Chisikwah v Kores & another (Environment & Land Case 90 of 2014) [2024] KEELC 698 (KLR) (14 February 2024) (Ruling)

Neutral citation: [2024] KEELC 698 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 90 OF 2014

JA MOGENI, J

FEBRUARY 14, 2024

BETWEEN

DANIEL MASINJILAH CHISIKWAH ..... PLAINTIFF

AND

OLEKU LAKATI KORES ..... 1ST DEFENDANT

MICHAEL MATANDA OLE MOIJO ..... 2ND DEFENDANT

RULING

1. Before this Court for determination is the Defendant/Applicant's Application dated 05/11/2023 filed under Sections 1A, 3, 3A & 80 of the *Civil Procedure Act*, Order 12 Rules 3 and 7, Order 45 Rule 45 Rule 1 & Order 51 Rule 1 of the *Civil Procedure Rules* 2010, Articles 48 and 159 of *the Constitution* of Kenya. The Defendant/Applicant is seeking for the following Orders:

    1. Spent.

    2. That this Honourable court be pleased to stay, suspend and/or set-aside the dismissal orders given in this matter on 18/10/2023.

    3. That this Honourable Court be pleased to direct that the Applicant/Defendant's two applications which are dated 15/08/2023 as well as the one dated 25/09/2023 to be reinstated and set down for hearing inter-parties and thereby a determination thereof be made based on the merits of the Applicant/Defendant's case.

    4. That this Honourable Court be pleased to allow the Applicant/Defendant through its advocate on record, an opportunity to prosecute its application filed herein and dated 15/08/2023 as well as the one dated 25/09/2023 and a determination thereof be made based on the merits.

    5. That the costs of the application be provided for in the cause.

2. The motion is premised on the grounds set out on its face together with the Supporting Affidavit of Mr. E. O Nyakeriga, the advocate representing the Defendant/Applicant herein sworn on 5/11/2023.

3. It is the Applicant's case that this Honourable court has the competence and jurisdiction to ensure that Justice is done to all, irrespective of status and all persons have access to justice without undue regard to procedural technicalities as guaranteed by *the constitution*. That Applicant/Defendant, through its Advocates appeared before this Honourable Court for the hearing its two applications which are dated on the 15/08/2023 as well as the one dated on the 25/09/ 2023; however, the same were dismissed. Further, on 18/10/2023 when the applications came up for hearing, the Applicant/Defendant's Advocate appeared before the court but mid-way through, his internet connection dropped and when he managed to re-connect and address the court on his predicament, it was found that the file had been called out and relevant orders had been given and the file taken back to the Registry. A copy of the cause list of the day has been annexed. Upon perusing the file in this suit, it was established that the two applications dated on the 15/08/2023 as well as the one dated on the 25/09/ 2023 had been dismissed and such dismissal are adverse and prejudicial to the Applicant/Defendant. The failure to prosecute the Applicant/ Defendant's said applications was not by design and therefore not deliberate.

4. Lastly, the Applicant through his counsel averred that if the orders sought are not granted, the Applicant/Defendant stands to suffer irreparable damages on the one hand. while the prejudice to he suffered by the Respondent/Plaintiff, if any at all, can be remedied by compensation in costs.

5. The Application is not opposed by the Plaintiff/Respondent herein despite seeking leave of 14 days to put in a response when the application came up on 28/11/2023.

6. On 28/11/2023, directions were given on filing of written submissions to the application. A ruling date was also reserved. By the time of writing this Ruling, no written submissions had been filed.

7. I have considered the motion and the affidavit in support. I have also considered the relevant law. I in turn have had time to analyze the emerging issues therein and this court is of the considered view that the germane issue falling for consideration are whether or not the Court should set aside the order issued on 18/10/2023 dismissing the Defendant/Applicant's Application dated 25/09/2023 and have the same reinstated.

8. From the record, the matter was before the Court on 26/09/2023 where both counsels for the Plaintiff, one Mr. Mukungi and for the 1st Defendant, one Mr. Nyakeriga appeared before me for directions on the 1st Defendant's application dated 15/08/2023. The Court directed counsel for the 1st Defendant to regularize his appearance before the Court. The parties were given a further mention date for 18/10/2023. When the matter came up on 18/10/2023, it was only the Plaintiff's advocate who appeared. Consequently, the Court dismissed the 1st Defendant's Application dated 25/09/2023 with costs to the Plaintiff for want of prosecution.

9. When a party wishes to set aside an order of dismissal of suit for want of prosecution are guided by the provisions of Order 12 Rule 7 of the *Civil Procedure Rules*. It provides that,

> " Where under this Order judgement has been entered or the suit has been dismissed, the court on application may set aside or vary the judgement or order upon such terms as may be just."

