



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 104 OF 2005

**CHRISTOPHER SHIVAMBO KARAMOJA..... 1ST
PLAINTIFF**

**FRANCIS MOSE MASESE..... 2ND
PLAINTIFF**

RACHEL WANJIRU

JESSY MBURU (as the personal legal representative of

**JUDRAPH NDUNGU MWAURA (deceased)..... 3RD
PLAINTIFF**

VERSUS

**JANE NJERI.....1ST
DEFENDANT**

JOSEPH K. KIIRU (as the personal representative of the

**estate of ELIZABETH WANJIRU KARANJA (deceased)....2ND
DEFENDANT**

**MONICA NJERI NG'ANG'A.....3RD
DEFENDANT**

RULING

1. The Notice of Motion dated 31/8/2017 seeks an order setting aside this court's orders made on 15/3/2017 dismissing the plaintiffs' case for non-attendance. The application is supported by the affidavit of Rachel Wanjiru Mwaura, one of the plaintiffs.
2. The grounds upon which the application is made are that the deponent was unwell and she was thus unable to attend court on 15th/16th March, 2017 when she was required to continue with her testimony. She states that though she was unwell, she had not provided her advocate any documentary evidence of her illness. She has now exhibited medical notes to her supporting affidavit.
3. The affidavit of the 1st plaintiff has also been attached. The deponent therein states that he was shocked to learn that the court had dismissed the entire suit due to the absence of Rachel Wanjiru on

15/3/2017. Nothing else in that affidavit is relevant to the resolution of the application at hand.

4. The affidavit of the plaintiff's advocate is also attached in support of the application. The gist of the said affidavit is that one of the plaintiffs was ill and could not attend court on 15/3/2017. The plaintiff's counsel avers that on 15/3/2017 he had instructed his clerk to have the case stood over to 16th March, 2017 as he was engaged at the Busia Court in Busia High Court Succession Cause No. 210 of 2015. He states that on the material day his clerk was in court and he was informed by the court clerk, one Collins that the case had been moved from 15th to 16th March, 2017 and that the same had been cancelled from the cause list of the day. Later, he says his clerk got information that the suit had been dismissed for non-attendance. He avers that the non-attendance on the part of counsel and of his "representative" was not deliberate.

5. Part of the exhibits to the plaintiff's application is an affidavit sworn by a clerk at the plaintiff's counsel's office. He states that he perused the cause list, that he found out that the case had been scheduled for hearing but the same had been "cancelled" and listed for hearing on 16th March, 2017; that he proceeded to another court and when he came out the court clerk informed him that his case had been called out and dismissed for non-attendance by counsel and the plaintiffs. He avers that his non-attendance was not deliberate. It is clear from the foregoing that the accounts of the plaintiff's counsel and his clerk are at variance.

6. The replying affidavit of the defendant's counsel has been filed in opposition to the motion. The gist of his affidavit is that on the 19th January, 2017 this matter could not proceed as the Judge who had heard it had been transferred; that on 9th February, 2017 this matter came up for directions and it was allocated two hearing dates, that is 15th and 16th March, 2017. Further the two dates were taken by consent of the advocate's representatives; that he checked the online list and confirmed that the suit was listed for hearing on the two days. It was on this basis that he and the 3rd defendant travelled all the way from Nairobi on 14/3/2017 so that they could arrive and prepare for the hearing together with the other defendants. On the said day, however, neither the plaintiff nor their advocates appeared when the matter was called out and it was therefore dismissed for non-attendance. He avers that the reasons for not attending court have not been properly explained. He further avers that the alleged communication from a clerk that the matter had been taken out of the courts hearings list was not a sufficient cause to occasion failure by an advocate to attend court and only communication from the Deputy Registrar could have that effect. He also draws attention to the engagement of the plaintiff's counsel at Busia High Court on 15/3/2017 and the allegation of illness of the witness and terms them as contradictory. He says there was no prior notice of the illness of the witness' or a request that the matter be rescheduled.

7. He further avers that the plaintiff's counsel had knowledge that the matter had been allocated two hearing dates owing to its age but he nevertheless opted to attend the Busia case. He states that the plaintiff's counsel did not try to call him or his office despite his knowledge of his client's illness.

8. The deponent also pointed out that Rachel Wanjiru was not the only witness and that on 22/10/2016 the plaintiff's counsel had indicated that he had two more witnesses to call. He avers that the court has given the plaintiff an opportunity of being heard since **1991** when they filed the matter and urges that the application should be dismissed.

9. The applicant's filed their written submissions on 10/10/2017 and the respondents on 12/10/2017. I have considered those submissions. The main issue in the instant application is whether the orders of dismissal of the suit made on 15/3/2017 should be set aside. In determining this it is necessary to consider whether the absence of the plaintiffs and their counsel from court on 15/3/2017 had been explained sufficiently.

10. It is common ground that the two hearing dates were taken by consent. On 9/2/2017 the plaintiff's counsel appearing in the matter is on the record as saying that there were three more witnesses for the plaintiff who were yet to be called to testify. The matter was given two dates in his presence. On 15/3/2017 the court noted that the plaintiffs were not in court. Only Mr. Githumbi for the defendants

appeared and he stated that he had 3 witnesses. The suit was on that day dismissed for non-attendance.

11. In his submissions in support of the application on 16/10/201 the plaintiff's counsel urged that though this matter is old it is one of the many that are pending before court for resolution, that it was only after he came into the matter that it proceeded, that his clerk did not get to court in time on the morning the matter was dismissed, and that this court has a wide discretion in the matter. It is noted that his most recent narrative on his clerk's participation conflicts with the other two narratives earlier mentioned in this ruling. He cited the case of ***Thomas Ratemo Ongeru & 2 Others -vs- Zacharia Isaboke & Another ELC 95 of 2004*** as authority for the proposition that there is no error that cannot be put right by payment of costs. He said that costs can be paid in this case.

12. The defendant's counsel on the other hand reiterated that the plaintiffs had failed to give good reasons as to why they never attended court on 15/3/2017. In response, the plaintiff's counsel final submission was that the only witness he wished to call after Rachel Wanjiru had testified was a surveyor and his report is already filed in the court record. He stated that since the parties have waited for many years, they should be allowed to leave the court satisfied by being given a chance to be heard. He also reiterated that the plaintiffs are ready to pay costs to the defendants.

Determination

13. What happened on 15th March, 2017 is not new in this old case. There have been earlier incidents which are recorded in this matter which show that the plaintiffs are guilty of much delay. On 13/2/2012, the matter was adjourned to 7/5/2012 for *want of service of an application by plaintiffs* upon the defendants. On 26/7/2012, there was *no appearance* for the plaintiff and the matter was adjourned to 25/9/2012. On 25/9/2012 the matter was adjourned generally for the reason that even the counsel for the plaintiff *did not to appear to know what the mention of the matter was for*; on 21/1/2013, the matter was stood over generally at the instance of the plaintiff's counsel for the reason that the 3rd plaintiff then had *died the previous year*.

14. On 4/6/2013, the counsel for the defendant appeared before court. The plaintiff's counsel *never appeared*. On 30/7/2013, the plaintiff's counsel said he *did not have the copy of the death certificate* and that he *could not "confirm if the suit had abated"*. On 30/10/2013, the plaintiff's counsel applied for an adjournment on the basis that the third plaintiff was deceased and *substitution was required*. The court noted that *"the plaintiffs' advocate has been adjourning this case since January this year. This cannot go on. The plaintiff is granted last adjournment. Plaintiff to pay today's costs to the defendant any pay court adjournment fee before next hearing date is given"*.

