Mulongo v Nzai (Environment & Land Case 187 of 2013)
[2024] KEELC 313 (KLR) (31 January 2024) (Ruling)

Neutral citation: [2024] KEELC 313 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 187 OF 2013

NA MATHEKA, J

JANUARY 31, 2024

BETWEEN

EDWARD WANEKHWE MULONGO ..... PLAINTIFF

AND

KARISA NZAI ..... DEFENDANT

RULING

1. The application is dated 8th October 2018 and is brought under Article 50 (1), Article 159 (2) (d) of *the Constitution* of Kenya, 2010; Order 51 Rule 1, Order 12 Rule 7 of the *Civil Procedure Rules*, 2010; Sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap 21, Laws of Kenya seeking the following orders;

    1. That this Honorable Court be pleased to set aside its orders issued on the 26th day of September, 2018 dismissing the plaintiff's suit upon such terms as are just.

    2. That this Honorable Court be pleased to reinstate the plaintiff's suit for hearing on merit.

    3. That the costs of this application be in the cause.

2. It is based on the following grounds that the plaintiff's suit herein was dismissed on the 26th September, 2018 for the reason that the plaintiff had failed to serve the Defendant with a hearing notice by substituted service owing to the fact that both the defendant and his counsel cannot be located. The plaintiff himself was not in court but was represented by his counsel on record. Counsel on record for the plaintiff inadvertently failed to inform the plaintiff of the orders directing the plaintiff to serve the defendant with a hearing notice by substituted service owing to miscommunication within counsel's office. As a result, the plaintiff did not provide funds for such service counsel following the inadvertent omission of counsel. Further still, the defendant will not be prejudiced in any way should the plaintiff's application herein be allowed; whereas the plaintiff will be occasioned great injustice and hardship should his suit not be reinstated and thereafter heard on merit. The court has a wide discretion to set aside the orders on such terms that are just. In the premises it is only fair and just and in the interests of

the administration of justice that this Honorable Court exercises its discretion in favor of the plaintiff by granting the orders sought.

3. This court has considered the application and submissions therein. The relevant law governing setting aside judgment or dismissal is Order 12 Rule 7 of the *Civil Procedure Rules*. It provides as follows:

> Where under this order judgment has been entered or a suit dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just"

4. The determination of whether to or not to allow an application for setting aside judgment or an order for dismissal of a suit due to non-attendance of a Plaintiff is within the wide discretion of the court. This discretion has to be exercised judiciously, as was stated the case of *Shah vs Mbogo* (1979) EA 116 quoted with approval in the case of *John Mukuha Mburu vs Charles Mwenga Mburu* (2019) eKLR, where that court stated that;

> .....this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice."

5. For the Court to exercise its discretion in favour of the Applicant, it has to be satisfied that there is sufficient cause or reason to warrant it to be put into use in setting aside the order of dismissal and subsequently reinstate the suit. Sufficient Cause was defined by the Supreme Court of India in *Parimal vs Veena* which was cited with approval in the case of *Wachira Karani vs Bildad Wachir*a (2016) eKLR. In the case, the said Supreme Court stated that;

> "sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously"
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> The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgment impugned before it. The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. 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. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause."

6. In the instant case the plaintiff's suit herein was dismissed on the 26th September, 2018 for the reason that the plaintiff had failed to serve the Defendant with a hearing notice by substituted service owing to the fact that both the defendant and his counsel cannot be located. The plaintiff himself was not in court but was represented by his counsel on record. Counsel on record for the plaintiff inadvertently failed to inform the plaintiff of the orders directing the plaintiff to serve the defendant with a hearing notice by substituted service owing to miscommunication within counsel's office. From the court record I note that the file was previously in court on 30th November 2018 when the court noted that this suit was dismissed. It was not until 3rd April 2023 when the Applicant took a hearing date for this application. This matter was filed way back in 2013.

7. I find that both the Applicant and his advocate demonstrated inexcusable laxity in prosecuting this case, and not only on the material date but others. It is the role of the Plaintiff and his counsel to ensure that the case proceeds for hearing expeditiously. In the case of *Utalii Transport Co. Ltd and 3 Others vs N.I.C. Bank and Anoth*er (2014) eKLR, the court held that;

> "It is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court."
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> 33. It is also the duty of the parties to assist the court to adjudicate on the matters brought before it expeditiously as was held in *Gideon Sitelu Konchella vs Daima Bank Limited* (2013)eKLR where the court while citing the case of *Mobil Kitale Service Limited vs Mobil Oil Kenya Limited*, held that:-
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> > "It is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice by delay would be a thing of the past. Justice would be better served if we dispose of matters expeditiously ....the overriding objection of this Act and Rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act."

8. The Plaintiff/Applicant blames his advocate for the inadvertent mistake. This is the Plaintiff's case and he ought to have been vigilant. The case does not belong to his advocate. In the case of *Savings and Loans Limited vs Susan Wanjiru Muritu* Nairobi HCCC No. 397/2002, the court stated that;

> Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocates 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.

9. 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.

10. I am minded that dismissal of cases upon summary procedure may be draconian but when the occasion calls for such action, the court should not shy away from taking such measures (see the case of *Kenya Power & Lightning Co. Ltd vs Alliance Media Kenya Ltd* (2014) eKLR). The Plaintiff is indolent and this is inexcusable. Suits are meant to be prosecuted. From the facts before me, the law and authorities cited above I find that the application is unmerited and I dismiss it with costs.

11. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 31ST DAY OF JANUARY 2024.

N.A. MATHEKA

JUDGE