10. Order 12 Rule 3 of the *Civil Procedure Rules* allows the court to dismiss a suit for a non-attendance while Rule 7 allows the aggrieved party to apply to set aside that order and reinstate that suit. The Notice of Motion herein was filed on 7/11/2023, twenty (20) days after the suit was dismissed. The same in my view was therefore filed without delay. In the case of *Shah v Mbogo* (1967) EA 116, it was

stated that the exercise of discretion of the court to set aside *ex-parte* Orders is to avoid an injustice or hardship from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought by evasion or otherwise to obstruct or delay the course of justice.

11. In this case, the Defendant/Applicant has explained that he, through its Advocates appeared before this Honourable Court for the hearing its two applications which are dated 15/08/2023 and 25/09/2023 respectively. That on 18/10/2023 when the applications came up for hearing, the Applicant/Defendant's Advocate appeared before the court but mid-way through, his internet connection dropped and when he managed to re-connect and address the court on his predicament, it was found that the file had been called out and relevant orders had been given and the file taken back to the Registry.

12. In the case of *Belinda Murai & Others v Amoi Wainaina* (1978), Madan J set out the following approach to be adopted when dealing with the question as to whether or not a party should be completely locked out of a court of justice on account of a mistake.

> " The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistake which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule....."

13. Apaloo JA outlined the following approach to a similar question in *Philip Chemwolo & another v Augustine Kubede* (1982-88) KAR 103.

> " Blunder 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 the purpose of imposing discipline".

14. Further, in *Nicholas Roussos v Gulamhussein Habib Virann and anor* SCCA No.9 of 1993(unreported) wherein Court noted that,

> " The Courts have attempted to lay down some of the grounds or circumstances which may amount to sufficient cause. A mistake by an Advocate though negligent may be accepted as a sufficient cause."

15. I am further persuaded by the decision in *Rawal v Mombasa Hardware Ltd* (1968) EA 392 which was concerned with the dismissal of a case for want of prosecution although the circumstances are different given the Plaintiff's failure to attend court to prosecute his case when it was called for hearing, the important extract from this decision is the Ruling of Sir Charles Newbold at pg. 394-; where the court held that, the trial court had the power to re-instate a suit within its inherent jurisdiction. I quote;

> " We all know that a Court has control over its order until it is perfected. Even if the order is made in the presence of the parties and after argument... It is still open to Court before it is perfected to recall the order."

16. Therefore, in my view, a mistake that leads to failure to attend court should not automatically lead to the shutting of the door to the court seized of a dispute. The court's overriding objective is to do

justice. Before the door of justice is closed on an applicant, the respondent must satisfy the court that he will be prejudiced by the reinstatement and that justice will not be done owing to the circumstances of the case. I would add that the right to a hearing is secured under Article 50(1) of *the Constitution* of Kenya 2010. In exercising judicial discretion, courts are obligated to do all that is possible within their discretion to give effect to that right. There is also no evidence that the Plaintiff/Respondent will suffer prejudice which cannot be compensated by an award of costs.

17. From the affidavit in support of the application, I am satisfied that the failure to attend court was not intentional or deliberate on the part of the Defendant/Applicant's advocate and the same should be excused. The Plaintiff/Respondent has not demonstrated that he would suffer prejudice if the orders sought are granted. I am persuaded the circumstances of this case justifies giving the Defendant/Applicant another chance which is not only feasible but also the just thing to do. The overriding objective of the court would also come to the aid of the applicant in order for his two applications be decided on merit.

18. In conclusion, I would say I am convinced the Defendant/Applicant's advocate has offered an excusable reason for his failure to attend court on 18/10/2023. The inconvenience caused to the Plaintiff/Respondent by the counsel's failure to attend court on the material day can be compensated by an award of modest costs.

19. By reasons of the foregoing, I am satisfied that the notice of motion dated 5/11/2023 has merit. The application is allowed. The Order made herein on 18/10/2023 dismissing the Defendant/Applicant's Application dated 25/09/2023 for want of prosecution is set aside and the same is reinstated for hearing and determination on merit. The Defendant/Applicant shall pay the Plaintiff throw-away costs of Kshs. 20,000.00. The same shall be paid within 21 days from the date hereof and in default, the order herein shall stand vacated and the Application dated 25/09/2023 shall stand dismissed. Costs of this application shall be in the cause.

20. Further order, mention after 21 days to confirm compliance and for directions on the Applications dated 25/09/2023 and 15/08/2023 respectively.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF FEBRUARY 2024.

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MOGENI J

JUDGE

In the virtual presence of ;-

Ms. Thegenyo holding brief for Ms. Mukungi for Plaintiff/Respondent

Mr. Ndung'u coming on record for the Plaintiff

None appearance for the 1st Defendant/Applicant

None appearance for the 2nd Defendant

Ms. C. Sagina: Court Assistant

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MOGENI J

JUDGE