



**Lelei & 2 others v Kimetto & 30 others (Environment & Land Case 143 of 2017) [2024] KEELC 1220 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1220 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT & LAND CASE 143 OF 2017**

**MC OUNDO, J**

**MARCH 7, 2024**

**BETWEEN**

**PHILIP KIPNGETICH LELEI ..... 1<sup>ST</sup> PLAINTIFF**

**RICHARD KIPNGETICH KIRUI ..... 2<sup>ND</sup> PLAINTIFF**

**RICHARD KIPKORIR KIRUI ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**HENRY KIPNGENO KIMETTO & 30 OTHERS ..... RESPONDENT**

**RULING**

1. Before me for determination is an Application by way of Notice of Motion dated the 26<sup>th</sup> May, 2022, brought pursuant to the provisions of Order 12 Rule 7, Order 22 Rule 25 (sic), Section 3A of the Civil Procedure Act and all the enabling provisions of the law, where the Applicants herein seek for stay of execution, review, vary and/or setting aside of the court’s order of 17<sup>th</sup> May, 2022 and all consequential orders thereto following the dismissal of the suit, so that it can be reinstated to allow them to prosecute their case as required by justice.
2. The said Application was supported by the grounds on its face and the two Supporting Affidavits of equal date, sworn by Julius Mong’are Motanya, an advocate of the High Court and Richard Kipkorir Kirui, the 3<sup>rd</sup> Applicant herein respectively. Counsel had deponed that whereas the instant matter had been fixed for mention on 17<sup>th</sup> May, 2022, he had inadvertently forgotten to diarize it and inform his clients of the same.
3. That since there was pending at the Kericho High Court Succession Cause No. 1 of 2007, it had been agreed that all proceedings relating to the instant matter be stayed to allow mediation between the parties with the view of recording a consent on this matter. That parties were in the final stages of subdividing the land having concluded the Succession matter but since there were some outstanding issues which could only be resolved once the instant matter was determined on merit, parties been unable



to take dates which had prompted the court to set a mention date and thereafter issue the impugned orders in their absence.

4. That the Respondents who had been present on the said mention date did not act in good faith when they failed to inform the court of the existing agreement between the parties. That his absence in court on the material date was a mistake of an Advocate which should not be visited upon the innocent Applicants herein. That the court to exercise its discretion in favour of the Applicants and reinstate the suit for hearing, of the outstanding issue not covered by the consent, as the Applicants stood to suffer irreparable and insurmountable loss should the ex-parte judgement orders remain in force. That the Respondents would not suffer any prejudice were the orders granted as the Applicants were willing to compensate them with costs.
5. The 2<sup>nd</sup> Applicant's Affidavit in support of the application reiterated what their Counsel had deponed adding that at the behest of the Respondents' Counsel, they decided to stay any proceedings herein to pursue an out of court agreement so as to enable them complete the succession proceedings in the High Court, but to their surprise, on the 23<sup>rd</sup> May, 2023, they had been served them with a Bill of Costs dated 22<sup>nd</sup> May, 2023 only to discover that the matter had been dismissed for non-attendance on the 17<sup>th</sup> May, 2022. That Counsel's failure to diarize the matter hence their absence in court on the material day had neither been deliberate nor on account of mistake on their part and his mistake should not be visited on them.
6. The Application was opposed by the Respondents' Replying Affidavit dated 27<sup>th</sup> June, 2023 sworn by Julius Kiprotich Mutai the Respondents' Advocate who deponed that the instant application was reactionary, made in bad faith, for wrong purpose, was unmerited and deserving nothing other than a frown and an order dismissing the same with costs. That pursuant to service of the Mention Notice upon he and the Applicants, the instant matter had been fixed for mention before court on 17<sup>th</sup> May 2022 wherein the Applicants and their Counsel had failed to attend court and the matter had been dismissed with costs for want of prosecution.
7. That for a whole year the Applicants had not discovered that their suit had been dismissed for want of prosecution until their Advocate was served with a Party and Party Bill of Costs on the 23<sup>rd</sup> May, 2023 which awoke them from their slumber. That the Application was an abuse of the court process because the Applicants had been indolent and guilty of laches, inordinate and unexplained delays in filing the application for reinstatement. That their conduct militated against a favorable exercise of the Court's discretion and grant of reinstatement orders as it had been their duty and the duty of their Counsel since they had been the ones who had dragged the Respondents to court, to ensure that the case proceeded for hearing without wasting the court's precious time.
8. That they had acted diligently and in good faith throughout the proceedings hence the Applicant's Advocate had no basis for blaming the Respondents' Advocate for his failure to diarize the mention date for the suit. That the Respondents would be prejudiced should the instant matter be reinstated as they would have been kept under the unending apprehension of a pending case that had never been prosecuted as the Applicants had already displayed the predisposition to keep the matter in court without prosecuting the same to its logical conclusion.
9. That the Applicants had lost interest in the instant suit after using the interim orders to evict the Respondents, hence having achieved the intent of filing the instant suit, they had no further purpose of the suit save to vex the Respondents. That the interest of justice called for the dismissal of the instant application as the same had been marked by indolence, laches, bad faith and abuse of the court process, all of which required to be stopped forthwith.



10. Despite directions having been issued on 26<sup>th</sup> June, 2023 for the application to be canvassed by way of written submissions, only the Respondents complied and filed their submissions dated 17<sup>th</sup> July 2023 wherein they gave a brief background to the matter in question before framing their issues for determination as follows;
  - i. Whether the Applicants had demonstrated sufficient cause to warrant stay of execution and reinstatement of suit.
  - ii. Whether the prayer for reinstatement of suit is merited.
  - iii. Who should bear the costs of the application.
11. On the first issue for determination as to whether the Applicant had demonstrated sufficient cause to warrant stay of execution and reinstatement of suit, the Respondents' submission was in the negative to the effect that the Applicants were litigants in bad faith, malicious and taking advantage of the court process to frustrate the wheels of justice and deny the Respondents their rights to costs as per the court's orders of 17<sup>th</sup> May, 2022. Reliance was placed on the decision in the case of Muchanga Investment Limited v Safaris Unlimited (Africa) Ltd & 2 Others (Civil Appeal No. 25 of 2002 (2009) eKLR 229.
12. The Respondents further submitted that the Applicants had not presented any valid evidence to prove the kind of substantial loss they would suffer in case the stay of execution was not granted. That stay of execution was only granted upon prove of merit and precipitation of an issue pending determination by the court, but in the instance matter, no substance had been attached to the stay of execution sought hence the said application for stay was baseless and brought in bad faith.
13. The Respondents' submissions as to whether the prayer for reinstatement of the instant suit was merited was that it was trite that an application for reinstatement of suit must meet the required principles and the court would exercise its discrimination judiciously, to allow or disallow the application. Reliance was placed in the decided case of John Kipngeno Arap Sang vs. Joseph Kipkorir Sang, Kericho ELC No. 97 of 2017 (sic) where the court cited with approval the case of Richard Nchapi Leyangu vs. Independence Electoral & Boundaries Commission & 2 others [2014] eKLR and Mobil Kitale Service Limited v Mobil Oil Kenya Limited [2004] eKLR to submit that it had taken a whole year to file the instant application after the suit had been dismissed. That Applicants were only awoken from slumber by the service of Party and Party Bill of Costs. That the Applicants were manifestly guilty of laches and undeserving any exercise of discretion in their favour. Reliance was placed on the decided case of Benjoh Amalgamated Limited & another vs. Kenya Commercial Bank Limited [2014] eKLR, Court of Appeal Case No. 16 of 2012 Nairobi (Civil Application), where the court referred to the holding in Lindsley Petroleum Co. vs. Hurd 918740 L.R. 5 P.C. 221 at page 240.
14. On the Applicants' statement that the mistakes of the advocate should not be visited on innocent clients, the Respondents placed reliance on the decision in the case of John Kipngeno Arap Sang's case (supra) and Julius Kibiwott Tuwei vs. Reuben Argut & 7 others [2022] eKLR to submit that suits did not belong to the Counsel or the court but to parties who should show interest by following proceedings in court. That the Respondents needed to be relieved from the gravely prejudicial apprehension of a pending suit without prosecution by dismissing the present application with costs.
15. As to who should bear the cost of the instant application, the Respondent submitted that costs followed the events thus the Applicants should bear the responsibility of paying the costs of and incidental to the application.
16. In conclusion, the Respondents submitted that the Applicants were not deserving of the exercise of discretion of the court, that the instant application had not been in pursuit of justice but to push away



the Party to Party bill of costs. That the application dated 26<sup>th</sup> May 2023 was devoid of any merit and the same ought to be dismissed with costs.

### **Determination.**

17. I have considered the Application herein seeking that the court stays execution and reviews, varies and/or sets aside its orders of 17<sup>th</sup> May 2022 wherein the Applicants' suit had been dismissed for want of prosecution. The Applicants also seek that the court reinstates the instant suit to allow them prosecute the same as required by justice. The reason as presented by the Applicants in their quest for the said orders was the inadvertency of their Counsel to inform them and to have the matter diarized which had occasioned their absence in court on the material day when their case had been dismissed.
18. I have also considered the Respondents' response and written submissions against allowing the said application to wit that the same was filed one year after the dismissal of the suit for want of prosecution. That it had been after service of a Party and Party Bill of Costs on the 23<sup>rd</sup> May, 2023, that the Applicants had awoken from their slumber. That the instant application for reinstatement was therefore reactionary and an attempt to forestall costs, which was outside the parameters of the exercise of the Court's discretion. That the Applicants were not deserving of the exercise of discretion of the court because their conduct was wanting as they were guilty of laches. That the instant application had not been in pursuit of justice but to push away the Party to Party bill of costs.
19. I find the issues arising for determination herein as being;
  - i. Whether the Applicants have satisfactorily discharged the conditions warranting the grant of stay of execution of the order of dismissal.
  - ii. Whether the court's orders should be reviewed and/or set aside and the Applicants' suit be reinstated.
  - iii. What orders should the court to grant?
20. Firstly, it is clear that whereas directions for disposal of the application had been issued on 26<sup>th</sup> June, 2023 that the application be canvassed by way of written submissions, wherein on the 14<sup>th</sup> November 2023, the Applicants had been granted an extension to file their written submissions, as per the time I write this ruling, the Applicants were yet to comply.
21. It is now a settled practice under the new constitutional dispensation that filing of written submissions is the norm as written submissions serve the purpose of expedience and amounts to addressing the court on the evaluation of the evidence of each party and analysis of the law. It is therefore trite that parties who fail to file their submissions on an application as ordered by the court are deemed as parties who have failed to prosecute their application and therefore that application is liable for dismissal. The filing of submissions having been ordered as a mode for the hearing and determination of the application and there having been no compliance by the Applicants herein, the failure by the Applicants' to exercise the leave granted to them to file written submissions clearly demonstrated inertia and inordinate delay, lack of interest and/or seriousness on the Applicants' part in the prosecution of the matter. The Applicants had been afforded an opportunity to be heard by way of written submissions but they did not take it up.
22. The Court of Appeal in Rowlands Ndegwa and 4 Others vs. County Government of Nyeri and 3 Others; Agriculture, Fisheries and Food Authority & Another (Interested Parties) [2020] eKLR, citing



with approval the decision of the High Court in, Winnie Wanjiku Mwai vs. Attorney General & 3 Others [2016] eKLR, observed as follows:

“With regard to dismissal for want of prosecution, there are indeed no hard and fast rules as to the manner in which the inherent power and discretion to dismiss an action for want of prosecution is to be exercised. It is however generally accepted that dismissal will be invited if there should be a delay in the prosecution of the action and the Respondent is prejudiced by the delay with attention also being paid to the reasons for the inactivity....”

23. The mode of hearing having been adopted by the court, and there having been no compliance by the Applicant to prosecute the same, I am persuaded to dismiss the main motion dated the 26<sup>th</sup> May, 2022.

24. In case I am wrong, I have looked at the order issued on 17<sup>th</sup> May 2022 dismissing the Applicants suit for want of prosecution pursuant to Order 17 Rule 2 (5) of the Civil Procedure Rules which provides as follows:

“A suit stands dismissed after two years where no step has been undertaken.”

25. The Applicant seeks stay of execution of the said order and thereafter that the court reviews, varies and/or sets aside the said order, so that the suit can be reinstated for hearing on merit.

26. Secondly, the order sought to be stayed herein in my humble opinion was a negative order.

27. Under Section 2 of the *Civil Procedure Act*, the definition of a decree holder alludes to an order that was capable of being executed. It defines a decree holder as:

‘any person in whose favour a decree has been passed or an order capable of execution has been made...’

28. In the present case, the Court had only dismissed the suit for want of prosecution and had not ordered the Applicants to do anything or to abstain from doing anything or to pay any sum of money, I find that an order for stay cannot therefore be granted where a negative order had been issued.

29. In the decided case of Sonalux Limited & Another vs. Barclays Bank of Kenya Limited [2008] eKLR (supra) the Court of Appeal held:

‘As regards the matter before us all we can say is that the ruling of the superior Court (Kasango, J.) in no way ordered any of the parties to do anything or to abstain from doing anything or to pay any sum of money. Consequently, it is incapable of execution. It therefore follows that no order of stay can properly issue relating to that ruling.’

30. The Applicant’s Application for orders of stay of execution of the orders of 17<sup>th</sup> May 2022 cannot properly issue.

31. Lastly, the law applicable for setting aside judgment or dismissal is Order 12 Rule 7 of the Civil Procedure Rules which provide 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.”



32. Setting aside a judgment or order for dismissal is a matter of the discretion of the court, as was held in the case of Esther Wamaitha Njihia & 2 others vs. Safaricom Ltd [2014] eKLR where the court citing relevant cases on the issue held inter alia:-

“The discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel vs E.A. Cargo Handling Services Ltd.) the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah vs. Mbogo). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the Plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration vs Gasyali. It also goes without saying that the reason for failure to attend should be considered.”

33. The Court of Appeal for Eastern Africa in the case of Mbogo vs. Shah [1968] EA 93, held that for the court to set aside a judgment/order, it must be satisfied about one of the two things namely:-

- a. either that the Defendant was not properly served with summons; or
- b. that the Defendant failed to appear in court at the hearing due to sufficient cause.

34. The Supreme Court of India in the case of Parimal vs Veena 2011 3 SCC 545 attempted to describe what sufficient cause constituted when it observed that: -

“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.”

35. In the instant case, was the failure by the Applicant to prosecute their suit constitute sufficient cause or was it meant to deliberately delay the cause of justice?

36. The Court of Appeal in the case of Peter Ngome vs Plantex Company Limited [1983] eKLR held that the dismissal of a suit for non-attendance of the Plaintiff or for want of prosecution amounted to a judgment in that suit. A court’s discretion to set aside an *ex parte* judgment or order, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error, but not to assist a person who deliberately seeks to obstruct or delay the course of justice.

37. I have considered the reasons presented before me by the Applicant’s Counsel regarding his failure to attend court to prosecute their matter. I have also considered the affidavits filed in support of the application and considered whether the failure to attend court on 17<sup>th</sup> May 2022 by both the Applicants and their Counsel constituted an inadvertent excusable mistake or whether it was meant to deliberately delay the cause of justice. I have further considered whether the filing of the application



for setting aside orders made on the 26<sup>th</sup> May 2023, more than one year after the said order was made, constituted inordinate delay.

38. In the case of *Belinda Murai & Others – Vs – Amos Wainaina* [1978] KLR 278 per Madan JA (as he then), cited with approval in the case of *Richard Ncharpi Leiyagu – vs – IEBC and 2 Others*, Nyeri CA 18 of 2013, where he described what constitutes a mistake in the following terms:

“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior Counsel. Though in the case of junior Counsel the court might feel compassionate more readily. A blunder on a point of law can be 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.”

39. His Lordship went further to state that:

“It is well known that courts of law themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of legal point of view which courts of appeal sometimes overrule...”

40. In the case of *Phillip Chemwolo & Another vs Augustine Kubede* [1982-88] KAR 103 AT 1040, Apaloo J (as he then was) and cited with approval in the Nyeri CA 18 of 2013 (supra), 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 the purpose of imposing discipline.”

41. In this case, although the Applicants did not act with alacrity upon discovery of the mistake in seeking to correct the mistake when they filed the present application more than one year later, and although the right to a hearing, in my view has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law, I also find that the overriding objective for the courts in dispensing justice must be to ensure expeditious, fair, and just proportionate and economic disposal of cases.

42. In the matter before me, the conduct of the Applicants was indicative that they were not willing to prosecute their matter as they had been making application after application which applications they were not ready to prosecute kept on withdrawing them. That it had also taken them 1 year and 6 days after the dismissal of their suit for them to file the present application seeking to reinstate the same and this was by sheer lack after they had been woken from their slumber when they were served with the Respondents’ Party and Party bill of costs dated 22<sup>nd</sup> May, 2023.

43. The Court of Appeal in the case of *Richard Nchapi Leiyagu* (supra) had expressed itself as follows:-

“we agree with the noble principles which goes further to establish that the court’s discretion to set aside ex parte Judgment or Order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.”



44. In the present suit, I find that the Applicants deliberately failed to prosecute their case by refusing to avail themselves to the court process. Indeed, it had been their primary duty to take steps to expeditiously progress their case since they had been the ones who had dragged the Respondents to court.
45. Suits do not belong to the Counsel or the court but to parties who should show interest by following proceedings in court and not laying back and waiting for a miracle to happen. To further demonstrate their lack of seriousness, the Applicants herein in furtherance of their delay tactics failed to file written submissions to their present application. I therefore find that the present Application is an afterthought, a waste of judicial time and an abuse of the court process and is also intended to vex the Respondents and put them to expense. The Respondents are being gravely prejudiced by the Applicants and therefore there is need for the court to balance the rights of both parties and to exercise its discretion in dispensing justice for it is not powerless to grant relief, when the ends of justice and equity so demand. Therefore, the Applicants' application seeking to review, vary and/or set aside the orders of the court that had dismissed their suit fails. Consequently, the prayer for reinstatement of the instant suit also fails.
46. In the end, I find that the Application dated 26<sup>th</sup> May 2023 has no merit and the same is dismissed with costs.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 7<sup>TH</sup> DAY OF MARCH 2024.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

