Maguta v Mukima (Environment & Land Case E027 of 2022) [2025] KEELC 841 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEELC 841 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND CASE E027 OF 2022

FM NJOROGE, J

FEBRUARY 27, 2025

BETWEEN

KIMANI MBUGUA MAGUTA .... PLAINTIFF

AND

FRANCIS M'TAARU MUKIMA .... DEFENDANT

RULING

1. There are two applications for determination dated 1/10/2024 and 14/10/2024, both filed by the Defendant. In the former application, the Defendant seeks the following reliefs: -
   1. ....Spent;
   2. That this honourable court be pleased to vary and/or set aside its orders dismissing the Defendant/applicant's notice of motion application dated 18th July 2024 for want of prosecution and non-attendance and reinstate the said application for hearing and determination on merit;
   3. That the honourable court do make any such order or further orders as it may deem fair and just in the interest of justice;
   4. That costs of the application be costs in the cause.
2. The application was premised on the grounds listed on the face of the motion and supported by a supporting affidavit sworn by the Defendant. The grounds were framed as follows:
   1. That the Defendant/Applicant herein filed an application dated 18th July 2024 upon which the said application was to come up for inter partes hearing on 1st October 2024;
   2. That when the matter came up for hearing, the advocate logged in in due time and was actually online when the first two hearings in the cause list were called out;

3. That as the said advocate was still online and handling two different matters in two different court, immediately power went off and eventually the internet was disconnected;
4. That by the time the said advocate logged back and was admitted, the matter had been called out and the application had been dismissed for non-attendance and want of prosecution;
5. That power and internet challenges cannot be anticipated and when it occurs then it creates some form of unnecessary confusion the results being as such;
6. That the dismissal of the application is adverse to the defendant/applicant who wishes to have his application heard on merit;
7. That allowing this application will not prejudice the Plaintiff/respondent after all the Defendant/applicant has a triable case with high chances of success;
8. That the application herein has been filed without undue delay;
9. That in the interest of substantial justice it is the defendant/applicant's plea that the contents of the application be treated in its unique circumstance and grant the orders sought to avoid huge miscarriage of justice.

3. In the latter application, the Defendant wants the Court to grant the following orders-
    1. Spent.
    2. Spent.
    3. That upon granting prayer 2 above this honourable court be further pleased to issue an order of conservation and preservation of the suit property from the scheduled demolition of the Defendant/applicant's house and permit status quo to be maintained pending the hearing and final determination of the Application dated 18th July 2024 and the entire suit.
    4. That this honourable court be further pleased to make such other interlocutory orders as may appear to the court to be just and convenient.
    5. That the cost of this application to be provided for.

4. The application is premised on the grounds enumerated in the motion and in the supporting affidavit sworn by the Defendant on 14/10/2024. The Defendant reiterated the grounds raised in the former application and averred that he was summoned by the OCS- Watamu on 13/10/2024 to demolish his house as per the terms of a judgment delivered in this suit on 22/5/2024. The Defendant was thus apprehensive that if the status quo is not maintained, he will suffer immensely and his application for stay of execution and review be rendered nugatory.

5. In response to the first application, the Plaintiff filed a Replying Affidavit sworn by Mr. Geoffrey Kilonzo, counsel for the Plaintiff, on 3/10/2024. Mr. Kilonzo stated that the application was unmerited, bad in law, vexatious and meant to deny the Plaintiff from enjoying fruits of litigation. He deposed that the same is an academic exercise since the application for review sought to be reinstated would not succeed, by virtue of the documentary evidence confirming the Plaintiff's ownership over the suit property. According to Mr. Kilonzo, the Defendant's counsel has not given any plausible reasons to warrant granting the orders sought.

6. The Plaintiff swore and filed a Replying Affidavit in response to the second application. In that affidavit dated 15/11/2024, the Plaintiff deposed that the Defendant was given 60 days to vacate the suit

property and having failed to do so, he was forced to exercise his right in performance of the court orders. To him, the application is incompetent and an abuse of the court process.

7. The Court directed that both applications be canvassed by way of written submissions. The parties filed their respective submissions.

Analysis

8. Having carefully considered the application, the rival affidavits, the submissions and authorities relied on and the law cited, it is my view that the issues for determination are:

   i. Whether the Orders issued on 1/10/2024 dismissing the Defendant/applicant's notice of motion application dated 18th July 2024 for want of prosecution and non-attendance should be set aside, and the application reinstated.

   ii. Whether an order for *status quo* should be issued.

9. This suit was heard, determined and judgment delivered on 22/5/2024 in favour of the Plaintiff. Subsequently, the Defendant filed an application for review dated 18/7/2024. The said application was scheduled to be heard on 1/10/2024 when it was dismissed for non-attendance. Thus, 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 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."

10. The decision of whether to or not to allow an application for setting aside judgment or an order for dismissal due to non-attendance of a plaintiff or applicant is within the wide discretion of the court. This discretion has to be exercised judiciously, as was stated in the case of *Shah v Mbogo* (1979) EA 116 quoted with approval in the case of *John Mukuha Mburu v Charles Mwenga Mburu* [2019] eKLR, where that court held thus:

> "......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."

11. In *Patel v EA Cargo Handling Services Ltd* [1974] EA 75, the court stated that:

> "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."

12. The guiding principles for exercise of that discretion were well stated by the Court of Appeal in *Simon Thuo Mwangi v Unga Feeds Limited* [2015] eKLR as thus: -

> "On reasons presented, it takes course to set aside or refuse to set aside. The court thus exercises a judicial discretion all the time having in mind what is just and fair in the case. The reason to set aside must therefore be based on good grounds or reasons advanced not on a whim or caprice."

13. Further, for the Court to exercise its discretion in favour of an Applicant, he or she must demonstrate 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 application. "Sufficient Cause" was defined in the case of *Wachira Karani v Bildad Wachira* [2016] eKLR where the court cited with approval the Supreme Court of India in *Parimal v Veena* as follows: -

> " "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. 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."

14. In the instant case, the application was dismissed for non-attendance. The Defendant averred that his counsel was present in the virtual court until her call dropped due to internet loss occasioned by power disconnection. I am aware of the rampant electricity disruptions in this country, and which can occur at any time due to factors beyond anyone's control. The Defendant filed the application to set aside on the same date that the orders for dismissal were issued. In the given circumstances, I will exercise my discretion in favour of the Defendant and reinstate the application dated 18/7/2024.

15. A perusal of the said application reveals that the Defendant's intention is to review the judgment of this court. The effect of the orders granted in the impugned judgment in this case, involved demolition of the Defendant's home. In my view, this would amount to substantial loss defeating the whole purpose of the intended review. For this reason, it is paramount that the status quo be maintained pending the outcome of the intended review.

16. The upshot is that the applications dated 1/10/2024 and 14/10/2024 are hereby allowed on condition that the Defendant pays throw away costs of Kshs. 20,000/- to the Plaintiff. The Plaintiff shall also have the costs of both applications. The application dated 18/7/2025 shall be disposed of by way of written submissions. the applicant shall file and serve submissions within 14 days from the date of this order and the respondent shall file submissions and serve within 14 days from the date of expiry of the period granted to the applicant for the filing of his submissions. The application shall be mentioned

on 27/3/2025 for issuance of a ruling date. No submissions shall be filed beyond the timelines allowed without leave being sought from court.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 27TH DAY OF FEBRUARY 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI