Saptet Farm Company Limited v SK Soi Company Limited (Environment & Land Case 20 of 2006) [2024] KEELC 1051 (KLR) (29 February 2024) (Ruling)

Neutral citation: [2024] KEELC 1051 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ENVIRONMENT & LAND CASE 20 OF 2006

MC OUNDO, J

FEBRUARY 29, 2024

BETWEEN

SAPTET FARM COMPANY LIMITED ..... APPLICANT

AND

SK SOI COMPANY LIMITED ..... RESPONDENT

RULING

1. On the 12th July, 2023 the day scheduled for hearing of the suit, the Applicant was not present and/or ready to proceed wherein the court, having noted that this matter had not proceeded for hearing since its inception in the year 2006 which was more that seventeen (17) years later, dismissed the Applicant's suit for want of prosecution pursuant to the provisions of Order 12 Rule 3 (1) of the Civil Procedure Rules and directed that the Respondent's Counter Claim proceeds for hearing.

2. Following this cause of action, the Applicant filed a Notice of Appeal dated the 20th July, 2023 and thereafter an Application dated the 24th October, 2023 pursuant to the provisions of Order 12 Rule 7 of the Civil Procedure Rules, Section 1A, 3A of the *Civil Procedure Act*, Article 159 of *the Constitution* and all other enabling provisions seeking that the court sets aside orders of 12th July, 2023 that had dismissed its case for want of prosecution, and all other consequential orders thereto and thereafter reinstates its suit so that the same could be heard on merit.

3. The said Application was supported by the grounds set on its face as well as on the supporting affidavit of equal date sworn by Charles Kiplangat Too a Director of the Applicant who had deponed that its non-attendance on the day scheduled for hearing had been due to lack of Notice by their former Advocate on record. That there had been an attempt to settle the matter out of court and their former Advocate had not appraised them that the negotiation had collapsed. But otherwise they're had been ready and willing at all times to prosecute the instant matter. That the court should not drive them from the seat of justice unheard while the Respondent gets a free pass to prosecute their claim.

4. That the instant application had been made without undue delay, in good faith and in furtherance of the interest of justice. Further that the Respondent would suffer no prejudice if the instant suit was reinstated and dismissal orders set aside. That conversely, if the instant application was declined, the Applicant would have been condemned unheard on merit thus occasioning it undue hardship and prejudice.

5. In response and in opposition to the said application, the Respondent herein filed its Replying Affidavit dated 3rd November, 2023 sworn by Moses Kiptoo Langat its Director who deponed that the conduct of the Applicant had militated against the granting of the orders sought. On the 27th December, 2021, the court had given the Applicant a last adjournment so as to confirm finalizing of negotiations wherein on 22nd November 2021 parties had indicated that they had not agreed prompting the court to give a hearing date.

6. That on 28th February, 2023 the parties had still not reached any agreement, wherein the court having observed that the matter had been initiated in the year 2006, listed it for hearing on a condition that if parties would not be ready to proceed, the matter would be dismissed for want of prosecution.

7. That subsequently, on 12th July, 2023, the Applicant attended the court and indicated that it was not ready to proceed as the negotiations were still ongoing. The Court thus proceeded to dismiss the Applicant's claim for want of prosecution pursuant to its earlier orders issued on 28th February, 2023. That the Applicant's actions demonstrated above had only been intended to obstruct the cause of justice. That the Applicant having dragged the Respondent to court, it ought to have expedited the prosecution of the instant matter thus it would be a miscarriage of justice if the orders sought were granted.

8. By consent parties agreed for the application to be disposed of by way of written submissions to which I shall herein summarize as follows:

Applicant's submissions.

9. The Applicant summarized the factual background of the matter before framing one issue for determination to wit; whether the court should set aside the orders made on 12th July, 2023 dismissing the Applicant's suit and reinstate the instant suit.

10. The Applicant's reliance was hinged on the provisions of Order 12 rule 7 of the Civil Procedure Rules to submit that the court was clothed with the discretion to set aside and/or vary the orders of 12th July 2023 to avoid hardship and injustice. Reliance was also placed on a combination of decisions in the case of Samuel M. Wang'ombe v Charles Muriithi Nyamu [2019] eKLR and John Nahason Mwangi vs Kenya Finance Bank Limited (in liquidation) [2015] eKLR.

11. The Applicant reiterated the content of its Supporting Affidavit especially regarding the payments that had been made by the Respondent pursuant to out of court negotiations and submitted that although the Respondent had contended that the said payments had been for settlement of accrued rent arrears, it had been clear from the records that the parties had been engaged in protracted negotiations to settle the matter and thus any payment made could be reasonably inferred to have been made as a gesture of good faith to settle the matter once and for all. That from the receipts received, the payments had been made between January 2016 and 22nd February, 2019. Further that via their consent, it had been agreed that the instant matter would be marked as settled subject to the refund of accrued rent of Kshs. 6,000,000/= to the Applicant. The Applicant thus urged the court to reject the Respondent's vain attempt to split hairs about the essence /objectives of the said payments, and accordingly exercises its discretion to set aside the impugned order of dismissal of the Applicant's case.

12. The Applicant then relied on the decided case of East Africa Vento Co. Ltd v Agricultural Finance Co-op Ltd & another [2019] eKLR to submit that the acts and/or omission of its former advocate should not be visited upon it. Further that it stood to suffer undue hardship and prejudice were the orders sought not granted as it would have been forever driven from the seat of justice while the Respondent gets a free pass to prosecute its counterclaim. That court ought to allow the instant application which had been filed without undue delay to avert such an unfortunate circumstance. Reliance was placed on the decided case of Hanson Muidi Mutula & 8 others v Kennedy Mutua Ngunu & 3 others [2022] eKLR.

13. The Applicant contended that the Respondent would not suffer any prejudice as it would still have a chance to prosecute its counterclaim. It relied on the decision in the case of Muambi v National Social Security Fund [2004] eKLR and implored upon the court to find its Application dated 24th October 2023 as being merited and accordingly allow it as prayed.

Respondent's Submissions

14. The Respondent, in opposition of the instant application, vide its written submission dated 15th November, 2023 framed one issue for determination to wit; whether the court should set aside the orders made on 12th July, 2023.

15. The Respondent's reliance was hinged on Ronald Mackenzie vs. Damaris Kiarie [2021] eKLR to reiterate that the Applicant herein had dragged the them to court but had not been keen in prosecuting the instant suit which had led to the dismissal of the same for want of prosecution hence the court ought not to assist the Applicant as it had been indolent. The Respondent reiterated that the Applicant's conduct had militated against granting of the orders sought as such actions were intended to obstruct the cause of justice contrary to Article 159 (2) (b) of *the Constitution*.

16. It reiterated that dismissal of suits for want of prosecution had no window for setting aside since it was expected that parties would have been heard before such orders had been issued. That the only option available to the Applicant was to appeal against the said decision. Reliance was placed on Elizabeth Wakari Njiru vs. Kamuri Mubuta & 6 others [2019] eKLR Further that it had been a blatant lie for the Applicant to state that its former Advocate did not update them on the hearing dates. That it was a well-established legal principle that the case did not belong to the Advocate but to the litigant hence it was not enough for a party to lay the blame for any omission or commissions on his Advocate. That the Applicant must show the tangible steps that it had taken to advance its case. Reliance was placed on a combination of the decisions in the cases of Ruga Distributors Limited vs. Nairobi Bottlers Limited [2015] eKLR, Savings & Loans Limited vs. Susan Wanjiru Muritu Nairobi (Milimani) HCCC No. 397 of 2002 and Duale Mary Ann Gurre vs. Amina Mohamed Mohamood & Another [2014] eKLR

17. That the Applicant in the instant case had merely blamed its former Advocates for failure to inform them of the dates scheduled for hearing without demonstrating what, if any tangible steps they themselves had taken to prosecute the instant case. That Applicant did not write any letters to either their Advocate or the Court Registry seeking to be advised on the status of the suit. That the Applicant had indicated that as a show of settlement, the Respondent had started making some payments but as evidenced from the receipts issued, it had been clear that the said payments were in regard to the rent arrears and not aimed at settling the claim.

18. The Respondent reiterated that the Applicant had not offered reasons to persuade the court to exercise its discretion in its favour to reinstate the suit. That it was trite law that the discretion of the court was to be exercised not in a design of assisting a person who had deliberately sought to obstruct the cause

of justice. That based on the provisions of the law and the authorities, cited, the Application dated 24th October, 2023 was not merited and the same should be dismissed with costs.

