



**Ricci v County Land Registrar – Kilifi (Miscellaneous Civil Application
17 of 2021) [2022] KEELC 2739 (KLR) (12 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2739 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
MISCELLANEOUS CIVIL APPLICATION 17 OF 2021**

**MAO ODENY, J
JULY 12, 2022**

BETWEEN

DANIEL RICCI APPLICANT

AND

COUNTY LAND REGISTRAR – KILIFI RESPONDENT

RULING

- 1 This ruling is in respect of a Notice of Motion dated 23rd November, 2021 by the plaintiff/applicant seeking the following orders;
 1. That the court be pleased to review, vary and/or set aside the Order of the Honourable court made on the 7th October, 2021 dismissing the Applicant’s motion dated 12th May, 2021 herein for want of prosecution.
 2. That the motion dated 12th May, 2021 be reinstated for hearing and final disposition.
 3. That the costs of the application be in the cause.
- 2 Counsel tried negotiating this matter but they were not able to agree therefore they filed submissions. The application was supported by the affidavit of Gicharu Kimani sworn on the 24th November, 2021 where he stated that he motion dated 12th May, 2021 came up for hearing on the 7th October, 2021 where the Applicant was ready to prosecute the same but he was unable to log onto the online platform due to technical challenges hence the motion was dismissed for want of prosecution and non-attendance.
- 3 Counsel for the Respondent opposed the application through a Replying Affidavit sworn by Rutto Luttasworn on the 18th January, 2022 whereby she deponed that the application was filed with great delay on the part of the Plaintiff amounting to a total of 2 months and that the delay is inordinate and inexcusable. She asserted that the application was filed as an afterthought and that the applicant was



not keen on prosecuting the application. Further, that counsel has not demonstrated or given sufficient reasons for the non-attendance.

Plaintiff's Submissions

- 4 Counsel gave a brief background to the case and stated that on 22nd April 2016, this Honourable Court issued a judgment in Malindi ELC No. 178 of 2013 *Daniel Ricci -vs- County Land Registrar and another* in favor of the Applicant herein and a Decree was issued on 16th August 2016. That the said Decree was duly served upon the Respondent on the 10th March 2021 and the Respondent has since had knowledge of the existence of the said Court Decree but despite service of the said Decree upon the Respondent, the Respondent has willfully disobeyed to comply with the Decree to the detriment of the Applicant.
- 5 Counsel further stated that the Applicant moved this Honourable Court dated 23rd November 2021 citing contempt on the part of the Respondent and seeking remedy and/or enforcement of the said Decree of this Honourable Court dated 16th August 2016. That the on 7th October 2021 the motion came up for hearing and the Applicant was unable to access the virtual platform/virtual Court as provided due to technical difficulties and as a result, the said Motion was dismissed for non-appearance on the part of the Applicant.
- 6 Mr Gicharu submitted that the Applicant has been diligent in prosecuting the suit and the non-appearance of the Applicant on the schedule date was due to reasons beyond his control as they faced technical difficulties in accessing the virtual platform/virtual Court.
- 7 Counsel identified two issues for determination as follows
 - a. Whether there is a basis for the court to exercise its discretionary power to set aside the order of 7th October 2021 and reinstate this suit.
 - b. Whether the applicant has tendered a reasonable explanation for his failure to appear in court on the date his suit was dismissed.
- 8 On the first issue counsel relied on Section 3A of the *Civil Procedure Act* on 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.
- 9 Counsel submitted that the court has unlimited discretionary power to set aside interlocutory judgments against the applicant to avoid causing injustice and hardships caused by inexcusable errors and relied on the cases of *Belinda Murai & Others vs Amoi Wainaina* (1978) and that of *Martha Wangari Karua vs IEBC Nyeri Civil Appeal No. 1 of 2017* where the court held that the rules of natural justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be.

Respondent's Submissions

- 10 Counsel opposed the application and submitted that the application was not filed timeously and that the applicant has not explained the inordinate delay in bringing this application. The delay is an afterthought and inexcusable.
- 11 Ms Lutta further submitted that the Notice of Motion dated 12th May, 2021 has no chance of success considering that there is still a case pending before this Honourable Court on the same subject matter which matter is yet to proceed for hearing and determination.



- 12 Counsel relied on the case of *Shah vs Mbogo & Another* (1967) EA, *Argan Wekesa Okumu v Dima College Limited & 2 others* (2015) eKLR and *Kestem Company Ltd v Ndala Shop Limited & 2 others* (2018) eKLR in support of the fact that no cogent or sufficient reasons have been adduced by the applicant for their failure to appear in court to prosecute the application.

Analysis and Determination

- 13 The issue for determination is whether the order made on 7th October dismissing the applicant's application dated 12th May 2021 for non-attendance. As stated earlier that counsel had attempted to negotiate this matter but they did not come to a settlement therefore filed submissions for the court to determine the application.

- 14 The jurisdiction of the court to review or set aside its decisions is wide and unfettered. In *Shah v Mbogo and Another* [1967] EA 116 the Court of Appeal of East Africa held that:

This discretion (to set aside ex parte proceedings or decision) is intended so to be exercised to avoid injustice or hardship resulting from accident, 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.”

- 15 The legal threshold to consider before exercising the said discretion is whether the Applicant has demonstrated a sufficient cause to warrant the setting aside of the ex-parte decision or proceedings.

- 16 In the case of *Wachira Karani v Bildad Wachira* [2016] eKLR Mativo J held that:

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....”

- 17 The applicant has explained that he was not able to log in to the online platform when the matter was called out. The applicant must show sufficient cause why he did not attend court to prosecute the application. The court takes judicial notice of the teething problems challenges that the virtual platform has been experiencing.

- 18 In the case of *Edney Adaka Ismail v Equity Bank* [2014] eKLR which was cited with approval in the case of *CMC Holdings Limited v Nzioki* [2004] 1 KLR 173 which stated as follows:-

That discretion must be exercised upon reasons and must be exercised judiciously..... In law, the discretion that a Court of law has, in deciding whether or not to set aside ex-parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle..... The answer to that weight, matter was not to advise the Appellant of the recourse open to it as the learned Magistrate did here. In doing so, she drove the Appellant out of the seat of justice empty handed when it had what if might have well amounted to an excusable mistake visited upon the Appellant by its Advocate.”

- 19 The court has considered the affidavit sworn by counsel Mr. Gicharu where he has explained challenges he experienced in joining the virtual court on the date when the application was listed for hearing and the court is satisfied that this is sufficient reason for the court to exercise its discretion in favour of the applicant.



20 In the case of *Richard Nchapai Leiyangu vs IEBC & 2 others* (2016) eKLR where the court expressed itself as follows: -

We agree with the noble principles which go further to establish that the courts' discretion to set aside ex parte judgement or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice”

21 Accordingly, I find that the application dated 23rd November, 2021 has merit and is therefore allowed as prayed and orders dated 7th day October 2021 are set aside. Applicant to fix the application for hearing within 30 days.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 12TH DAY OF JULY, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the *Civil Procedure Rules*.

