**Yusuf & another v Banda & another (Environment and Land Case E072 of 2022) [2025] KEELC 5646 (KLR) (30 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5646 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ENVIRONMENT AND LAND CASE E072 OF 2022**

**SM KIBUNJA, J**

**JULY 30, 2025**

**BETWEEN**

**ISSA ABDALLA YUSUF ..... 1ST PLAINTIFF**

**ASATBAI ISSA ABDALLA ..... 2ND PLAINTIFF**

**AND**

**KARISA BANDA MWAKILAGO A.K.A HAMZA KARISA BANDA ..... 1ST DEFENDANT**

**THE LAND REGISTRAR ..... 2ND DEFENDANT**

**RULING**

[Notice Of Motion Dated 5th March 2025]

1. The plaintiffs moved the court through the application dated 5th March 2025, seeking for among others the varying and ultimately setting aside the orders of 29th January 2025 striking out the plaintiffs' suit on grounds of non-compliance with the mediation process; and an order of reinstatement of the suit and directions for the suit be heard, and determined on merits. The application is predicated on the thirty seven (37) grounds on its face and supported by the affidavits of Issa Abdalla Yusuf and Asatbai Issa Abdalla, the 1st and 2nd plaintiffs respectively, sworn on the 6th March 2025, and 1st April 2025 inter alia deposing that their then advocates, Ganzala & Ganzala Advocates, acted negligently and unprofessionally by failing to attend the mediation sessions and by not informing them of the dates the matter was coming up for mediation, leading to the suit being struck out; that their then advocates conduct denied them the opportunity to attend the mediation sessions, and that failure should not be taken as their fault and their application should be allowed as prayed.

2. The 1st defendant opposed the application through the seventeen (17) grounds of opposition dated the 17th March 2025 and notice of preliminary objection dated 17th March 2025, raising five (5) grounds summarized as follows:

a. That the application is bad in law and an abuse of court process, as they have not explained why they failed to attend the mediations sessions, file their case summary and file a reply to the application to strike out the suit.

b. That the plaintiffs have all along been represented by counsel and they have not shown that they have lodged any complaints against their then counsel.

c. That the matter was referred to mediation upon the application by the plaintiffs, but they failed to comply with the mediation processes.

d. That the Rules 27 and 28 of the Mediation Rules are not available to the plaintiffs to set aside the striking out order issued under Rule 29 thereof, but could have been available as a defence to the application to strike out.

e. That even Rule 54 of the Mediation Rules that could have assisted the plaintiffs is not available to them as it is only applicable where there is an active suit before the mediator.

f. That section 3A of the *Civil Procedure Act*, cannot come to the assistance of the plaintiffs as they are the ones abusing the court process, by failing to adhere and respect the mediation process.

3. The learned counsel for the plaintiffs and 1st defendant filed their submissions dated the 22nd April 2025 and 20th May 2025 respectively that the court has considered.

4. The following are the issues for the court's determinations:

a. Whether the court is with jurisdiction to hear and determine the application to set aside the striking out order for failure to comply with the mediation process.

b. Whether the plaintiffs have met the threshold for setting aside the striking out order and reinstatement of their suit.

c. Who pays the costs?

5. The court has carefully considered the grounds on the notice of motion, grounds of opposition and on the notice of preliminary objection, affidavit evidence, submissions by the learned counsel for the plaintiffs and 1st defendant, superior courts decisions cited thereon, the record and come to the following determinations:

a. That the plaintiffs have in their application invoked Rules 27, 28, 29 and 56 of the Court Annexed Mediation Rules, 2022, Order 51 Rule 1 of the Civil Procedure Rules, and sections 1 and 3A of the *Civil Procedure Act*. Going by the heading on Rules 27, 28, 29 & 56 of the Court Annexed Mediation Rules, they provide for role of advocate in mediation, non-compliance, consequences of non-compliance and applications respectively. Though Rule 56 requires applications under the Rules to be by notice of motion unless otherwise provided, none of the Rules relied on by the plaintiffs provides for setting aside an order striking out a suit issued under Rule 29 for reasons of the party failing to adhere or comply with the mediation processes.

b. As seen from the margin notes, sections 1 & 3A of the *Civil Procedure Act* chapter 21 of Laws of Kenya provides for short title and application of the Act and saving of special jurisdiction and powers respectively. The record of the proceeding of 9th October 2023 confirms the suit was referred to mediation by consent of the parties' counsel. The mediator consequently filed a report dated 4th December 2023 that there was no settlement for the plaintiffs had failed to

comply with mediation directions. During the proceedings of 20th June 2024, the counsel for the 1st defendant informed the court that they intended to file an application to sanction the plaintiffs, but counsel for the plaintiffs sought for time to discuss and see whether they could settle the matter out of court. The court agreed and set down the matter for mention on 22nd July 2024. On that date, counsel for the 1st defendant was the only one present and informed the court he had filed an application dated 16th July 2024 and requested for a mention date to enable him serve. The court directed the matter be mentioned on 16th September 2024 when both counsel attended. The counsel for the plaintiffs requested for two (2) days to file and serve a reply which was granted. The court also gave timelines for filing and exchanging submissions, but come the next mention of 4th November 2024, no reply or submissions had been filed by the plaintiffs, and their counsel did not attend. The counsel for 1st defendant had filed their submissions and the application was set down for ruling on 29th January 2025. In that ruling that is now sought to be set aside, the court found merit in the 1st defendant's application dated 16th July 2024 and proceeded to strike out the plaintiffs' pleadings/suit for failure to comply with the mediation process.

c. In law, a party has the right to participate in a civil litigation in person or through an appointed counsel. The plaintiffs commenced this suit through the plaint dated 24th June 2022 filed through their counsel, Ganzala & Ganzala Advocates. The plaintiffs appear through their application dated 5th March 2025, to blame the said counsel for their failure to participate in the mediation processes and to defend the striking out application dated 16th July 2024. However, as posited by counsel for the 1st defendant, they have not availed before this court evidence to show what action they have taken if any against their said counsel. The other parties and the court cannot be blamed for the plaintiffs' inaction as the suit was theirs and had a duty to keep checking on its progress from their advocates, if none was shared within reasonable periods. The court cannot just take it that their former advocates were to blame as alleged by the plaintiffs without evidence in support and when it is clear the application was not served upon their previous advocates. Had they have been served, and had they been minded to respond, probably they would have told a different story, including blaming the plaintiffs. I therefore find the plaintiffs have failed to establish a reasonable case and to meet the threshold for the court to exercise its discretionary power of setting aside orders in their favour.

d. That sections 1A and 1B of *Civil Procedure Act* provides for the objective of the Act and duty of the court respectively, as seen from the margin notes. Section 1A of the said Act provides that:

> " SUBPARA 1A
>
> (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
>
> (2) The court shall, in the exercise of its powers under this Act or the interpretation of its provisions, seek to give effect to the overriding objective specified in (1).
>
> (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the court to further the overriding objective of the Act and, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court."

Further, section 3 of the *Environment and Land Court Act* No.19 of 2011 provides as follows:

> " 3.
>
> (1) The principal objective of this Act is to enable the court facilitate the just, expeditious, proportionate and accessible resolution of disputes government by this Act.
>
> (2) The court shall, in the discharge of its functions under this Act give effect to the principal objective in subsection (1).
>
> (3) The parties and their duly authorised representatives as the case may be, shall assist the court to further the overriding objective and participate in the proceedings of the court."

The provisions in the above two sections, though in different statutes, speak to more or less the same substance, and specifically that parties and or their counsel are obligated to participate in the court processes and to comply with the court directions and orders. Only then will the court attain the overriding objective of the two legislations to facilitate the just, expeditious, proportionate, accessible, and affordable resolution of the civil disputes covered thereunder. That is the only way, the courts will be able to comply with the principle under Article 159(2) (b) of *the Constitution* of Kenya, 2010, that "justice shall not be delayed".

e. That court annexed mediation processes are part of the court process, and directions and orders issued by the appointed mediator are to be complied with by the parties and or counsel as appropriate, so as to further the overriding objective to facilitate the resolution of the dispute in a matter before him/her in a just, expeditious, proportionate and affordable and accessible way or manner. The failure by the plaintiffs, herein and their then counsel to comply with the appointed mediator's directions, run counter to that requirement of the law and no reasonable explanations for the obvious lack of cooperation was presented. The court therefore, finds the plaintiffs have not met the threshold for the setting aside order to be considered in their favour. That the court cannot consider the prayer for reinstatement of the suit as the plaintiffs have failed in the setting aside prayer, that should precede it.

f. That section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya provides that costs follow the event unless where the court for good reasons orders otherwise. In this instance, I do not find any such reasons and plaintiffs will pay the 1st defendant costs.

6. In view of the determinations set out above, on the notice of motion dated 5th March 2025, the court finds and orders as follows:

   a. That the said application is without merit.

   b. The application is dismissed with costs.

   It is so ordered.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 30TH DAY OF JULY 2025.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In the presence of:

Plaintiffs : M/s Nafula For Kahindi

Defendants :mr. Oddiaga

Shitemi-court Assistant.

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**