Gituma & another v Manene & another (Being sued as the Legal Representatives of the Estate of Manene Tumanga) (Enviromental and Land Originating Summons E017 of 2022) [2024] KEELC 1724 (KLR) (20 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1724 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIROMENTAL AND LAND ORIGINATING SUMMONS E017 OF 2022

CK NZILI, J

MARCH 20, 2024

BETWEEN

DAVID MUNENE GITUMA .... 1ST PLAINTIFF

JAMES KINOTI KIRINYA .... 2ND PLAINTIFF

AND

JUDAH MUNGATIA MANENE .... 1ST RESPONDENT

IBRAHIM MUTEA MANENE .... 2ND RESPONDENT

BEING SUED AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF MANENE TUMANGA

RULING

1. The court is asked through an application dated 4.12.2022 to review, vary and set aside the order made on 4.10.2023, and reinstate the suit for hearing after granting the applicant seven days to comply with Order 11 of the *Civil Procedure Rules*. The reasons are contained on the face of the application and in a supporting affidavit of David Gituma Munene sworn on 4.12.2023. Briefly, the applicant avers he availed additional documents to his lawyer in February 2023, who sought leave to file them and was granted 21 days in a ruling dated 4.10.2023 neither he did not attend its delivery nor was he aware of the directions issued, even though he had been served with a mention notice by the registry.
2. The applicant avers he has always been ready to prosecute his suit and kept in touch with his advocates who, after he was frustrated with him, has now changed advocates. The applicant avers that on 1.12.2020, his former advocates advised him to seek alternative legal redress only to realize the suit had been dismissed for want of prosecution.

3. The applicant says his former advocate was dilatorious in pursuing his claim and should, therefore, not be punished for the mistakes of his advocate, who failed to comply with court directives despite receiving sufficient instructions to do so. The applicant avers that if the orders sought are not issued, he shall be kept out of the seat of justice and denied a chance to be heard on his claim for adverse possession on the suit land, where his permanent residence is and the only known home since childhood occupied by his family who stand to be prejudiced and shall suffer irreparable harm or injury.

4. The application is opposed through a replying affidavit sworn by Ibrahim Mutea Manene, the respondent, on 18.12.2023. It is averred that the suit came up on 2.11.2023 to confirm compliance with orders issued on 4.10.2023, which were to the effect that if there was non-compliance, the suit should stand dismissed for non-compliance and non-prosecution.

5. The respondent avers the applicant opted not to comply with the order or attend court, which by itself proves reluctance to pursue their suit and endlessly delay it by filing multiple applications to prolong the matter. The respondent avers the court had the discretion to dismiss the suit on the mentioned date since the same was meant to confirm conditional compliance on their part. The respondent terms the application as an abuse of the court process, a delaying gimmick and that even if the notice was late, the applicants should have appeared before the court as the suit belongs to them.

6. The respondent avers the delay in filing this application has not been explained and the applicants cannot blame the former advocates of indolence while also exhibiting the same. The respondent avers from a previous ruling dated 18.1.2023; the court held the applicant had not established a prima facie case and, as such, no prejudice will be suffered if the suit is not reinstated.

7. On 18.1.2023, the plaintiff's application dated 31.10.2022 was dismissed. Parties were directed to comply with Order 11 *Civil Procedure Rules* and list the suit for hearing. A case conference was placed for 13.2.2023 by consent. The plaintiffs neither attended court on that date nor had they complied with Order 11 of the *Civil Procedure Rules.*

8. The defendants, on their part, attended court and confirmed compliance with Order 11 and requested for a hearing date. The court listed the matter for hearing on 15.5.2023. A hearing notice was directed to be served upon the plaintiffs. On 7.3.2023, the plaintiff filed further witness statements of Gladys Kinya Mwebia and David Munene Gituma and a list of exhibits in anticipation of the hearing date the following week.

9. Come 15.5.2023, the plaintiffs did not attend the hearing. The defendants attended ready to proceed and informed the court that a hearing notice had been served upon the plaintiffs neither 20.2.2023, through an email and a text message.

