



**Rado Development Company Limited v County Government of Kisumu & another (Environment & Land Petition E003 of 2020) [2024] KEELC 858 (KLR) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 858 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND PETITION E003 OF 2020  
SO OKONG'O, J  
FEBRUARY 22, 2024**

**BETWEEN**

**RADO DEVELOPMENT COMPANY LIMITED ..... PETITIONER**

**AND**

**THE COUNTY GOVERNMENT OF KISUMU ..... 1<sup>ST</sup> RESPONDENT**

**ABALA WANGA, KISUMU CITY MANAGER ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This suit was brought by the petitioner by way of a petition dated 16<sup>th</sup> December 2020. In the petition, the petitioner sought the following reliefs;
  1. Conservatory orders directed at the respondents restraining them from entering upon or attempting to demolish all that property known as Title No. Kisumu/Municipality Block 9/111(hereinafter referred to as “the suit property”) in pursuance of the impugned notice or otherwise interfering with the petitioner’s quiet possession and enjoyment of the property.
  2. Prohibitory Orders directed at the respondents restraining them from claiming, entering upon or attempting to demolish the suit property in pursuance of the impugned notice or otherwise howsoever interfering with the petitioner’s possession and quiet enjoyment of the property.
  3. A declaration that the purported “Public Notice” dated 9<sup>th</sup> December 2020 is null and void and of no legal consequences to the extent that it relates to the suit property.
  4. A declaration that the respondents’ police have threatened, infringed upon and violated the petitioner’s fundamental rights to privacy, property and fair administrative action.
  5. A declaration that by their actions, the respondents have acted capriciously, and arbitrarily, and have abused and exceeded their lawful powers.



6. A declaration that as a result of the respondents' actions aforesaid, the petitioner has suffered damage and loss and is entitled to exemplary damages.
  7. An order for compensation to be assessed and quantified by the court.
  8. General damages.
  9. Costs of the petition.
2. In its petition, the petitioner averred that it was the duly registered leasehold proprietor of all that parcel of land known as Title No. Kisumu Municipality/Block 9/111 ("the suit property"). The petitioner averred that it purchased the suit property in 2012 from the County Council of Kisumu (hereinafter referred to only as "the Council") at a consideration of Kshs. 31,000,000/- after all the necessary approvals were obtained by the Council to sell the property by tender to defray its debts. The petitioner averred that it participated in the tender and emerged the winner after which it entered into a formal agreement of sale with the Council on 14<sup>th</sup> June 2012. The petitioner averred that after it fulfilled its part of the agreement for sale, the suit property was transferred to it on 3<sup>rd</sup> September 2012 and it was issued with a certificate of lease. The petitioner averred that its leasehold interest in the suit property was for a term of 69 years with effect from 1<sup>st</sup> April 1985 and that the same was still subsisting.
  3. The petitioner averred that it had enjoyed quiet possession of the suit property since 2012 with the full knowledge of the respondents to which it had paid land rates over the years and received approvals for the developments that it had carried out on the property. The petitioner averred that on 14<sup>th</sup> December 2020, the respondents caused a notice dated 9<sup>th</sup> January 2020 to be affixed on the main gate of the suit property. The petitioner averred that the said notice required the petitioner and its tenants on the suit property numbering 74 to vacate the suit property in less than 48 hours in default of which the 1<sup>st</sup> respondent would forcibly evict them and raze the suit property to the ground.
  4. The petitioner averred that through its advocates on record, it wrote to the respondents explaining and demonstrating that it was the lawful owner of the suit property and as such was lawfully in occupation thereof. The petitioner averred that despite receipt of the letter, the respondents refused to withdraw the said notice. The petitioner averred that the respondents were hell-bent on carrying out arbitrary, illegal, and unconstitutional eviction of the petitioner from the suit property and demolition of its structures thereon. The petitioner averred that the current value of the suit property inclusive of the developments thereon was Kshs. 155,000,000/-. The petitioner averred that the petitioner and its tenants stood to suffer colossal loss and irreparable damage should the court not intervene and halt the respondents' illegal acts complained of.
  5. In response to the petition, the respondents filed grounds of opposition dated 20<sup>th</sup> January 2021 in which the respondents termed the petition as unmerited. The respondents averred that the petition was based on irrelevant and inadmissible evidence. The respondents averred that the suit property which was public land was acquired by the petitioner illegally. The respondents averred that the title to the suit property held by the petitioner having been acquired illegally did not enjoy the protection of the law. In addition to the grounds of opposition, the respondents filed an answer to the petition and a cross-petition. In their answer to the petition and cross-petition, the respondents reiterated that the suit property was public land and that the same was acquired by the petitioner corruptly, irregularly, illegally and fraudulently. The respondents denied that the petitioner acquired the suit property through an open competitive tender as claimed in the petition.



6. In their cross-petition, the respondents contended that the petitioner fraudulently and illegally acquired the suit property that was reserved for public use and had denied the public access and use thereof. The respondents sought the following reliefs against the petitioner in the cross-petition;
  1. A declaration that the 1<sup>st</sup> respondent is the rightful owner of the suit property.
  2. A declaration that the petitioner's purported acquisition of the suit property is illegal, null and void.
  3. Rectification of the register for the suit property by cancelling the registration of the petitioner as the owner and registering the 1<sup>st</sup> respondent as the property owner.
  4. A declaration that the petitioner's occupation of the suit property is illegal and an order for its eviction from the property.
  5. A permanent injunction to restrain the petitioner from interfering with the respondents' use and occupation of the suit property and from transferring, selling and encumbering the said property.
7. On 13<sup>th</sup> February 2023, the court directed that the petition shall be heard through oral evidence and fixed the same for hearing on 26<sup>th</sup> June 2023. On 26<sup>th</sup> June 2023, the hearing of the petition was adjourned on an application for adjournment by the petitioner whose advocate Mr. Thomas Ogola was said to be attending to an urgent matter in Isiolo. The court adjourned the matter to 26<sup>th</sup> October 2023 in the presence of the advocate who held brief for Mr. Thomas Ogola for the petitioner, and the advocate for the respondents. When the matter came up for hearing on 26<sup>th</sup> October 2023, Mr. Cheruiyot held brief for Mr. Thomas Ogola for the petitioner while Ms. Mathenge held brief for Mr. Mongeri for the respondents. On that day, Mr. Cheruiyot told the court that Mr. Thomas Ogola was not ready to proceed with the hearing of the suit because "he was engaged in some consultancy". Ms. Mathenge for the respondents told the court that they had no objection to the application for adjournment. The court considered the reason that was given for the adjournment that was sought by the advocate for the petitioner and found no merit in the application. The application for adjournment was dismissed and the parties were ordered to proceed with the hearing of the petition.
8. Mr. Cheruiyot for the petitioner told the court that since Mr. Thomas Ogola had received an assurance from the advocates for the respondents that they would not oppose the application for adjournment, Mr. Ogola did not ask the petitioner's witnesses to come to court. Since the petitioner had no witnesses and as such no evidence to tender in support of the petition, the court dismissed the petition with costs to the respondents and allowed the respondents to lead evidence in proof of their cross-petition. Mr. Cheruiyot told the court that he did not wish to continue participating in the proceedings because he no longer had instructions in the matter. The respondents called one witness and closed their case. The court thereafter directed the parties to make closing submissions in writing.
9. What is now before me is the petitioner's Notice of Motion application dated 14<sup>th</sup> November 2023 brought under Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* and Order 12 Rule 7 and Order 40 Rule 1 of the *Civil Procedure Rules* and all enabling provisions of the law. In the application, the petitioner has sought orders that the order made by the court on 26<sup>th</sup> October 2023 dismissing the petitioner's petition for non-attendance be set aside and the petition reinstated for hearing and determination on merit. The petitioner has also sought an order that the petitioner be allowed to defend the respondent's cross-petition. The application was brought on several grounds set out on the face thereof and on the affidavit sworn by the petitioner's advocate Thomas Ogola on 14<sup>th</sup> November 2023.



10. In summary, the application was brought on the ground that Mr. Ogola who had the conduct of the suit on behalf of the petitioner was unable to attend court on 26<sup>th</sup> October 2023 and had no other advocate in his firm whom he could instruct to conduct the hearing of the matter. In his affidavit in support of the application, Mr. Ogola stated that on 26<sup>th</sup> October 2023 when the matter came up for hearing, he was held up in Voi where he was facilitating “a session involving multiple stakeholders”. He stated further that the only other qualified advocate in his firm who could have held his brief in the matter had resigned on 4<sup>th</sup> October 2023. Mr. Ogola stated further that the petition raised serious contested constitutional and statutory issues which should be heard and determined on merit. He stated that the petitioner stood to suffer irreparable loss and damage owing to its substantial investment in the suit property if its petition was not reinstated for hearing on merit and it was also not allowed to defend the cross-petition. He urged the court not to visit his inadvertence or error on the petitioner who had an arguable petition and who stood to lose a huge investment if the application was not allowed.
11. The application was not opposed by the respondents and the petitioner chose to rely entirely on the grounds on the face of the application and the supporting affidavit. The petitioner had not filed submissions by the time of writing this ruling as directed by the court.

### **Analysis and determination**

12. I have considered the application together with the affidavit filed in support thereof. The application was brought principally under Order 12 Rule 7 of the *Civil Procedure Rules*. The burden was upon the petitioner to establish sufficient grounds to warrant the setting aside of this court’s orders made on 26<sup>th</sup> October 2023, the reinstatement of the petition for hearing on merit and the hearing of the cross-petition a fresh. Order 12 Rule 7 of the *Civil Procedure Rules* gives the court discretionary power to set aside an order of dismissal of a suit made in the absence of a party. The court’s discretionary powers must be exercised judiciously. In *Patriotic Guards Ltd. v. James Kipchirchir Sambu* [2018] eKLR the court stated as follows:

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”

13. The principles applied by the court in applications of this nature were set out in *Shah v. Mbogo* [1967] E.A 116 as follows:

“...the court’s discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.”

14. I am not convinced that the reason given for the petitioner’s advocate, and the petitioner’s witnesses’ failure to attend court on 26<sup>th</sup> October 2023 would justify the exercise of this court’s discretion in favour of granting the orders sought in the application before the court. As I have mentioned earlier in the ruling, the hearing date of 26<sup>th</sup> October 2023 was fixed in court on 26<sup>th</sup> June 2023 in the presence of the advocates for both parties. From the material before the court, after that date was given by the court, the firm of advocates representing the petitioner was retained on 24<sup>th</sup> September 2023 to



act as consultants for an entity known as Kenya Wildlife Conservancies Association. Following that engagement, the petitioner's advocate Mr. Thomas Ogola from the said firm knowing well that he was alone in his law firm decided to attend a meeting that was organized by the said Kenya Wildlife Conservancies Association in Voi on 26<sup>th</sup> October 2023; the same date this petition was coming up for hearing. It is clear from the foregoing that the petitioner's advocate chose to do consultancy work rather than attend to this petition. I believe that the counsel was aware that appearance before a superior court should take precedence over what he has referred to in his affidavit as "facilitating a session involving multiple stakeholders." I believe that if the advocate had taken this court seriously, he could have rescheduled his consultancy work and attended the hearing of the petition. It is immaterial that the respondents' advocates had confirmed to him that they would not oppose the application for adjournment. Adjournments are not granted by the advocates to each other but by the court. I have said enough to show that the application before me has no merit. That said, I have noted that the application is not opposed. I have also taken note of the nature of the dispute before the court and the loss that the petitioner may suffer if the application before the court is not allowed.

15. In *Phillip Chemwolo & Another v Augustine Kubede* [1982-88] KAR 103 at 1040, Apaloo J. (as he then was) stated as follows:

"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."

16. In *Richard Nchapi Leiyangu v IEBC & 2 others*, Civil Appeal No. 18 of 2013, the court stated that:

"The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent power to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day, there should be proportionality".

17. It is for the foregoing reasons that I will allow the petitioner's application. The Notice of Motion dated 14<sup>th</sup> November 2023 is allowed on the following terms;

1. The order made on 26<sup>th</sup> October 2023 dismissing the petitioner's petition with costs is set aside.
2. The proceedings of 26<sup>th</sup> October 2023 relating to the hearing of the respondents' cross-petition, and consequential orders are set aside.
3. The respondents' cross-petition shall be heard afresh.
4. Each party shall bear its own costs.

**DELIVERED, DATED AND SIGNED AT KISUMU ON THIS 22<sup>ND</sup> DAY OF FEBRUARY 2024**

**S. OKONG'O**

**JUDGE**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Omolo h/b for Mr. Ogola for the Petitioner



Mr. Mongeri for the Respondents

-Court Assistant

