who fraudulently sold the suit property to the 1st defendant. It is averred that the notice to show cause why the suit should not be dismissed was never served upon her advocate. That this was evidenced by lack of the said advocates firm stamp on the received copy of the notice to show cause, though it is admitted the 2nd defendants stamp is visible. The applicant however faults the firm of Kadima and Co advocates for failing to be keen on prosecuting the suit.
14. The applicant states that she has invested on the land by developing the same as her matrimonial and retirement home. That in the event that the orders sought are denied the same will lead to irreparable losses and damage on her part. She urged the court to allow the notice of motion for justice to be served.

Submissions of the parties

15. Parties filed and exchanged submissions as follows; -

Plaintiff/applicants submissions.

16. The plaintiff's submissions were filed before court on March 30, 2021. The applicant submits that she made several steps to protect her interests on the suit property by lodging a caution over the same. That she however got suspicious when the then land registrar asked her to avail the original title deed to the suit property, the transfer documents and all the relevant documents in relation to the suit property for investigations at the Kwale Lands Registry. The plaintiff referred to the letter dated August 2, 2019 from the department of criminal investigations and which requested the principal secretary of lands to cancel the green card illegally prepared in favour of the 1st defendant.



17. On the law it was submitted that mistakes of an advocate should not be visited on the client. That the plaintiff had instructed an advocate in conduct of the suit but who failed to act with due diligence leading to dismissal of the same. It is stated that the advocate was however not served with the notice to show cause why the matter was not to be dismissed. That a copy of the notice on the record does not bear evidence of the same having been received by the firm of Kadima & co advocates who were on record for the plaintiff as of that time. However, it was no excuse as counsel would have exercised his duty by following up on the matter even before the notice to show cause. Reliance is placed on *Pishon Waweru Maina v Thuka Mugiria* [1983] eKLR, *Master Power Systems Limited v Civicon Engineering Africa & Another* [2019] eKLR and *Pan-Africa Paper Mills Limited v Sylvester Nyarango Obwocha* [2018] eKLR
18. On setting aside, the dismissal order. It is submitted that the applicant is not to be blamed for the dismissal. That the court has on several occasions opted to determine matters on merit in disregard of excusable circumstances for dismissal. Counsel cited *Patriotic Guards Ltd v James Kipchirchir Sambu* [2018] eKLR and *Philip Kiptoo Chemwolo & Another v Augustine Kubende* [1986] eKLR in support of this point.
19. On the merits of the case, it is submitted that the 1st Defendant has not disclosed all the facts as raised in paragraph 10 of its replying affidavit. It is clarified that indeed the plaintiff was arrested and charged on allegations of forgery of a passport in Criminal Case No 1888 of 2014. The case was however withdrawn after it was established that her surname had changed after she was married. The 1st defendant left out the said information in order to portray the applicant in bad light. The court was asked to allow the applicant to prosecute her case as it had been established that the suit property was illegally sold to the 1st defendant by an imposter and who was being charged in Mombasa criminal case no E273 of 2021 R versus Stella Samaiyan Seiki. That the ID used in the fraudulent sale of the suit property indicated the applicants name but the ID number and serial number appearing on the same belonged to two different people. The land Registrar Kwale refused to place caution on the suit property and the 1st Defendant filed suit in the lower court against the applicant and her husband for trespass [Kwale Land Case No 9 of 2020 Hazina Investments Ltd v Jane Njeri Miserez & Reto Ambuehl].
20. It is further submitted that the 1st defendant is well aware that they were defrauded of Kenya shillings 16,200,000/- and made a complaint against Stella Samaiyan Seki the applicants impersonator. That it beats logic why they are still insisting on ownership of the suit property.
21. On what prejudice will be suffered by the Respondents in the event that the instant application is allowed. It is submitted that no prejudice will be suffered as the said parties will be given an opportunity to ventilate their cases. That in the interest of justice the applicant should be granted audience for her to access justice as provided for under Articles 47 and 48 of the constitution. That in the event the application is not allowed, the applicant stands to suffer irreparable loss and damage. Reliance is placed on the holding in *Chandulal K Vora & Co Ltd v Kenya Revenue Authority* [2017] eKLR, *Abdirahman Muhumed Abdi v Safi Petroleum Products Ltd & 6 Others* Nairobi Civil Suit 173 of 2010 as was quoted with approval in *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 Others* [2013] eKLR.

1st defendant/respondent's submissions

22. In the submissions dated April 19, 2021 the 1st Defendant has curved out 5 issues for determination as summarized here below; -



Whether the applicant is guilty of laches

23. It is submitted that the matter was last actively in court on September 16, 2013 before its dismissal on July 21, 2017. That the reasons given by the applicants for failure to litigate over the matter are not plausible. That the applicant has failed to produce credible documents to back up the claim that the applicant resides in Switzerland and has been out of the county for some time. That the application has been filed after five years from its dismissal and hence the applicant is guilty of laches and the court cannot encourage indolence. Counsel referred this court to Civil Case No 596 Of 2008 *Margaret Nadako Wafula v James Simiyu Wanyonyi & 5 Others*, Civil suit no 17 of 2017 *Nzoia Sugar Company Ltd v West Kenya Sugar Ltd* and Petition no 8 of 2015 *Ali Issa Ali v The Attorney General*

Whether the Plaintiff's conduct prior to the application warrants the court's indulgence

24. Counsel urged that the applicant hands were tainted as she had failed to deposit the security for costs as ordered by the court and should not benefit from the courts discretion in allowing the application. It was emphasised that the suit is irredeemably spent, that the suit property has been subdivided from Kwale/Galu Kinondo/783 to Kwale/Galu Kinondo/ 2773 and 2774. That at the time of the said subdivision, the suit had already been dismissed and the property was free from any encumbrances.

Whether the suit in the lower court affords recourse to the plaintiff

25. In addition, Counsel submitted that reopening of this case is untenable and a waste of courts time as there is a pending suit in the lower court which can give the applicant reprieve.
26. It was lastly submitted that the application is an abuse of the court process and the same should be dismissed with costs.

Analysis and determination

27. This court has considered the pleadings filed herein, the written submissions for and against the application as well as the authorities relied upon. The main issue for determination is whether the applicant has met the threshold for grant of the orders sought. The court is called upon to exercise its discretionary power to set aside the orders of July 21, 2017 and to reinstate this suit.
28. The suit was dismissed for want of prosecution. The provisions of the law conferring the court with powers to dismiss a suit for want of prosecution are Order 17 Rule (1) which provides thus: -
- In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed and if cause is not shown to its satisfaction, may dismiss the suit.
29. From the above provisions the court can exercise the power where there has been no application made or none of parties has taken any step in the matter for a period of one year. This connotes dormancy. There must also be notice in writing to the parties to appear before court to explain why the suit should not be dismissed for such dormancy. In the case of *Associated Warehouse Co Ltd & Others - v- Trust Bank Ltd* HCCC No 1266 of 1999 (unreported) F Azangalala, Ag Judge while commenting on the same provisions in the repealed statute stated thus -

“Rule 2 (1) of order 16 (repealed Civil Procedure Rules) presupposes service before dismissal. It is also clear under this rule that even where cause is not shown, dismissal is not mandatory as the rule is permissive. In this case the plaintiffs were not given a chance to show cause why their suit should not be dismissed. The plaintiffs have this persistent complaint regarding



alleged “Bearer certificates of Deposit”. The plaintiffs may have misinterpreted the effect of the interlocutory order made by Gacheche, Commissioner of Assize as she then was. This reason for delay in prosecuting this suit may be unsatisfactory, but I will not hold it against the plaintiffs. In any event the Defendant has not demonstrated the prejudice it will suffer.’

30. From the above it is clear that before the court settles on dismissing a suit for want of prosecution, it has to be satisfied that the notice of intended dismissal issued and was indeed served on the parties. In the instant case, the applicant pleads that the notice to show cause had not been served upon her counsel on record prior to the matter being dismissed. The said notice is required to be served by the court. I have perused the court record. Indeed, a Notice to Show Cause was issued dated May 26, 2017. Firstly, it is addressed only to one party the Hon. Attorney General who appear for the Land Registrar. On the face of the Notice is a stamp of the said party evidencing receipt of the said notice on May 9, 2017. I did not come across a separate Notice to Show Cause addressed to the other parties the applicant included and served as well. I also noted that while the Notice is dated May 26, 2017 the date when the parties were supposed to appear before court and address the court on the matter is shown as May 17, 2017 which was earlier than the date of the notice itself. The office of the Attorney General also received the Notice ahead of its being issued by the court. I have also perused the court proceedings of May 17, 2017, none of the parties appeared and the irregularities both in terms of the addressees as well as the dates were not noted by the court. The provisions of Order 17 require that all the parties in the suit should be notified. Clearly the notice was not served upon the rest of the parties, it was also defective. I make a finding that there was no service upon the applicant. In my view the requirement for notice was to accord the parties the opportunity to convince the court not to dismiss the suit by furnishing reasons in justification for the dormancy and especially the plaintiff. The court is of the opinion that the plaintiff applicant was not given the chance to do so. The dismissal was based on a notice which was not only not served but which was defective. It cannot stand the test of law. This failure in my view was prejudicial to the plaintiff applicant. In this regard I’m guided by an excerpt in *Belinda Murai & Others v Amos Wainaina* [1978] where the court expressed itself on mistakes made before court by litigants or counsel and whether such mistakes should be a basis of a litigant being locked out of the seat of justice as follows;

“...the doors 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 ought certainly to do whatever is necessary to rectify it if the interest of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule”

31. As it is the suit remains dismissed as per the orders issued by Justice Yano on the said May 17, 2017 and the applicant craves its reinstatement based on the want of notice, her absence from the country though she was all along represented by Counsel and failure by Counsel to notify her or progress the suit. The proposed reinstatement is vehemently opposed by the 1st defendant on the basis of inordinate delay having been filed before the court in March 2020, 2 years and 7 months after the order on dismissal, and lack of bonafides on the part of the applicant among other grounds. Indeed, from perusing the file, I note that the plaintiff in some occasions missed court and whereby the court was alerted of her inability to travel from Switzerland where she resided. However, the record bears the evidence that the plaintiff was also present in other instances as recorded in the court proceedings.

32. The brief facts of the case indicate how the applicant was allegedly impersonated and the suit property allegedly sold to the 1st defendant by her impersonator. A criminal case subject of this fraudulent sale and transfer is before the Mombasa court and has been mentioned in the pleadings. The chronology



of events is indeed a clear setback towards the timeous disposal of this suit. It is clear that the delay was occasioned by the events narrated and which further included the applicant's arrest and arraignment in court over forgery of her passport.

33. For the suit herein to be conclusively dealt with, then it is imperative upon the court to allow the parties to each ventilate their case and present evidence in support of their cases. I'm convinced that based on the subsequent events that follow the transfer of the land to the 1st defendant, a lot of confusion followed as evidenced by the numerous applications and investigations on the various documents held by the parties herein. The delay has therefore been sufficiently explained. In *Agip (Kenya) Limited-v-Highlands Tyres Limited* [2001] KLR 630, Visram J considered the issue of inordinate delay and stated;
- “Delay is a matter of fact to be decided on the circumstances of each case. Where a reason for the delay is offered, the court should be lenient and allow the Plaintiff an opportunity to have his case determined on merit. The court must also consider whether the Defendant has been prejudiced by the delay.”
34. It is important to consider whether the 1st defendant will suffer prejudice. Both parties herein claim that they have been deprived of the use of the suit property which they all claim ownership of. It was emphasised that the suit is irredeemably spent, that the suit property has been subdivided from Kwale/Galu Kinondo/783 to Kwale/Galu Kinondo/ 2773 and 2774 following the dismissal. This subdivision is also contested on the basis of ownership of the mother title. To deny the plaintiff the chance to be heard on this basis will also not settle the issue ownership.
35. This court has been urged that it would be a waste of time to reopen these proceedings since the plaintiff still has an opportunity to pursue her claim under the proceedings in CMCC No 9 of 2020 Kwale. [Hazina Investment Company Limited v Jane Njeri & Another). This court has considered the pleadings in Environment and Land Case No 9 of 2020 filed in the Principal Magistrates court Kwale. The crux of this matter is who is the true owner of the suit property and a determination in this regard will settle the issues in PMCC No 9 of 2020 Kwale [Hazina Investment Company Limited v Jane Njeri & Another. In any case the instant suit was the first to be filed and as I have already observed it ought not to have been dismissed. I see no prejudice in reopening these proceedings. Consequently, the proceedings in the lower court will have to be stayed under the subjudice rule to await the outcome of this case.
36. The upshot of the foregoing is that I find the plaintiff's application dated March 17, 2020 is merited. The following orders shall and hereby issue to dispose of the application; -
- i. The Order made on 21/7/2017 dismissing the suit for want of prosecution is hereby set aside.
 - ii. The suit is hereby reinstated for hearing and determination on merits
 - iii. The lower court proceedings between the parties herein being PMCC No 9 of 2020 Kwale [Hazina Investment Company Limited v Jane Njeri & Another] are hereby stayed pending the hearing and determination of this matter.
 - iv. The status quo shall be maintained pending the hearing and determination of this suit.
 - v. A hearing date shall be granted on priority basis due to the age of the matter.
 - vi. Costs shall follow the event.

DELIVERED AND DATED AT KWALE THIS 4TH DAY OF JULY 2022

A.E. DENA



JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Kihira for the Plaintiffs

Mr. Nduati for 1st Defendant

Mrs. Njau Holding brief for Ms. Lang'at for 2nd Defendant

Mr. Denis Mwakina- Court Assistant.

