



REPUBLIC OF KENYA



**B2 Yatta Ranching Co-operative Society Limited v Kitui County Government & 12 others
(Environment and Land Case 21 of 2021) [2024] KEELC 1105 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1105 (KLR)

FORMERLY MACHAKOS NO. 109 OF 2018

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND CASE 21 OF 2021
LG KIMANI, J
FEBRUARY 29, 2024**

BETWEEN

B2 YATTA RANCHING CO-OPERATIVE SOCIETY LIMITED PLAINTIFF

AND

**KITUI COUNTY GOVERNMENT 1ST DEFENDANT
CEDRIC SAMMY MWANZIA 2ND DEFENDANT
MUTHENGI MULAMBAYA 3RD DEFENDANT
MUSYOKI SYUKI 4TH DEFENDANT
NGUU NDONGA 5TH DEFENDANT
BENSON NGUTHU 6TH DEFENDANT
FESTUS MUSUMBI KAKYA 7TH DEFENDANT
JOSEPH NDELI MUSYOKA 8TH DEFENDANT
PIUS KAKONO KAU 9TH DEFENDANT
GEOFFREY KISINGA SAMBI 10TH DEFENDANT
BEATRICE MATHEKA 11TH DEFENDANT
MUNINI KITHAMI 12TH DEFENDANT
THE HON ATTORNEY GENERAL 13TH DEFENDANT**



RULING

1. The 2nd to 7th Defendants applied by way of the Notice of Motion dated 24th October 2023 seeking the following orders:
 1. Spent
 2. The Order dismissing the 2nd to 7th defendants' counterclaim for non-attendance issued on 24.10.2023 be set aside.
 3. Directions be issued for the hearing of the 1st and 2nd to 7th defendants' counterclaims in light of the dismissal of the plaintiff's suit.
 4. That *status quo* be maintained in respect of the suit property pending the hearing and disposal of this application and suit.
 5. Such other or further directions be issued as shall serve the interests of justice.
2. The application is supported by the affidavit of Koyokko Bernard Advocate for the 2nd to 7th Defendants where it was stated that this suit was scheduled for hearing on 24th and 25th October 2023. When this suit was called out on 24th October 2023, Counsel was virtually on his feet before the Court of Appeal Judges Pauline Nyamweya, Abida Aroni and Mwaniki Gachoka in Civil Application No. E509/2023 Chavda Educational Holdings Limited -vs Jane Magondu.
3. Counsel deposed that he received notice of hearing of the Court of Appeal matter on 9th October 2023 and he notified other Counsel on record 16th October 2023 that he would be appearing before the Court of Appeal on 24th October 2023 and proposed that they proceed with this matter on 25th October 2023. Counsel stated that none of the counsels objected to the Notification.
4. Counsel stated that his clients had filed their witness statements and documents and were ready to proceed with the hearing. He further deposes that no witness statement nor documents had been filed by the plaintiff while the 13th Defendant had only filed a list of documents and witnesses without the statements.
5. Counsel states that on the morning of 24th of October 2023, he was logged onto both courts but when the Court of Appeal matter was called out at about 10:00 a.m. while he was addressing the Court he was notified by his Secretary and Clerk that this matter in Kitui had equally been called out. He was unable to leave the Court of Appeal proceedings to address the ELC court, he later found out that the plaintiff's suit as well as the 2nd to 7th Defendants' Counterclaim had already been dismissed for non-attendance.
6. In the circumstances, the Advocate for the 2nd -7th Defendants prays that the order dismissing the counterclaim be set aside and the hearing of the suit proceed. He further prays that the subsisting *status quo* orders made on 17th February 2009 be reinstated pending the hearing and disposal of the suit since his clients represent over 3000 people whose constitutional and property rights will be at risk unless they are heard.

The 1st Respondent's Replying Affidavit

7. Sammy Kathike, the Director of Lands and Physical Planning at the County Government swore an affidavit in response to the application deposing that this suit was a consolidation of various suits



filed at the Machakos High Court HCCC No.9 of 2008, Machakos ELC No.1057 of 2012 and Machakos HCCC 76 of 2003 which demonstrates that the case has been in court from 2003 with no demonstrable effort by the Plaintiff nor to the 2nd to 7th Defendants to resolve the dispute.

8. His position is that the Application is not supported by any reasonable grounds and that in a scenario where an advocate has two or more matters in a day, the advocate should engage someone to hold his brief.
9. Further, the 1st Respondent highlights that the parties herein are the same or are related to the parties in ELC Petition 12 of 2021 *Francis Musyoki & 400 others vs County Government of Kitui* and ELC Petition No.15 of 2021-*Duncan Wambua & others vs County Government of Kitui* which involves the same suit parcels of land LR.12010 and L.R11802 situated in Kanyonyoo area within Kitui County where this Court has already pronounced itself. The Court found that the land was set aside as public land and that upon the expiry of the Lease, the land reverted to the County Government of Kitui.
10. It is therefore the 1st Respondent's view that reinstating the suit will be inviting the Court to repeat itself on the questions it has already answered regarding the suit lands and pray that the Court dismiss the application for being an abuse of the court's process.

13th Defendant's Replying affidavit

11. The 13th Defendant/Respondent filed a replying affidavit sworn by E. M. Gitiba, the Commandant, National Police Service Border Police Unit. He deposed that this matter came up for hearing on 13th July 2023 in the presence of Counsel for the 2nd Defendant but the matter did not proceed. And was set for hearing on 24th and 25th October 2023. He especially opposed the application by the Plaintiff for reinstatement of the suit and the reasons given.
12. The 13th Respondent further opposed the grant of orders of *status quo* as prayed and stated that even though the court has discretion it should not be taken for a ride. He stated that the Plaintiff has been indolent in prosecuting the suit while enjoying orders of *status quo*.

Applicant's submissions.

13. Counsel for the Applicants reiterated the contents of their application, submitting that they filed this application as soon as they learnt of the dismissal of their counterclaim. It is their submission that the 2nd to 7th defendants are representatives of an association of persons numbering over 3000 who are ordinary residents on the suit property and whose rights should be determined on merit.
14. The Applicants submit that they were otherwise ready to proceed with their counterclaim and the 2nd to 7th Defendants had filed their witness statements and supporting documents.
15. It is their submission that upon the dismissal of the plaintiff's suit, the ordinary order of trial would have required the defendants to prosecute their counterclaim and that it was a miscarriage of justice since the 1st Defendant was not ready to prosecute their counter-claim on the 24th October 2023 and had requested to do so on the 25th of October 2023.
16. Invoking the wide and unfettered discretion this court has to reinstate the suit under Order 12 rule 7, counsel for the applicants submits that the uncontroverted facts and circumstances of this case warrant the exercise of this discretion in favour of the 2nd to 7th defendants to reinstate the counterclaim.
17. The Applicants also pray that the *status quo* orders that were subsisting be extended as they are vital to the preservation of the suit property. They also submit that the Plaintiff, 1st Defendant and 13th Defendant have not demonstrated any prejudice that will be suffered if their counter-claim is reinstated.



18. The Applicants relied on the authority of *Mwanamisi Ali Magendo & Another-vs- Miningwo & 3 others (2022) KEELC 2563 (KLR)* and the case of *Philip Kiptoo Chemwolo & another vs Augustine Kubende* and pray that their application be granted as prayed.
19. They also filed further submissions highlighting that Counsel for the 1st and 13th defendants do not deny the fact that the 2nd to 7th Defendant’s counsel had notified their counsels that he had another hearing before the Court of Appeal on the 24th of October 2023.
20. Their submission is that their excuse is cogent and uncontroverted and that the 1st and 13th defendants are keen to have this suit dismissed on a technicality rather than merit, which does not accord with our constitutional principles and values that guarantee all citizens the right to be heard.

Analysis and Determination

21. The application herein is brought under Order 12 Rule 7 of the *Civil Procedure Code*, which provides that:

“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.”
22. The facts pertaining to the application are that on 13th July 2023, in the presence of Counsel Odhiambo Odhim for the Plaintiff, Mwanzia holding brief for Kimanthi for the 1st Defendant, Koyoko for the 2nd to 7th Defendants and M/S Kerubo appearing together with Motari for the 13th Defendant, the court gave a hearing date for this suit for 24th and 25th October 2023. This hearing date was given on the application of the Counsel for the Plaintiff and the 1st Defendant and the court marked the adjournment as the very last adjournment and further noted that as a 2008 matter the presence of the suit in the court’s records was untenable and the same needed to be finalized.
23. When the matter came up for hearing on 24th October 2023 Counsel for the Plaintiff and the 2nd to 7th Defendants were absent while Counsel for the 1st and 13th Defendants were present and they both applied for dismissal of the Plaintiff’s suit and the counterclaim by the 2nd to 7th Defendants. Further, counsel for the 13th Defendant indicated that he was ready to proceed with the Plaintiff’s case. Counsel for the 1st Defendant also indicated that he was not ready to proceed with his client’s counterclaim since he was appearing in County Committee proceedings but that he would be ready to proceed the next day 25th October 2023. In line with the provisions of Order 12 Rule 1 of the Civil Procedure Rules, the Plaintiff’s suit as well as the 2nd to 7th defendants’ counter-claim were dismissed for non-attendance. Order 12 Rule 1 states that:

“If on the day fixed for hearing, after the suit has been called on for hearing outside the court, neither party attends, the court may dismiss the suit.”
24. On the same date, Counsel for the 2nd to 7th Defendants filed the present application while Counsel for the Plaintiff filed an application dated 25th October 2023 filed on the same date. It is noted for the record that the application by Counsel for the Plaintiff was dismissed for want of prosecution on 23rd January 2024.
25. Counsel for the Applicants explained and gave reasons for non-attendance in court on 24th October 2023 stating that he was appearing virtually before the Court of Appeal Judges Pauline Nyamweya, Abida Aroni and Mwaniki Gachoka in Civil Application No. E509/2023 Chavda Educational Holdings Limited -vs Jane Magondu on 24th October 2023 when this matter was called out.



26. Order 7 Rule 13 of the [Civil Procedure Rules](#) provides as that:

“If, in any case in which the defendant sets up a counterclaim the suit of the plaintiff is stayed, discontinued or dismissed, the counterclaim may nevertheless be proceeded with.”

27. Dr. Fred Nyagaka J held in the case of [Muna & 5 others v Boscardin & 5 others \(Environment & Land Case 27 of 2020\) \[2022\] KEELC 3133 \(KLR\) \(2 June 2022\) \(Ruling\)](#) that:

“It is correct to argue that a counterclaim can be treated as a cross-suit, as was held by the Supreme Court of India in *Sh. Jag Mohan Chawla & another v Dera Radha Swami Satsang & Ors (supra)*. If it is a cross suit, as long as it was instituted within time, its existence should not necessarily depend on that of the suit. It breathes its own life and can bring forth the life of a judgment or decision of a court independent of the suit. Thus, in [Beatrice Mumbi Wamabiu v Mobil Oil Kenya Ltd \[2011\] eKLR](#) it was held that “...the withdrawal of the main suit did not affect the counter-claim. A counterclaim is treated as a separate suit under Section 35 of the [Limitation of Actions Act](#) hence its survival cannot be pegged on the pendency of the primary suit.”

28. The Applicants rely on the holding in the case of [Magendo & another v Miningwo & 3 others \(Environment and Land Case Civil Suit 13 of 2021\) \[2022\] KEELC 2563 \(KLR\) \(5 July 2022\) \(Ruling\)](#) to submit that they have shown sufficient cause to warrant the grant of the orders sought where it was held that:

“For the Court to exercise its discretion in favour of the Applicant, he or she has satisfied it 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 – versus - Veena*” which was cited with approval in the case of “[Wachira Karani – versus - Bildad Wachira \[2016\] 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”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...”

29. Counsel for the applicants has explained the reason for his non-attendance in court, and noted that the application herein was filed in good time on the same date of dismissal. The Court has considered the explanation given by Counsel and what comes out is that the said non-attendance was caused by



carelessness and/or negligence on the part of Counsel who failed to take into account the fact that the hearing date was given by the court and the indulgence and/or discretion on whether to take out the matter from the hearing list was the function of the court and not his co-counsel. Counsel ought to have informed the court that he had received the hearing notice issued by the Court of Appeal and sought directions from the court. It was quite presumptuous of the Counsel to only inform the Counsel for other parties of his predicament and imagine that all would be well.

30. Further, from the submission and evidence of Counsel he completed the hearing before the Court of Appeal at about 10:15 A.M. No reason is given as to why he did not make arrangements to attend to this matter after the Court of Appeal hearing especially considering that the Court of Appeal hearing was virtual and this Court had given a very last adjournment. It is also noted that at the time of giving the date the court had considered the age of this case.
31. On the other hand, the court has also considered the fact that when the matter was mentioned on 24th October 2023, counsel for the 1st Defendant applied for dismissal of the suit but he also indicated that he was not ready to proceed with his counterclaim for the reason that he was attending a County Committee meeting. He applied to have the counterclaim proceed on the 25th of October 2023. Counsel for the 13th Defendant stated that he was ready to proceed with the case for the Plaintiff but he did not tell the court whether he was ready to proceed with his client's defence as well.
32. Taking all the above into account the Court went further to consider the court record and previous court attendances and noted that Counsel for the 2nd to 7th Defendant Koyokko Bernard has attended court most of the times when it is shown that he was served and when a date was taken in his presence. Notably since the transfer of this suit to this court, Counsel has attended court on 23rd September, 7th October, 30th November 2021, 1st February, 8th March, 22nd June, 3rd October 2022 and 13th July 2023.
33. The Court considered the law regarding the exercise of the Court's discretion which is now settled from the holding of Judge Harris (as he then was), where he had this to say in the case of *Shah vs Mbogo* [1967] EA 116 and 123B:-

“The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”
34. Despite the court's finding on the conduct of counsel for the 2nd to 7th defendants, the court finds that counsel did not intend to deliberately, by evasion or otherwise obstruct or delay the course of justice.
35. Having considered the matters stated above and taking into account that the court's power to set aside a dismissal order and reinstate a suit is discretionary, the court is inclined to exercise its discretion in favour of allowing the application with an order for payment of appropriate costs.
36. On prayer No. 4, the court declines to grant the prayer that the *status quo* be maintained in respect of the suit property pending the hearing and disposal of this application and suit for the reason that sufficient reasons have not been given for the grant of the orders. The said orders have been in force since 2009 and the parties have not pushed to have the suit heard and determined speedily.
37. The upshot of the above is that the Court allows the application dated 24th October 2023 in the following terms;



1. The Order dismissing the 2nd to 7th defendants' counterclaim for non-attendance issued on 24.10.2023 be and is hereby set aside and the 2nd to 7th Defendant's counterclaim is hereby reinstated.
2. Thrown away costs of Kshs. 20,000/= each to be paid to the 1st and 13th Defendant/ Respondents.
3. The suit be set down for hearing of the 1st and 2nd to 7th Defendants counterclaims.

DELIVERED, DATED AND SIGNED AT KITUI THIS 29TH DAY OF FEBRUARY, 2024.

HON. L. G. KIMANI

JUDGE ENVIRONMENT AND LAND COURT

The judgement is read virtually and in open court in the presence of-

J. Musyoki Court Assistant.

Koyoko for the 2nd to 7th Defendant/Applicant

M/s Kerubo for 13th Defendant

Mutwa holding brief for Musyoki for 1st Defendant