15. On 3/3/2014, an application dated 27/11/2013 was on record. Parties were ordered to file their witness statements and the matter was fixed for hearing on 12/6/2014. However the plaintiffs sought and obtained a hearing date of 27/3/2014 *for the application dated 28/2/2014*. It was allowed by consent on 27/3/2014. On 24/6/2014, the suit was fixed for hearing on 23/10/2014. On 23/10/2014 the plaintiff's counsel was *not ready to proceed*. The court was told that the plaintiff's counsel was in Kisii and the 1st plaintiff was in the United States.

16. On 9/2/2015, when the matter was scheduled to be heard, the plaintiff's counsel was said to be *in Eldoret for another matter*. On 6/5/2015, the plaintiff's counsel was *said to be unwell* and an adjournment was secured on his behalf. On 27/7/2015, the plaintiff's counsel told the court that the 1st *plaintiff is not present and the representatives of the 3rd plaintiff do not have the original documents*.

17. In all the occasions mentioned, it is apparent that whether by design or by default the plaintiffs were the cause of delay in the hearing of this matter. It was not until **22/10/2015** when the hearing commenced and **PW1 – PW4** testified.

18. The defendants played their own albeit relatively lesser role in the delay thereafter as they were not ready to proceed on 13/9/2016 when the matter next came up for hearing. On 9/2/2017, this court was

informed during the mention that the plaintiff has 3 more witnesses to call. The matter was then allocated 2 hearing dates at the instance of the plaintiffs' counsel present. It is on these dates that the plaintiffs and their counsel failed to come to court, leading to the dismissal for non-attendance which prompted the instant application.

19. In examining the reasons given for failing to attend court, the averments of the plaintiff's counsel and his clerk and the client are vital. However I have noted serious discrepancies in the record of what they say. Whereas in his affidavit the clerk to the advocate states that he came to court on 15/3/2016 (sic) and that he perused the cause list and found that the case was scheduled for hearing but the same had been rescheduled for 16/3/2017 as the same had been listed for 15th March, 2016 erroneously, the plaintiff's counsel adopts the same story save that he ends up stating as follows at paragraph 9 of his supporting affidavit:-

“That the non-attendance on our part and or (sic) my representative was not deliberate”.

Later on in his oral submissions the plaintiff's counsel seems to concede that his clerk never went to the court in time. This raises the question as to whether the clerk or any other else ever stepped into the courtroom on that day in following of this matter.

20. Secondly, it is claimed that the plaintiffs' advocate's clerk *“was informed by the court clerk one Collins that the case had been moved from 15th to 16th March, 2017 and the same had been cancelled from the cause list of that day”*. The record of the court does not show any clerk by that name was on duty in court on the material day. There is virtually no evidence that the conversations between the counsel's clerk and any court clerk occurred. On at least one earlier occasion the plaintiff liaised with the Deputy Registrar of the court and the defendants to reschedule this same case when the plaintiffs became aware that they could not proceed with the hearing of an application dated 12/6/1995 as scheduled on 17/7/1995 as seen in correspondence on the record.

21. Thirdly the **Busia Succession Cause No. 210 of 2015** which the plaintiff's counsel is said to have attended on 15/3/2017 is evidently a relatively fresh case compared to this suit which began in 1991. It is strange that counsel would fail to attend a matter twenty seven years old in order to attend a matter two years old elsewhere.

22. When it occurs, litigation is a tiresome part of life that the parties, and especially defendants who have been dragged to court, have to bear. It is no exaggeration to state that it may exert quite an immense measure of anxiety as parties await the court's decision. It is quite vexatious when the party who approached the court first for a remedy fails to prosecute their case, or so slothfully prosecutes it as to wear out the patience of and thus prejudice the other party. Failure to prosecute a suit which emanates from non-attendance by counsel or parties is one of the respected grounds for dismissal of a suit as seen in **Order 12 Rule 1** of the **Civil Procedure Rules**, which states as follows:

“If on the day fixed for hearing, after the suit has been called for hearing outside the court, neither party attends the court may dismiss the suit.”

23. That is the scenario this court is dealing with in the instant application. And sadly, ground after ground in support of the application to set aside has fallen as seen above.

24. As urged by counsel for the plaintiff, this court has very wide discretion in an application of this nature as seen in the case of **Patel v EA Cargo Handling Services Ltd [1974] EA 75**. However, as seen in the case of **Shah v Mbogo [1969] EA 116**, this 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.

25. I have considered the fact that the plaintiffs may all suffer considerably if the suit is dismissed entirely for the reason that the 3rd plaintiff did not come to court. However this is one suit; the plaintiffs all chose

at inception of this litigation to slowly sail on a trans-oceanic odyssey in a single boat rowed by one captain on their behalf, in which any unseaworthy conduct of one plaintiff or their captain may upset the vessel to the detriment of all the voyagers. This court is of the view that where the claims by each plaintiff have not been separated, the court should ordinarily be less concerned with whether the failure by one or more plaintiffs and their counsel to attend and prosecute their matter when ordered to do so would, if the suit is dismissed by reason thereof, lead to prejudice on the part of the other plaintiffs. It was their choice, to move as a single front.

26. The court is more concerned with the fact that all the parties may collectively lose the advantage of having a real dispute herein determined on its merits in order to settle an age old contest with finality. Besides, the court recognizes that the parties themselves may not be entirely to blame for the non-prosecution of the matter, as can be seen from the analysis of the conduct of their counsel hereinabove. As seen in the case of **Joseph Mweteri Igweta -vs-Mukira M’Ethare & Attorney General 2002 [Eklr]** this court is capable of overlooking the blunders made by litigants and their counsel from time to time, if there is possibility that justice may be done to the parties at last. In the case of **Kitale Land Case No. 97 of 2008 Marcellus Lazima Chegge Versus Mary Mutoro Sirengo and Others** this court stated as follows:-

“Nevertheless this court finds that it is better for the plaintiff to suffer a little inconvenience which can be compensated for by way of costs rather than let the 2nd defendant walk away from court with the feeling that he has been denied a hearing on the basis of a mistake on the part of his counsel. He may have other recourse for the redress of that mistake.

However the court looks farther than this. The granting of the application at hand will mean the rescheduling of the intended judgement in the case, and the setting down of the suit for the hearing of the 2nd defendant’s evidence, and the application of more judicial time for the purpose of hearing of the 2nd defendant’s evidence. It will mean that the time that could have been spent better hearing parties who were ready for their cases will be now spent on a party who has been negligent in the conduct of his case. This is improper and the 2nd defendant can not walk away without any sanctions.”

27. In that case the court imposed costs of Kshs.30,000/= upon the defendant whose conduct appeared deliberately tailored to delay the completion of the proceedings.

28. I have considered the fact that the plaintiffs’ case is almost closed. I have also considered the fact that the defendant was ready to proceed with 3 witnesses on 15/3/2017. I have also considered that costs may for now be panacea to the inconvenience created for the defendants over the time this application has dragged on in place of the hearing of the suit, by reason of the plaintiffs’ or their counsel’s default.

29. I therefore opt to exercise my discretion in favour of the plaintiffs. The application dated **31/8/2017** is hereby allowed. The plaintiffs herein are hereby ordered to pay each of the three defendants costs of Kshs.15,000/= before the next hearing date. This matter shall be listed for hearing on an appropriate date in the third term of this year when the parties will be expected to proceed with their respective cases.

Dated, signed and delivered at Kitale on this **20th** day of **December, 2017.**

MWANGI NJOROGE

JUDGE

20/12/2017

Before - Mwangi Njoroge -Judge

Court Assistant - Isabellah

Ms. Mwemeke holding brief for Samba for plaintiff/applicant

Mr. Majanja holding brief for Githumbi for respondent

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

20/12/2017