10. The court reluctantly adjourned the matter, gave the plaintiffs the last adjournment, and condemned them to pay Kshs.5,000/= attendance costs, to the defendant before the next hearing on 31.7.2023.

11. Through a certificate of urgency dated 23.5.2023, the plaintiffs sought admission of additional documents as per the list dated 6.3.2023. The affidavit in support was signed by Simon Mwangi on 23.5.2023. It was silent on non-attendance of the hearing date and non -non-compliance. The application was certified urgent and listed for 30.5.2023 with an order that it be served upon the defendants. On 30.5.2023, the defendant appeared in court while the plaintiffs did not show up, yet it was them who had served the application with a date upon the defendant.

12. By a ruling dated 4.10.2023, the court observed that the plaintiffs had been reluctant to comply with of the of the Order 11 *Civil Procedure Rules* or attend court on four occasions. The applicants were given 21 days to comply with the compliance; otherwise, the suit would stand dismissed.

13. The plaintiffs did not bother to attend court on 31.7.2023 or follow up to know the ruling date on 4.10.2023, on whatever directions the court had given. Between the signing of the affidavit on 23.5.2023 and 2.11.2023, when the suit came up to confirm compliance, the plaintiffs were silent on what efforts they made as follow-ups with their former advocates.

14. The case belongs to the plaintiffs and not their advocates. It is not enough to blame the erstwhile advocates. See *Savings & Loan Ltd vs Wanjiru Muritu* Nrb HCC No. 397 of 2002. The documents alluded to and attached in the affidavit sworn on 4.12.2023, had been filed with the further witness statement signed by David Munene Gituma on 6.3.2023. With documents in the court file, the defendants on 2.11.2023 complained that they had not been served with them.

15. From this, there is sheer negligence on the part of the applicants. They appear unaware of what their former lawyers had done in their absence. It is evident that there was a complete miscommunication between the plaintiffs and their former advocates; otherwise, if the plaintiffs were keen on the progress of their matter, they should have been privy to the filing of the documents, the certification of their application dated 23.5.2023, the listing of the application hearing on 30.5.2023, hearing dates for 15.5.2023 the adjournment granted on 15.5.2023 for further hearing on 31.7.2023, the date for delivery of ruling on 4.10.2023 and the listing of the matter for confirmation of compliance on 4.11.2023.

16. Mistakes by counsel may be pardoned. However, where such mistakes and lack of vigilance, but if condoned or tolerated by a party, who must constantly check the progress of his case. The inordinate delay herein shows a lack of interest on the part of the plaintiffs to follow up their case with their former advocates, as evidenced in the supporting affidavit. For instance, the applicants have not mentioned the last date they got in touch with or visited the offices of their former advocates between 18.1.2023 and 2.11.2023 for follow-ups, issuance of instructions and preparation for the hearing.

17. The plaintiffs were unaware of the hearing dates given by the court. See *Ali Mohammed Haji Suleiman Body Builders Ltd vs Jivraj & another* (1990) KLR 224. Whereas the court has jurisdiction to reinstate a suit dismissed for non-compliance and non-attendance, the discretion has to be exercised judiciously and on sound principles. The applicants must give good sufficient reasons for non-compliance and non-attendance.

18. In *Omar Sharif t/a Kemco Auto vs Freight Forwarders Ltd & another* (2008) eKLR, the trial court had said a consequence of willful non-compliance was the dismissal of the suit after the expiry of the time for compliance. The Court of Appeal held there was a need by the trial court to determine whether failure to comply was willful before a party was refused a hearing or the suit dismissed. The court cited *Carribean General Insurance Ltd vs Frizzel Insurance Broker Ltd* (1994) 2 Lloyds Report 32 CA, that final preemptory or unless orders are only made by the court when the party in default has already failed to comply with a requirement of the rules or order and the court is satisfied that the time already allowed has been sufficient in the circumstances of the case and the failure of the party to comply with the order was inexcusable.

19. In *Eastern Radio Service vs Tiny Tots* (1967) EALR 393, Sir Charles Newbold held that unless failure to comply with an order was willful or intentional and not accidental, a court ought not to impose the penalty of dismissing a suit except in extreme cases and as a last resort and should only do so where it was satisfied of the plaintiff's willful default.

20. Looking at the totality of missteps and misdeeds of the plaintiffs, I think the plaintiffs cannot escape the tag of indolence, inertia, lack of interest, or candor in delaying the cause of justice. The law has not set a maximum or minimum delay. It all depends on the circumstances of each case. Extension of

time to comply is also not a right of a party but a discretionary relief exercisable to deserving cases and on a case-to-case basis, as held in *Nicholas Arap Salat vs IEBC and others* (2014) eKLR. The public interest element has also to be considered. Article 159 of the *Constitution*, as read together with Sections 1A & 1B of the *Civil Procedure Act*, provides that parties and their advocates must assist the court in achieving its overriding objective to expedite the delivery of justice in a cost-effective, proportionate and affordable manner.

21. The plaintiffs have inordinately delayed their case for non-compliance with compliance documents and non-attendance. If the documents were filed on 7.3.2023 and have never been served upon the defendants yet, the applicants seem not to be aware that all the defendants were saying is that the documents had not been served since filing in court or pagination made; therefore it meant the left-hand does not know what the right hand has been doing.

22. Lack of coordination and cooperation between the plaintiffs and their former advocates should not be used to derail the course of justice. It is the plaintiffs who hired the former advocates. They must take the blame and the consequences of the lawyer's mistakes, especially if they share the blame or negligence in delaying justice. A lawyer has a duty to the court as well. See *Tana & Arthi Rivers Development Authority vs Jeremiah Kimigho Mwakio & others* (2015) eKLR.

23. The *Edney Adaka Ismail vs Equity Bank (K) Ltd* (2014) eKLR, the court said a party other than blaming his advocate has to show tangible steps taken by him in following up his matter. In *Ivita vs Kyumbu* (1984) KLR 441, the court said justice is justice to both the plaintiff and the defendant, so both parties to the suit must be considered, and the position of the judge too.

24. In *Abdi Noor Umar vs Adan Mamo Elema & 2 others; County Government of Isiolo* (IP) (2022) eKLR, the court cited *Black's Law Dictionary* 11th Edition Bryan A. Garner Thomas Reuters page 1199 – 2000 that a mistake is an error, misconception or misunderstanding, while negligence at page 1245 was a failure to exercise the standard duty of care that a reasonable prudent person would have exercised in a similar situation. The court cited *Patriotic Guards Ltd vs James Kipchirchir Sambu* (2018) eKLR, on conduct leading to the defeat of the end of justice or delay.

25. Failure to act or communicate by counsel is a grave complaint for referral to the advocate's disciplinary tribunal. Communication is a two-way traffic. The applicants, in my view, left the case to their lawyers and neglected to follow up. I find no sufficient cause shown. The mistakes and or acts of negligence are too many and border on indifference and on derailing the course of justice to the detriment of the defendant. In *Ongom vs Owota* (2023) eKLR, the court held that parties are bound by acts and omissions of the advocates representing them, especially when the litigant is privy to the default. Similarly, in *Rukenya Buuri vs. M'arimi Ming'ora & 2 others* (2018) eKLR, the court held that where a party has not been a diligent litigant or was indolent, he could not blame his former law firm.

26. As much as the plaintiffs have a right to a fair hearing and access to justice, the two rights are subject to the rights of the defendant. They have not been honest with the court in disclosing how they ensured their former advocates undertook their instructions. They create an impression of ignorance of whatever actions that have been taken in this suit.

27. The upshot is that I find no basis to review the orders made on 18.1.2023, 4.10.2023, and 2.11.2023. The delay from 2.11.2023 to 4.12.2023 was also not explained. The motion is, as a result of this, dismissed with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 20th DAY OF MARCH, 2024

HON. C K NZILI

JUDGE

In presence of

C.A Kananu

Respondent

Mwirigi B for the plaintiff/applicant

Mrs. Mugo for the respondents