



Obusuru v Mwai & 3 others (Trading as Karima Housing Company) & another (Environment & Land Case 207 of 2016) [2024] KEELC 1606 (KLR) (14 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1606 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 207 OF 2016
OA ANGOTE, J
MARCH 14, 2024**

BETWEEN

ROBERT OBUSURU PLAINTIFF

AND

**KARUMI MWAI, WAIRI KARIUKI, MURAGE WOKABI &
GACHUKIRI NGERECHA (TRADING AS KARIMA HOUSING
COMPANY) 1ST DEFENDANT**

JOHN NG'ANGA KIARIE 2ND DEFENDANT

RULING

Introduction

1. Before this Court for determination is the Plaintiff's/Applicant's Motion dated 23rd May, 2023 seeking the following reliefs;
 - a. That the Honourable Court be pleased to vary or set aside its orders/directions of 9th May, 2023 and all consequential orders.
 - b. That the Notice of Motion Application dated 21st July, 2022 be and is hereby ordered reinstated for hearing and determination on merit.
 - c. That any other orders that meets the ends of justice do issue.
 - d. That the costs of this Application be in the cause.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Esther Ivan Anya, Counsel for the Plaintiffs who deposed that on 9th May, 2023, the matter came up for mention and directions on the Applicants' application dated 21st July, 2022 were given and that



- on the aforesaid date, they did not attend Court leading to the Court dismissing the application for want of prosecution.
3. It was deponed that their failure to attend Court was inadvertent and excusable; that they duly logged onto the Court vide the Court link at 9:00am but thereafter experienced internet issues leading to them being disconnected from the platform and that by the time the issue was resolved and they re-joined the Court, the matter had already been called out and were informed by the Court that the matter had been dismissed.
 4. Ms Anya deponed that it is trite that a client should not suffer for the administrative mistakes of Counsel; that the 2nd Respondent is guilty of not prosecuting the matter and holding the Applicant at ransom and that the aforesaid has been demonstrated by the fact that the 2nd Respondent filed a Notice of Preliminary Objection on 31st August, 2022 which he has yet to prosecute.
 5. Counsel for the Plaintiff deponed that the 2nd Respondent never served the Applicant with his reply to the Motion of 21st July, 2022 and they only realized that the same was filed on the portal; that the aforesaid actions are mischievous, calculated to prejudice the Applicant and run contra to the principles of natural justice and that the same is defiance of Court orders and denied the Applicants an opportunity to prepare their response.
 6. The 1st Respondent did not participate in the application. The 2nd Respondent filed a Replying Affidavit in which he deponed that the application constitutes an abuse of Court process; that the same has been brought in bad faith and is designed to obstruct justice; that the reasons laid out for reinstatement are unsatisfactory and that the Applicant has never been keen to prosecute his application.
 7. The parties filed submissions and authorities which I have considered.

Analysys and Determination

8. Having considered the application, responses and submissions thereon, the sole issue that arises for determination is whether there are sufficient reasons to warrant the reinstatement of the application dated 21st July, 2022.
9. The Court's power to dismiss a suit or an application for want of prosecution/non-attendance is provided for under Order 12 of the Civil Procedure Rules. Order 12 Rule 7 of the [Civil Procedure Rules](#), gives relief to a party whose application/suit has been dismissed by providing thus;

“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. As correctly stated by counsel for the Applicant, this position was enunciated by the Court of Appeal of East Africa in the case of *Shah v Mbogo & Another* (1967) EA 116, where the learned justices held as follows:

“The 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 it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”



11. More recently, the Court of Appeal in the case of *Patriotic Guards Limited v James Kipchirchir Sambu* [2018] eKLR stated that:

“...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.”
12. As to what constitutes sufficient cause to set aside a dismissal order, the court will be guided by the decision of the Court of Appeal in *Wilson Cheboi Yego v Samuel Kipsang Cheboi* [2019] eKLR, where it was held as follows::

“But what is 'sufficient cause'? It is a question of fact and the court has to exercise its discretion in the varied and special circumstances of each case.”
13. In the present case, the Applicant seeks an order setting aside the orders made by this Court on 9th May, 2023. On the aforesaid date, the matter was coming up for hearing of the Applicant’s Motion of 21st July, 2022. There was no appearance by the Applicant or his counsel.
14. On the said date, the 2nd Respondent’s counsel informed the court that apart from his non-attendance, the Applicant had not filed submissions to its Motion. Counsel urged that the same be dismissed.
15. The Court noted that the Applicant had not complied with the directions of the court of 26th September, 2022 and 25th January, 2023 with respect to the filing of submissions in support of the application. The Court proceeded to dismiss the application for want of prosecution.
16. The record shows that on 26th September, 2022, the matter came up for directions on the Motion, whereat the Applicant was directed by the court to file a Further Affidavit together with submissions. On 25th January, 2023, similar directions were issued which were equally not complied with.
17. Counsel for the applicant has deponed that he was unable to file the Further Affidavit because he had not been served with the 2nd Respondent’s Replying Affidavit. It is however noted that as at 25th January, 2023, Counsel was aware of the Replying Affidavit having sought to have it struck out.
18. Indeed, as late as 9th May, 2023, the Applicant had not filed the Further Affidavit and/or submissions in respect of the Motion. On the issue of internet connectivity, the same has not been substantiated. Nonetheless, the Court takes judicial notice of the fact that internet connectivity issues are a common phenomenon in the era of online meetings and online court sessions.
19. However, the Applicant’s conduct as regards the prosecution of the application has been less than ideal. The excuse of procedural paralysis alleged is not viable considering the numerous chances given to counsel to file a Further Affidavit and submissions.
20. Nonetheless, the Court is alive to its mandate to strive towards substantive justice, taking the route of lesser injustice as set out in Section 3 of the *Environment and Land Court Act* as read together with Section 1A, 1B and 3A of the *Civil Procedure Act*.
21. The Court also finds that no prejudice will be suffered by the Respondents if the application under consideration was to be reinstated as none has been preferred in rebuttal of the application.



Consequently, the Court exercises its discretion in favour of the Applicant and grant him one more opportunity to prosecute his application.

22. For those reasons, the application dated 23rd May, 2023 is allowed as follows:

- a. The orders of 9th May, 2023 be and are hereby set aside.
- b. The Notice of Motion application dated 21st July, 2022 be and is hereby reinstated for hearing and determination on merit.
- c. The Applicant shall file and serve its Further Affidavit and submissions with respect to the Motion of 21st July, 2022 within 10 days of the date hereof.
- d. In the event of failure to abide by order (c) above, the application dated 21st July, 2023 will stand dismissed.
- e. The Plaintiff/Applicant shall bear the costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 14TH DAY OF MARCH, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

No appearance for the Plaintiff

No appearance for the Defendants

Court Assistant - Tracy

