



REPUBLIC OF KENYA



KENYA LAW
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**Parapara v Parapara & 2 others (Environment and Land Case
90 of 2015) [2024] KEELC 65 (KLR) (23 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 65 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND CASE 90 OF 2015
FO NYAGAKA, J
JANUARY 23, 2024**

BETWEEN

GRACE AHETE PARAPARA PLAINTIFF

AND

JACOB BARASA PARAPARA 1ST DEFENDANT

NATHAN WANJALA PARAPARA 2ND DEFENDANT

TOM PARAPARA 3RD DEFENDANT

RULING

1. The notice of motion application, subject of this ruling, is dated 20/09/2023. It was instituted by Grace Ahete Parapara, (hereinafter simply referred to as ‘The applicant’) and is supported by her affidavit deposited to on a similar date.
2. It seeks the following orders:
 - a) ... spent
 - b) The Firm of Mukabane Kagunza & Co. Advocates be granted leave to come on record for the Applicant.
 - c) The Orders made on 15th May 2023 dismissing the Plaintiff/Applicant’s suit dated 18/6/2015 for want of prosecution for non-attendance be set side.
 - d) That upon grant of the Order (b) above, the honourable Court be pleased to set down the suit for hearing and final determination.
 - e) Costs of the application be granted to the Applicant.



3. The Applicant gave the chronology of events in this dispute in the grounds in support of the Application. It was her case that she instituted the suit herein against the Respondents herein on 18th June, 2015 and despite service, they neither entered appearance nor filed a defence.
4. It was her case that Judgment was delivered on 24th August, 2017 in her favour and subsequently filed Bill of Costs dated 4th September, 2017. The Bill of Costs was served on the Respondents.
5. The Applicants stated that a Notice to Show Cause was issued against the Respondents on 15th February, 2019.
6. In response, the Respondents filed a Notice of Appointment of Advocates dated 24th April, 2019 appointing the Firm of Bororio & Advocates to act for them. Contemporaneously, they filed an application seeking to stay execution of the Judgment.
7. The Applicant stated that on 13th May, 2019, the Respondent's Application was allowed accordingly setting aside her Judgment. Consequently, on 1st July, 2019, the Defendants filed their statement of defence and the matter was scheduled for hearing on 1st October, 2019.
8. It is the Applicants case that on the day for hearing, the Respondents' Advocate requested the matter to be settled out of Court. Accordingly, one Elibabeth Nandako Wamwayi was appointed the Mediator.
9. In the Supporting Affidavit, the Applicant deposed that her suit was dismissed on 15th May, 2023 for want of prosecution for non-attendance.
10. It is the Applicants case that despite being willing to engage with the Defendant, who are her step sons they have been adamant.
11. She stated further that her then Counsel on record was unwilling to pursue the matter for non-payment of legal fees but, she has since instructed another Counsel who is willing to fast track the hearing and final determination. It was her case that it is in the interests of justice that the Orders sought are granted.
12. The Respondents did not oppose the Application. However, this Court suo moto reserved the Application for consideration.

Issues for Determination

13. Having appreciated the basis for the Application, the only issue for determination is whether the Applicant has met the threshold for setting aside Orders of this Court of 15th May, 2023 dismissing her suit for want of prosecution.

Analysis and Determination

14. The just and fair determination of this Application calls upon this Court go to the root of this dispute.
15. The Plaintiff instituted the Plaint dated 18th June, 2015 against the Defendants. She sought to injunct the Respondents from trespassing into the land parcel known as Kipsain/Kipsoen Scheme Plot No. 37 and to compel the 1st Respondent to execute all transfer instruments to have her share in the property transferred into her name.
16. As elaborated by the Applicant in the instant Application, the Respondents herein did not oppose the suit. Formal proof was conducted on 27th July, 2017 where the Applicant demonstrated to the Court that she was one of the wives of the Zaire Parapara (deceased).