Determination

19. After the Applicant's suit had been dismissed for want of prosecution, the Applicant has now filed an application seeking to set aside the court's order of 12th July 2023 that had dismissed the suit and thereafter to reinstate the suit so that the same can be heard on merit. I have also considered the Respondent's response thereto opposing the said application, as well as the subsequent written submissions for and against allowing the application, the law and the authorities herein cited.

20. I have further considered the reasons that were presented by the Applicant seeking to set aside the court's order of 12th July, 2023 and reinstate its case so it may be heard on merit and the averments herein deponed for reasons for its failure to prosecute its case where it had blamed its former Counsel for not having informed it of the hearing date that had been scheduled for the 12th July, 2023. Further that after its former Counsel had sought instructions to negotiate with the Respondent with a view of settling the matter out of court, there had been no communication that a tentative settlement had been reached.

21. That subsequently, its Directors had been laboring under the mistaken impression that the matter had been compromised which impression had also been fostered by the believe that the Respondent's payment of a total of Ksh. 2,550,000/= had been pursuant to the terms of the said consent.

22. The Respondent opposed the Applicant's application for reasons that the conduct of the Applicant militated against the granting of the orders sought. That from the proceedings in court, it could be seen that this matter had dragged in court for over 17 years. That since the Applicant had dragged the Respondent to court by filing the instant suit on 29th March, 2006, it ought to have expedited the prosecution of the same hence it would be a miscarriage of justice if the orders sought were granted.

23. That although the Applicant seemed to be shifting blame to its former Advocate, it was an established legal principle that a case did not belong to an Advocate but the litigant. That it was not enough for the Applicant to lay blame on its former Advocate, but ought to have demonstrated the steps it had undertaken to prosecute its matter. That the bundle of receipts alluded to by the Applicant had been with regards to payment for rent arrears and not to compromise the suit. That the instant suit having been in court for over seventeen (17) years, the Respondent would be greatly prejudiced if the instant application was allowed.

24. I find the issues arising for my determination as follows:

    i. Whether there has been raised sufficient ground to set aside the dismissal order and if so;

    ii. Whether the Applicant's suit should be reinstated

    iii. Who should bear the cost?

25. The law applicable for setting aside judgment or dismissal order is Order 12 Rule 7 of the Civil Procedure Rules which provide 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."

26. Setting aside a judgment or order for dismissal is a matter of the discretion of the court, as was held in the case of Esther Wamaitha Njihia & 2 others vs. Safaricom Ltd [2014] eKLR where the court citing relevant cases on the issue had held inter alia:-

> "The discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel vs E.A. Cargo Handling Services Ltd.) the 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 deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah vs. Mbogo). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the Applicant can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration vs Gasyali. It also goes without saying that the reason for failure to attend should be considered."

27. The Court of Appeal for Eastern Africa in the case of Mbogo vs. Shah [1968] EA 93, held that for the court to set aside a judgment/order, it must be satisfied about one of the two things namely: -

    a. either that the Respondent was not properly served with summons; or

    b. that the Respondent failed to appear in court at the hearing due to sufficient cause.

28. I have keenly perused the affidavit filed in support of the application to find out whether the Applicant had valid reasons for its failure to prosecute the instant matter. I have also perused through the court proceedings of the unfolding events since the suit was instituted in court up to when the same was dismissed for want of prosecution, so as to satisfy myself as to whether the dismissal of the said suit was as a result of an accident, inadvertence, excusable mistake, an error or otherwise and so as to determine whether the Applicant had established sufficient cause to have the order set aside.

29. It is on record that the suit herein had been filed vide a Plaint on the 29th March, 2006, by the Applicant who had subsequently filed an application dated 15th March, 2007 seeking for interim orders. In a ruling dated the 7th November 2017, the Respondent had been restrained from collecting rent from the tenants, carrying out constructions work or in any manner dealing with the suit land No. Kericho Municipality/Block 5/437 pending the hearing and determination of the suit. That the Respondent was also to pay a monthly rent to the Applicant which was to be agreed on or assessed and further that the tenants on the suit land were to pay rent to the Applicant.

30. Vide an Application dated 18th December, 2007, the Respondent applied for leave to amend its Defence to include a counterclaim which application had been allowed vide a ruling delivered on 24th June, 2008.

31. The hearing of the suit had then been slated for the 29th September, 2009 on which date, none of the parties appeared wherein the matter had been taken out of the cause list and stood over generally. On 26th February, 2010, Counsel for the Applicant, in the absence of the Respondent's Counsel had taken a mention date at the registry for the 27th April, 2010 for purposes of pre-trial. On the said date, parties had not fully complied and the mention for pre-trial had been re-scheduled for the 1st July, 2010. On the said day, Counsel for the Applicant sought for a leave of one month to amend its Plaint. The matter was stood over generally.

32. On 24th March 2011, the Applicant filed his application dated 23rd March, 2011 seeking to amend their Plaint wherein on the 1st April, 2011 by consent, parties appeared before the Deputy Registrar and

fixed the hearing of the said application for the 18th May, 2011. There were no proceedings recorded on that day however, on 10th June, 2011, the hearing of the said application had been re-scheduled for the 13th July, 2011 on which date, the Applicant's Counsel had sought for more time. The matter was then scheduled for mention for the 20th July, 2011 on which day, the Applicant's application dated 23rd March, 2023 had been allowed as prayed and corresponding leave granted to the Respondent to amend its Defence. On 26th August, 2011, the Applicant's Counsel had taken a mention date of 14th November, 2011 at the registry for directions, on which date parties had been directed to comply with pre-trial requirements whereby the matter had been slated for mention for the 30th January, 2012 for further directions.

33. On 30th January, 2012, parties had still not fully complied with pre-trial directions wherein they had sought for more time to enable them comply. The matter had then been re- scheduled for mention for the 7th March, 2012. On 7th April 2012, the mater had been fixed for pretrial for the 7th June 2012 and subsequently on the 31st October 2012 as the Hon Judge was on leave. In the meantime, on 5th July, 2012, the Applicant's Counsel filed an application of an equal date (the proceedings indicated 3rd July 2012) seeking that the Respondent be found in contempt of court's order of 13th December 2007. The Application was slated for hearing for the 28th November, 2012. On the said date there had not been appearance on the part of the Respondent hence the matter had been re-scheduled for mention for the 16th January, 2013 whereby on the said date by consent, parties had re-scheduled the mention date for the 26th March, 2013 and further the 23rd April, 2013.

34. On 23rd April, 2013, the matter had come up for purposes of taking a date for hearing the Applicant's application dated 5th July, 2012 but the Applicant's Counsel withdrew it and parties were directed to comply with the provisions of Order 11 within 30 days. A hearing date was scheduled for the 25th June, 2013 on which date, the Respondent had not been ready to proceed for reason that one of its directors had passed on and they were yet to agree on whom to take his place. On 6th April, 2014, the Respondent filed an application dated 22nd April, 2014 for maintenance of the status quo as per the Court's ruling of 7th November, 2007 to the effect that the Applicant continues collecting rent from the Respondent who was to remain on the suit land. The said application had been compromised on 26th May, 2014 by consent to the effect that status quo was going to be maintained whereby the Respondent was to remain as a tenant and continue paying rent pending the hearing and determination of the suit. The Applicant was restrained from selling and/or disposing the suit property until the suit had been heard and determined.

35. The matter had then been scheduled for pre-trial direction for the 24th June, 2014 on which day the Respondent's Counsel informed the court that the Applicant's Counsel had served him with a further supplementary list of documents for which he needed time to go through and respond. The matter was re-scheduled for mention for pre-trial for the 30th July, 2014. On the said date, whereas the Applicant had fully complied, the Respondent's Counsel had sought for seven (7) more days since he was awaiting a Valuation Report. The court then directed that the pre-trial date be taken from the registry once the parties were ready.

36. On 22nd August 2014, the parties fixed a mention date for pretrial for the 27th October, 2014 on which date both parties had confirmed compliance. On 30th January, 2015, the Applicant's Counsel had fixed the matter for hearing for the 24th March, 2015 on which date the parties requested for time to pursue an out of court settlement and the matter was scheduled for mention for the 22nd June, 2015 when parties had reported that the negotiations had been progressing and requested for a further mention date which had been slated for the 27th October, 2015.

37. Came the mention date and parties reported that they were finalizing on the negotiations hence the court directed that a mention date be taken from the Registry once they had finalized the said negotiations. There had been no action on the matter for close to 2[1]/2 years up until the 22nd May, 2018 when the Respondent's Counsel took a mention date for the 11th July, 2018 to confirm if parties had reached an out of court settlement and on which date, parties had requested for a further mention date which had been scheduled for the 19th November, 2018. On the said date, parties reported that the negotiations were still ongoing and requested for yet another mention date which had then been slated for the 13th February, 2019.

38. On the 13th February 2019, Counsel for the Applicant reported that parties were yet to agree and sought that the matter be mentioned in 14 days' time for purposes of recording a settlement whereby mention had been slated for the 5th May, 2019. On the said date, the Applicant's Counsel reported that he had drafted a consent order based on what the parties had agreed on and sought a further 30 days to see if parties would have settled. He also sought that the same be marked as the last mention. The court had obliged him and a mention date slated for the 18th April, 2019.

39. The matter had then proceeded only on mentions on diverse dates as a settlement had neither been reached nor recorded. On the 26th January, 2021, in the absence of the Applicant's Counsel, the Respondent's Counsel informed the court that his client, the Respondent had since vacated from the suit land. He thus sought for a mention date so that they could record a consent in presence of the Applicant's Counsel so as to have the matter settled. A mention date had then been slated for the 9th March, 2021.

40. Come the said date and there had been no appearance for the Applicant wherein the matter had been re-scheduled for a mention for the 27th September, 2021 on which date there had been no appearance of the Applicant's Counsel. The Court was then informed that parties were still negotiating wherein it slated the matter for mention for the 22nd November, 2021 and marked the adjournment as the last one.

41. On the date scheduled, parties had not agreed and the court fixed the matter for hearing for the 15th February, 2022 thereby directing that were parties to agree in the meantime, a consent would be recorded on the said date. Come the hearing date, there had been no appearance for the parties and the matter had been re-scheduled for mention for the 11th April, 2022, 14th June, 2022, and 28th September, 2022 when the court was not sitting .On the 28th February, 2023 the Applicant's Counsel informed the court that there had been no consent to record and sought for a further mention date. The court noted that the matter had been proceeding on mentions only for reasons that parties were negotiating. The court further noted that the matter had been filed way back in the year 2006 wherein it directed that there will be no further mention and the matter was to proceed for hearing on the 12th July, 2023. That in the meantime, if the parties had were not ready to proceed, then they should withdraw the suit or the same be dismissed for want of prosecution.

42. Come the hearing day, the Applicant's Counsel, being fully aware of the court's directions of 28th February, 2023, informed the court that they were not ready to proceed as the parties were still negotiating. He then sought to be granted one more chance. The Respondent's Counsel sought for the matter to be dismissed for want of prosecution as per the court's direction of 28th February, 2023 and that a date for hearing of its counterclaim be granted. Pursuant to the provisions of Order 12 Rule 3(1) of the Civil Procedure Rules, the court then dismissed the Applicant's suit with costs and scheduled the hearing of the Respondent's counter claim for the 7th November, 2023 without fail Pursuant to the provisions of order 12 Rule 3 (1) (3) of the Civil Procedure Rules.

43. Unlike what the Applicant wants us to believe that it had at all times been ready and willing to prosecute the instant matter and had always been ready to attend court whenever called upon hence had their former Advocate on record informed them that the negotiation for settlement out of court had collapsed, and the suit set down for hearing, they would have arranged for their witnesses to attend court and prosecute their case, it can be seen from the proceedings before and during the alleged out of court negotiations, that the proceedings had been marred by numerous non-appearance occasions by the Applicant and/or its Counsel. Of interest is that the instant matter had also been inactive for a period of 2^{1}/2 years from 27th October, 2015 to 22nd May, 2018 when the Respondent's Counsel obtained a mention date to confirm settlement.

44. Nothing prevented the Applicant from following up with its Counsel on the progress of the case and/or negotiation. The Applicant has stated that its former Advocate had intimated to them that a tentative settlement had been reached hence its Directors had been laboring under the mistaken impression that the instant matter had been compromised. It begs the question as to the identity of the parties who were negotiating. Was there no representative from the Applicant? The Counsels' reported to the court that the parties were negotiating, and the parties in the instant matter are the Applicant and the Respondent, so if the Applicant was not aware of the happenings both at the court and the out of court negotiations, who then are these parties who had been negotiating?

