



**Mukuria v Munene & another (Commercial Case 230 of 2019)
[2023] KEHC 27416 (KLR) (Commercial and Tax) (9 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 27416 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 230 OF 2019
DO CHEPKWONY, J
OCTOBER 9, 2023**

BETWEEN

JAMES GITAU MUKURIA PLAINTIFF

AND

PETER KAMAU MUNENE 1ST RESPONDENT

THE COOPERATIVE BANK OF KENYA LTD 2ND RESPONDENT

RULING

1. What is before the court for determination is the Notice of Motion application dated 21st November, 2022 which seeks the following orders:
 - a. Spent.
 - b. This Honourable court be pleased to set aside its orders made on the 17th Aril, 2020 to dismiss the Plaintiff's suit and all other consequential orders.
 - c. The suit be reinstated.
 - d. The costs of the application be in the cause.
2. The Application is based on the Affidavit of James Mukuria Gitau sworn on 21st November, 2022 and the following grounds:
 - i. The Plaintiff/Applicant instituted a suit vide a Plaint dated 10th June, 2015 and filed on 11th June, 2015 in the Environment and Land Court in which case was assigned Case No.514 of 2015.



- ii. Without the Plaintiff's/Applicant knowledge the file was transferred to the Commercial and Tax division of the High Court and assigned a new Case No 230 of 2019.
 - iii. The Plaintiff/Applicant had first instructed the firm of Ochieng Achach & Kaino Advocates. AEA Plaza, 7th floor to prosecute his case.
 - iv. The Plaintiff/Applicant later instructed the firm of Owuocha & Associates Advocates, Tourism Fund Building, Mezzanine floor, Bishops Road, early 2020.
 - v. On 09th September, 2019, the 2nd Defendant/Respondent filed an application on dismissal of the suit for want of prosecution.
 - vi. The Plaintiff/Applicant believed that his advocate was prosecuting the suit and was not aware that the suit had been dormant.
 - vii. The Plaintiff/Applicant was not aware of the application filed by the 2nd Defendant/Respondent had filed an application for dismissal for want of prosecution.
 - viii. A ruling was delivered on 17th April, 2020 giving the Plaintiff 45 days to prosecute the suit or the suit would stand dismissed.
 - ix. The Plaintiff/Applicant was also not aware of the ruling as communication between him and the advocate has broken down.
 - x. 45 days have since lapsed and the suit is dismissed which the Plaintiff/Applicant was not aware of till recently.
 - xi. The property in question is matrimonial property and there is already a case in court seeking eviction of the Plaintiff/Applicant and dismissal of this suit will warrant his eviction from the property.
 - xii. The Plaintiff/Applicant stands to be condemned unheard if the orders sought under this application are not granted.
 - xiii. The Plaintiff/Applicant is desirous on prosecuting the matter.
 - xiv. The Plaintiff/Applicant plain raised an arguable case with high chances of success and it is in the best interest of justice that this suit be reinstated so that it can be heard and determined on merit.
 - xv. The Plaint raises triable issues and the court should allow the hearing of the suit in its merit.
3. In response thereof, the 2nd Respondent filed Grounds of opposition dated 30th November, 2022 on the following grounds;
- a. There is no order of 17th April 2020 dismissing the Plaintiff's suit.
 - b. The Applicant's application be struck out with costs.
4. The parties were directed to canvass the application by way of written submissions.

Analysis and determination

5. Having carefully read through the pleadings and submissions filed by the parties herein, the court finds that this Ruling and the court orders upon which the application is premised were issued on 4th



November, 2021 whereupon, while dealing with an application dated 9th September, 2019 seeking to dismiss this suit for want of prosecution, the court made the following orders:

“Be that at as it may, this court will in the wider interest of justice decline to dismiss the suit for want of prosecution and instead direct the plaintiff takes immediate steps to move the case to the next level within forty- five (45) of service with the defendants defence failure of which the suit will automatically stand dismissed for want of prosecution. In this regard, the defendant is directed to file and serve its defence within 14 days from the date of this ruling. I make no orders as to costs.”

6. It is the position of the 2nd Defendant that there are no court orders issued on 17th April, 2020 as stated by the Applicant and therefore the application should be dismissed.
7. However, the court takes judicial notice that this was an error on the part of the Applicant as the Ruling was delivered on 4th November, 2021 but the court cited the Directions that had been issued by the Chief Justice on 17th April, 2020 which could have led the confusion. This court therefore finds that this error is a procedural technicality which can be excused under the principles of Article 159 of *the Constitution* which provides for undue regard to technicalities in the face of substantive justice.
8. From the reading of the court orders, the Plaintiff was required to take steps within 45 days upon service of the Defendant’s defence, in default of which the suit would automatically stand dismissed for want of prosecution.
9. From the court record, the 2nd Defendant filed its Statement of Defence dated 18th November 2021 and the Plaintiff filed its Reply to Defence dated 1st March, 2022.
10. From the history of the case, the suit was filed way back in 2019 and has come up for mention several times even before the Ruling of 4th November, 2021. It is trite law that litigation must come to an end as parties cannot delay matters as this causes injustice to other parties. The court orders issued on 4th November, 2021 were clear and express on the timelines.
11. The 2nd Defendant complied with the 14 days timelines but the Plaintiff defaulted and only filed a Reply to Defence dated 1st March, 2022 after the 45 days timeline had lapsed. Thereafter, the Plaintiff went back to slumber land and was only awakened with the Mention date of 5th October, 2022 wherein he filed the present application more than one month later.
12. From the conduct of the Plaintiff, it is clear that he did not have an interest to prosecute the matter and he cannot blame the miscommunication between him and the advocate as the reason for the delay because as a litigant he had a duty to follow up on his case even after instructing the advocate, to its finality.
13. It is trite law that court orders are not issued in vain and they must be obeyed by parties so as to uphold the rule of law. This was the decision in the case of *B v Attorney General* [2004] 1 KLR 431 that:

“The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.”
14. In view of the default clause that directed the suit to stand dismissed in default of the orders issued, the suit automatically remains dismissed and cannot be reinstated as the reasons advanced by the Applicant are not satisfactory. It was the Plaintiff’s duty to pursue the prosecution of his case which he failed to do, hence he cannot now seek the indulgence of the court.



15. In the case of *Savings and Loans Limited v Susan Wanjiru Muritu* Nairobi (Milimani) HCCS No. 397 of 2002 Kimaru, J while addressing the duty of a litigant in pursuing a case, the court stated as follows:

“Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate’s failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate’s failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff’s determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and considering her past conduct in the prosecution of the application to set aside the default judgement that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant.”

16. Similarly, the court in the case of *Et Monks & Company Ltd v Evans* [1985] KLR 584, Kneller, J (as he then was) stated as follows:-

“Whether or not the application should be allowed is a matter for the discretion of the judge who must exercise it, of course, judicially. Each turns on its own facts and circumstances... If an action is dismissed for want of prosecution the plaintiff has certain options if it is not his fault. It may sue its advocate for negligence unless it has caused or consented to the delay which has resulted in the action being dismissed for want of prosecution. Advocates for the most part insure against the risk of liability for professional negligence. The plaintiff then has a remedy not against the defendants but against its own advocates...It is the duty of a plaintiff to bring his suit to early trial, and he cannot absolve himself of this duty by saying that the defendant consented to the position. A plaintiff who, for whatever reason, delays for over six years before bringing his suit for trial can expect little sympathy.”

17. Consequently, the application dated 21st November, 2022 lacks merit and is dismissed with costs to the 2nd Defendant. For avoidance of doubt, this suit stands dismissed and the matter to be closed.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 9TH DAY OF OCTOBER, 2023.

D.O CHEPKWONY

JUDGE

In the presence of:

M/S Kariuki holding brief for Mr. Achechi for the Applicant

Court Assistant - Martin