17. To that end, she produced copy of the Grant of Letter of Administration where the deceased shared out his property among his wives. The Applicant further produced copy of the Confirmation of Grant and a copy of the Survey signed by the family showing distribution.
18. The Applicant's Judgment was short-lived. It was set aside by this Court's Order of 13th May, 2019 when the Respondent's Application dated 24th April, 2019 to set aside the Judgment was unopposed.
19. From the statement of defence, the Court made the observation that the Respondents herein were not averse to settling the dispute out of Court. They were given an opportunity to file a consent.
20. From the record, it appears the parties were unable to agree hence the Orders of 1st July, 2021 where the Court scheduled the hearing of the suit on 27th October, 2021.
21. This Court subsequently ordered the parties to file their list of witnesses afresh and ordered court adjournment fees to be shared between them equally.
22. On 20th December, 2021, parties requested to settle the dispute out of court and to record a consent. Despite the Court's indulgence and reference to a mediator, the effort bore no fruit. The Deputy Registrar referred the matter back to court.
23. Subsequently, on 15th May, 2022 and on 27th October, 2022 both parties failed to attend Court. On 8th December, 2022, this Court ordered Counsel on record for both parties to be served with a mention notice.
24. After ascertaining that both parties were served, on 21st March, 2023, this Court scheduled a mention date on 18th April, 2023 for parties to show cause why the suit should not be dismissed for want of prosecution.
25. On the said date only the Counsel for the Respondent herein appeared. This Court made the following remarks:

“ ... The matter spared from dismissal the Plaintiff is given only 21 days to comply in default of which the suit will stand dismissed ...”
26. Upon expiry of the 21 days, there was not compliance with the Orders of this Court. It is then that the Applicant lodged the instant Application to set aside the Orders dismissing the suit on 15th May, 2023.
27. Having traced the factual background of this dispute, I now turn to the law and the legal principles guiding setting aside and reinstatement of suits.
28. Order 12 Rule 7 of the *Civil Procedure Rules* provides as follows:

“ where under this Order, judgment has been entered or the suit has been dismissed, the Court on application may set aside or vary the Judgment or order upon such terms as may be just.”
29. The foregoing speaks to the discretionary power of the Court to set aside its Orders. To that end, I am reminded of Section 3(A) of the *Civil Procedure Rules*. It provides as follows:

“ Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court”.



30. The crux of Order 12 Rule 7 of the *Civil Procedure Rules* as read with Section 3A of the *Civil Procedure* is ensure that litigants are accorded the leeway to ask the Court to relook at its Orders in order to meet the ends of justice.
31. In *Haji Ahmed Sheikh T/A Hasa Hauliers v Highway Carriers Ltd* (1982 - 88) 1 KAR 1184 the following remarks were made:
- “The powers of the Court in dealing with application under Order IX rule 10 is to do justice to the parties. In *Pithon Waweru Maina v Thuku Mugiria*, Civil Appeal No. 27 of 1982 (unreported) (ibid) (Porter, Kneller, JJA and Chesoni, Ag. JA) Potter, JA in quoting Duffus, P., in *Patel v E.A. Cargo Handling Services Ltd.*, (1974) EA 75 stated at page 1 of his judgment this:
- “There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment, he does so on such terms as may be just’ The main concern of the Court is to do justice to the parties, and the Court will not impose conditions on itself to fetter the wide discretion given to it by the rules”.
32. This Court has revisited the entire proceedings from inception of the suit. It is evident that initially, there was general reluctance by the Respondents herein to participate in the case.
33. They were jolted into action not by the Applicant’s Judgment but when execution of her Bill of Costs was imminent.
34. Despite their conduct, this Court was lenient on the Respondents herein by allowing their application to set aside this Court’s Judgment.
35. The applicant herein has explained to the Court that she has been unable to prosecute the matter because of financial challenges. She has also indicated that there were attempts in the interim period before dismissal of the suit for the parties to settle the matter but the Defendants became adamant after a while. She has indicated that her new Counsel will prosecute her case expeditiously.
36. The respondents are not opposed to the Application to set aside the Orders of this Court.
37. The sole objective of order 12 Rule 7 is to do justice to the parties. That, viewed alongside the Applicant’s advanced age and the fact that this Court once allowed the Respondents’ Application setting aside the Applicants Judgment, it is only fair and just to accord the Applicant the last opportunity to prosecute its case.
38. The upshot is that this Court finds and hereby holds that it is proportionate and just to set aside of the Order of this Court of 15th May, 2023.
39. In the premises the following final Orders hereby issue:
- i) The Orders of this Court of 15/05/2023 dismissing the Plaintiff’s case for want of prosecution are hereby set aside.
 - ii) In view of the age of the matter and the peculiar circumstances of the case, parties are hereby accorded the final opportunity to file their respective trial bundles within 21 days of this Ruling.
 - iii) The matter shall be mentioned virtually on 22/02/2024 to confirm compliance with Order 11 of the Civil Procedure Rules, 2010 and fixing a hearing date on priority basis.



iv) Costs to be in the Cause.

40. It is so Ordered.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS
23RD DAY OF JANUARY, 2024.**

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.