45. From the chronology of events herein above stated, it cannot be said that the Applicant had no notice of the proceedings in court, because it is clear that from when the matter had been instituted up to the time the same had been dismissed for want of prosecution, not only had it been represented by Counsel, but that there had been numerous adjournments sought by its Counsel for various reasons ranging from non-compliance to the fact that negotiations were still ongoing, from the year 2015 until 12th July, 2023 when the matter was dismissed for want of prosecution. In fact, on the said date of dismissal, its Counsel was still asking for more time, a negotiation that had allegedly been ongoing for a period of 8 years yet the parties were yet to agree.

46. Any person who initiates litigation against another has a duty and is under an obligation to ensure that the suit is expeditiously prosecuted without unnecessary delays. The overriding objective of rendering justice expeditiously as envisaged under Sections 1A and 1B of the *Civil Procedure Act* calls for the parties and their legal advisors to play their supportive roles in the chain of justice delivery.

47. An advocate is the agent of the party who instructs him and such instructing client as the principal continues to have the obligation and the duty to ensure that the agent is executing the instructions given. In the case of litigation, the suit belongs to the client and the client has an obligation to do follow ups with its Advocate to ensure the Advocate is carrying out the instructions as given.

48. The Court of Appeal in the case of B1-Mach Engineers Limited vs. James Kahoro Mwangi (2011) eKLR, while commenting on the duty of a client and an Advocate had observed as follows: -

> " I have examined the affidavit in support of the application and it is my view that it falls short of candidness and betrays lack of expedition. There is no explanation at all about what the applicant was doing between 2nd December and 30th December, 2010 when an undisclosed informer gave out the information about the decision of the court. The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. The client has a remedy against

such an advocate. It would also appear that there was unnecessary and unexplained delay after 30th December, 2010 and the filing of the motion on 2nd February, 2011. Without explanation, there would be no basis for the exercise of any discretion."

49. The question that I have asked myself is whether the alleged lack of Notice of the hearing by the Applicant's former Advocate and non-prosecution of the suit constituted sufficient cause or whether the Applicant had deliberately meant to delay the cause of justice.

50. The Supreme Court of India in the case of Parimal vs Veena 2011 3 SCC 545 attempted to describe what sufficient cause constituted when it observed 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."

51. The test to be applied was whether the Applicant had honestly and sincerely intended to prosecute the matter. Sufficient cause is thus the cause for which the Applicant could not be blamed for his inaction. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances.

52. The Applicant in the instant case has merely stated that its Advocate had not notified it of the hearing date but had intimated to it that there had been a possible out of court settlement. What action did it take to follow up on the case? Nothing as per its Supporting Affidavit. Inaction on the part of the Advocate without any explanation cannot constitute an excusable reason for delay. In the instant suit it is my finding that the Applicant and its previous Advocate had been casual in the manner they went about prosecuting the instant suit. The delay to prosecute the suit from the 29th March, 2006 to the 12th July, 2023 when the instant suit was dismissed for want of prosecution was unexplained. There is no basis upon which I can exercise my discretion in favour of the Applicant to reinstate its suit. It is thus my finding that the delay was inexcusable.

53. The Court of Appeal in the case of Richard Nchapi Leiyagu vs. Independent Electoral & Boundaries Commission & 2 others [2014] eKLR expressed itself as follows:-

> " we agree with the noble principles which goes further to establish that the court's discretion to set aside ex parte Judgment or Order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice."

54. In the present suit, I find that the Applicant deliberately failed to prosecute its case by refusing to avail itself to the court process. Indeed, it had been its primary duty to take steps to expeditiously progress its case since it had been the one who had dragged the Respondent to court.

55. I find that the present Application is an afterthought, a waste of judicial time and an abuse of the court process since the Respondent is being gravely prejudiced by the Applicant, there is need for the court to balance the rights of both parties and to exercise its discretion in dispensing justice for it is not powerless to grant relief, when the ends of justice and equity so demand. The application seeking to set aside the orders of the court that had dismissed the Applicant's suit therefore fails.

56. On the second issue for determination as to whether the Applicant's suit should be reinstated, having declined to set aside the orders dismissing the Applicant's suit for want of prosecution, this prayer also fails.

57. In the end, I find that the Application dated 24th October, 2023 has no merit and the same is dismissed with costs.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 29TH DAY OF FEBRUARY 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE