



**Wafula v Wanyonyi & 4 others (Civil Case 596 of 2008)
[2021] KEHC 81 (KLR) (Commercial and Tax) (16 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 81 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 596 OF 2008
MW MUIGAI, J
SEPTEMBER 16, 2021**

BETWEEN

MARGARET NANDAKO WAFULA PLAINTIFF

AND

JAMES SIMIYU WANYONYI 1ST DEFENDANT

GEORGE MWANGI MUGURO 2ND DEFENDANT

JOSEPH KANIA 3RD DEFENDANT

HOUSING FINANCE CO KY LTD 4TH DEFENDANT

NGURU ENTERPRISES 5TH DEFENDANT

RULING

1. The Plaintiff/Applicant filed application on 19th January 2021, under certificate of urgency and sought the Court determines by adjudicating how much money is actually owed and discharge the property subject-matter of the suit where the Court orders that the amount claimed by the 4th Defendant be paid into Court.
2. The Notice of Motion and Supporting Affidavit of Counsel for the Plaintiff annexed to the Certificate of Urgency also sought setting aside dismissal of the suit order of 18th June 2018 which resulted in dismissal of the pending application of 23rd May 2018 which entailed reinstatement of the suit dismissed on 10th February 2017.
3. The Applicant explained that on 18th June 2018, Counsel for the plaintiff inadvertently failed to attend Court due to mis diarizing occasioned by the Court Clerk of the Law Firm. The Applicant annexed the copy of Diary where the date was mis diarized and attached Supporting Affidavit of Court Clerk



Wcyliffe Ahuga Kidake to confirm the events that led to Counsel not attending Court on 18th June 2018.

4. The Applicant therefore sought reinstatement of the suit and application of 23rd May 2018 that ought to be heard and determined on merits

REPLYING AFFIDAVIT

5. The 4th Defendant through Legal Officer opposed the application on the following grounds;
 - a) The delay in pursuit of setting dismissal order of the Court that was granted 3 years ago
 - b) Detailed in paragraph 5 of the Replying Affidavit, the Applicant failed to explain satisfactorily various instances that the Plaintiff/Applicant failed or make any representations in Court or to attend Court despite service.
 - c) Sought that the Court order to release the funds released to the 4th Defendant is upheld and effected.

SUBMISSIONS

PLAINTIFF'S SUBMISSIONS

6. The Applicant submitted on settled law on setting aside Court orders, judgments;
 - a) Where there was no proper service, the Court has no discretion but to set aside the resulting Court orders/ruling/judgment as was held in *KANJI NARAN vs VELJI RAMJI* (1954)
 - b) The Court has wide discretion subject to limits and restriction to vary or set aside Court orders/judgment/ruling so long as it is done on terms that are just as held in *PATEL vs EA CARGO HANDLING SERVICES LTD* (1974) EA 75,76 BC
 - c) The Court discretion is intended 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 as held by Harris J in *SHAH vs MBOGO* (1969) EA 116, 123BC
 - d) The Court 's discretionary power is to be exercised judicially and not in a selective and discriminatory manner, not arbitrarily or idiosyncratically as observed by Anslie J in *SMITH vs MIDDLETON* (1972) SC 30 & Diplock J in *COOKSON vs KNOWLES* (1979) AC 556
7. Against these legal requirements, the Plaintiff/Applicant submitted that there was reasonable explanation for non -attendance in Court on 18th June 2018. Secondly, the real question is 1st & 2nd Defendants attempt to sell the suit property by private treaty without involving the Plaintiff, a joint owner of the said property with the [alleged] connivance of 4th Defendant's employee, the 3rd Defendant.
8. Thirdly, the Plaintiff stands to lose residential matrimonial home which she spent a lifetime to acquire and an order for costs will assuage the inconvenience the Defendant 's have gone through.



DEFENDANT'S SUBMISSIONS

9. The Defendant set out the back ground of the case as follows;
- a) The Plaintiff filed suit on 21st June 2006 and later amended it on 27th June 2006 with an application for injunction which was granted on 19th October 2009.
 - b) On 23rd August 2010, Hon. Kimondo J directed the Plaintiff to pay Ksh 3,040,855.55 to 4th Defendant within 150 days.
 - c. In November 2012, the Plaintiff paid into Court Ksh. 3,040,855.
 - d) The matter was set for hearing on 10th February 2017, the Plaintiff and/or Advocate did not appear and the suit was dismissed for inactivity since 2014.
 - e) On 11th June 2018, 4 years later, the Plaintiff filed Application of 23rd May 2018 and sought reinstatement of the suit.
 - f) On 18th July 2018, the Plaintiff and/or Advocate failed to attend Court. The suit was dismissed for non -appearance.
 - g) On 4th April 2019, the matter was mentioned for directions on release of funds deposited in Court, [the matter was adjourned to allow Counsel for the plaintiff to attend Court as the holding Brief Counsel had no instructions]
 - h) On 8th April 2019, 4th November 2020, 24th November 2020 despite the Plaintiff/Applicant's Counsel being served with Mention Notices failed to appear in Court.
 - i) On 15th December 2020, the plaintiff was served with Mention Notice that was received under protest.
 - j) The Plaintiff filed the instant Application 3 years later from 2018.
10. The Defendant submitted that the Plaintiff has to demonstrate compliance with the above stated principles for the judicial discretion to be exercised in their favor. The plaintiff failed to provide explanation for various instances of non-attendance in Court and failed to file application(s) for reinstatement of the suit/application without inordinate delay.
11. The Defendant relied on the following caselaw to confirm the principles of setting aside a Court order, judgment/Ruling;
- a) *Pithon Waweru Maina vs Thuku Mugiria* [1983] KLR 78 on exercise of judicial discretion.
 - b) *Bilba Ngonyo Isaac vs Kembu Farm & Anor* [2018] eKLR where the Court held;

There would be no injustice to a party who for 3 consecutive times would fail to attend Court for hearing of her case, and no satisfactory reasons are given when the Court fails to hear him out, then states that she is prejudiced by an order of dismissal.....



Pendency of a case in Court, when it is obvious that the Plaintiff is not interested to prosecute it costs time and money to the Defendants not to mention mental anguish.....in the process, the Court becomes the punching bag, leading to loss of confidence with the judicial system.....

DETERMINATION

The issue for determination is whether the application of 19th January 2021 should be granted reinstating the suit for determination of the apportionment of funds the plaintiff deposited in Court and the impending sale on the suit property.

1. NON -ATTENDANCE OF COURT PROCEEDINGS

1. From 2006 – 2014 parties through Counsel pursued the matter in Court before various Hon. Judges.
2. From 2014, the Court record reflects no activity and there is correspondence by the Plaintiff's advocate dated 26th April 2018, seeking that the Court file be availed as it was missing.
3. On 10th February 2017, Hon LJ R. Ngetich dismissed the suit as it was last in Court on 9th December 2014 and none of the parties' were present and the suit was dismissed for non -prosecution.
4. The plaintiff filed Notice of Motion of 23rd May 2018 for reinstatement of the suit and setting aside of dismissal order of 10th February 2017. On 18th July 2018, Hon Makau J dismissed the suit and application for non- attendance of the Plaintiff/Applicant.
5. The Plaintiff's advocate explained that the Court Clerk of the law Firm mis-diarized the hearing date as detailed the supporting affidavit and Clerk's affidavit with annexed copy of the Diary.
6. The Court record confirms that on 12th November 2018, both parties were absent and on 4th April 2019, Mr Wilson appeared before Hon LJ Okwany with Mr.Wachira holding brief for Mr Amollo for the Plaintiff.
7. The 3rd & 4th Defendants sought release of Ksh 3,040,885,55 deposited by the Plaintiff in Court. The Plaintiff's advocate sought adjournment as he had no instructions on the issue. The Trial Court adjourned the matter to 8th April 2019 and the Plaintiff's advocate failed to attend Court.
8. The 3rd & 4th Defendants appeared in Court and confirmed service to the Plaintiff and Affidavit of Service and sought receipt of the deposited funds as the Plaintiff had the Official Receipt. The Plaintiff was not present or represented.
9. On 24th February 2021, the 3rd & 4th Defendants appeared in Court pursuing the same application for release of funds and confirmed the Plaintiff's present Application of 19th January 2021. The Plaintiff's advocate was not present.
10. The Court sought to confirm the correct position from the Court record online and physical Court file and confirm on 17th March 2021.



11. On 17th March 2021, all the parties' Counsel were present in Court where they informed Court they would file submissions and highlight on 11th May 2021 which they complied.
12. The Court record confirms that the Plaintiff pursued her case 2006-2014. Thereafter, there was no activity except by letter of 26th April 2018, 4 years later seeking to have the Court file availed. The 4 years hiatus without explanation was inordinate delay and that is why the Court dismissed the suit for non-prosecution on 10th February, 2017.
13. After the dismissal, the application to reinstate the suit was filed on 23rd May 2018 after almost a year from dismissal of the suit. The dismissal of the application of 23rd May 2018 on 18th July 2018, the Plaintiff's advocate provided satisfactory reasonable explanation, that it was due to the Court Clerk's
14. Be that as it may, the subsequent mentions by the 3rd & 4th Defendant which they confirm service of the mention dates, the Plaintiff's advocate did not attend or make any representations for the Court to consider. Again, no explanation was/is offered for non-attendance.
15. The totality of the evidence from the Court record, is that there was unexplained non-prosecution of the matter from 2014-2017 inordinate delay in prosecuting the suit and in reinstatement of the suit application

ISSUES FOR DETERMINATION

16. The Plaintiff/Applicant's submission is that the Court ought to determine the following;
 - a. Following the Court Order the Plaintiff paid Ksh 3,040,855.55, the amount claimed by 4th Defendant HFCK into Court, what remains for the Court to determine is what is owed and discharge of the suit property the Plaintiff's matrimonial home.
17. Ruling by Hon LJ J Khaminwa of 19th October, 2009 on Plaintiff's Application for interim injunction read in part as follows;

The Defendants 3rd 4th & 5th Defendants also did file written submissions in opposition. There is no dispute that the amount advanced was Ksh 750,000/- and the security was their property Nairobi/Block 82/2404. The 4th Defendant states that there was default and as at 31/12/2005 the arrears was in the sum of Ksh 2,217,499/90. Therefore, the 4th Defendant issued only one statutory notice, although the security was owned by 2 persons.....

Failure to serve Statutory Notice invalidates the purported exercise of Chargee's power of sale.....where a valid notice has not been served the right of Chargee to sell does not arise...It has to be remembered that the Plaintiff was paying the agreed concessionary amount of Ksh 18,000/- regularly.



18. The issue of whether the impending statutory power of sale was legal and proper or not was determined, and there was no sale to be conducted in light of the circumstances outlined.

19. The Ruling by Hon. Kimondo J of 23rd February 2012, on Defendant's application to set aside the Injunction granted to the Plaintiff and reads in part;

The amount outstanding as at 1st July 2010 is Ksh 3,040,885.55.....

Clearly, the deficiency of the initial statutory notice can be cured by a subsequent notice. The Applicant's state that they have served a fresh statutory notice. The notice is marked JK2 in the Affidavit of Joseph Kania. The Plaintiff has not sufficiently, rebutted the averment at Paragraph 5 that the sum of Ksh 3,040,885.55 is due from her mortgage account.....

That the order of 19th October 2009 is hereby varied by requiring the Plaintiff to pay to the 4th Defendant the sum of Ksh 3,040,885.55.

20. The Court confirmed the amount due and owing as at 2010 the basis upon which the impending statutory power of sale was to be conducted. The Parties appeared before Hon LJ Angawa on 22nd August 2012 and signed Consent through their advocates, wherein they agreed;

- a) on extension of time to pay the outstanding mortgage account to 240 days.
- b) The 4th & 5th Defendants were restrained from selling by public auction LR NBI/BLOCK 82/2404
- c) Leave to appeal granted to the Defendants
- d) The Plaintiff & Defendants to file Witness Statements, Documents & Agreed Issues and mention on 26th November 2012.

21. The parties did not comply with the terms of Consent nor process the matter for hearing hence the dismissal of the suit in 2017. The application to reinstate the suit in 2018 was also dismissed for non-appearance and later the 3rd & 4th Defendants moved the Court to grant orders on release of funds deposited in Court by the Plaintiff. Hon. LJ Okwany on 8th April 2019 granted the order of release of Ksh 3,040,885.55/=

22. I have outlined the decisions by Courts of equal, concurrent and competent jurisdiction that adjudicated on the matter, the statutory power of sale was set aside, the mortgage outstanding amount was deposited in Court and the same was ordered to be released to the 4th Defendant. Ksh 3,040,885.55/= was due and owing as at 2010 and this was not contested at the time, so the amount cannot be subject to apportionment at this stage.

23. By parties' consent the auction was set aside on condition the amount due and owing was paid into Court which it was ordered to be released to 4th Defendant again the same was not contested as Plaintiff failed to appear before Hon.LJ Okwany with no



explanation for non- attendance. No review application was/is pursued. There is no pending issue(s) for determination as the outstanding amount that necessitated the sale was deposited in Court and ordered to be released to the 4th Defendant. If there are any amounts outstanding, the Plaintiff paid monthly Ksh 18,000/- the amount ought to be accounted for first then any claim is pursued thereafter if at all or any.

DISPOSITION

1. From the above outline, the Court takes the view that there is no reasonable basis for the Court to exercise judicial discretion to reinstate the suit.
2. This Court is persuaded by sentiments expressed in *Bilha Ngonyo Isaac vs Kembu Farm & Anor* [2018] eKLR supra
3. The parties had sufficient ample time to pursue the claim in Court but failed to comply with Pretrial orders by LJ Angawa and as per their own Consent. The Application is dismissed Each party to bear own Costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 16TH SEPTEMBER, 2021. (VIRTUAL CONFERENCE DUE TO CORVID 19 PANDEMIC MEASURES RESTRICTING OPEN COURT OPERATIONS AS PER CHIEF JUSTICE DIRECTIONS OF 17TH APRIL 2020)

M.W. MUIGAI

JUDGE

MR OPOLE H/B FOR 3RD 7& 4TH DEFENDANTS- PRESENT

MR AMOLLO FOR PLAINTIFF- ABSENT

COURT CLERK -TUPET

