



Africa Blooms Limited v Gatari (Suing as the Legal Representative of the Estate of Samuel Karuga Gatari (Deceased)) (Civil Application E021 of 2022) [2022] KECA 1368 (KLR) (8 December 2022) (Ruling)

Neutral citation: [2022] KECA 1368 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E021 OF 2022
F SICHALE, LA ACHODE & WK KORIR, JJA
DECEMBER 8, 2022**

BETWEEN

AFRICA BLOOMS LIMITED APPLICANT

AND

GADSON GATARI RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SAMUEL
KARUGA GATARI (DECEASED)**

(Being an application for reinstatement of the applicant's application dated 2nd August, 2019 dismissed by R.N. Nambuye, Asike -Makhandia and D. ole Kantai, JJ. A on 3rd February, 2021 for want of prosecution)

RULING

Background

1. African Blooms Limited (the applicant) filed a notice of motion dated May 6, 2022 under section 3A & 3B of the [Appellate Jurisdiction Act](#), rules 4, 5(2) (b), 42, 43,47, 56(3), 56 (4) & 57 (2) of the [Court of Appeal Rules, 2010](#) and articles 50 (1) & 159 (2)(d) of the [Constitution](#), for orders: -
 1. Spent
 2. Spent
 3. That pending the hearing and full determination of this application, an order of temporary injunction do issue restraining the respondent, its agents, servants and or any other person acting on their instructions from taking physical possession of, and or demolishing the structures erected on the 9.42 acres fronting the Nakuru Rongai Highway constituted within Land Reference Number 9770/11(original number 9770/6/2) situated in Nakuru County.



4. That this honourable court be pleased to vary, set aside and/or rescind its orders dated February 3, 2021 whose effect was to dismiss the applicant's notice of motion dated August 2, 2019 for want of prosecution.
5. That this honourable court be pleased to extend the time under rule 56(4) of the Court of Appeal Rules, 2010 within which an application for reinstatement of a dismissed application may be made.
6. That subject to order 5 above, the applicant's notice of motion dated August 2, 2019 be and is hereby reinstated for hearing and or rehearing and determination on merit.
7. That subject to order 6 above, pending the hearing and full determination of the applicant's notice of motion dated August 2, 2019, an order of temporary injunction do issue restraining the respondent, its agents, servants and or any other person acting on their instructions from taking physical possession of, and or demolishing the structures erected on the 9.43 acres fronting the Nakuru Rongai Highway constituted with Land Reference Number 9770/11 (original number 7990/2) situated in Nakuru County.
8. That costs of this application be in the cause.

The respondent is Gadson Gatari (suing as the legal representative of the estate of Samuel Karuga Gatari (deceased))

2. The application is premised on the grounds on the face thereof and the supporting affidavit of Inder Nain signed on May 6, 2022. The tenor of the said grounds is that on or about March 21, 2011, the applicant entered into a sale agreement with Sarkish Flora Limited, which was under receivership, over Land Reference No 9770/11 (Original Number 9770/6/2) (suit land). The suit land was consequently transferred from I&M Bank (chargee) to the applicant.
3. The genesis of the present dispute is that Samuel Karuga (deceased) filed a suit in Nakuru HCCC No 11 of 2004, dated March 15, 2011 suing Sarkish Flora Limited and Deloitte Consulting Limited. The suit was based on a sale agreement executed on the October 27, 2000, between the deceased and Sarkish for the purchase of the suit land measuring 90 acres, at a price of Kshs 7.2 million. It was alleged in the suit that Sarkish paid a sum of Kshs 4,686, 556/= but failed to pay the balance of Kshs 1.5 million and also failed to transfer 10 acres out of the suit property to the deceased as agreed.
4. Therefore, the deceased came to court seeking to compel Sarkish to transfer the 10 acres to him. The deceased was successful and by the judgement dated July 20, 2017, the court ordered the re-transfer of 9.43 acres to the deceased, being a sub-division of the parcel of land known as LR No 9770/6 fronting the Nakuru Rongai Highway.
5. Meanwhile, Sarkish which at all material times was the registered owner of all that property known as LR No 9770/6 which constituted 100 acres, had charged the entire parcel of land to I&M Bank on April 29, 2008 to secure a financial facility advanced to itself by the bank, which Sarkish defaulted in servicing. As a result, Sarkish was placed under receivership and Mr Harveen Gadhoke of Deloitte was appointed to act as the Receiver and Manager. The Receiver and Manger put Sarkish business up for sale and consequently, sold the assets of Sarkish including the suit land to the applicant herein, vide the sale agreements dated March 21, 2011 and March 31, 2011 respectively.
6. The applicant deposes that when they acquired the legal title over the suit land, they charged the land and created a debenture, in favour of Standard Chartered Limited, to secure a loan of Kshs 45,000,000/=. Thereafter they enjoyed quiet possession of the property until January 25, 2019 when the respondent, accompanied by police officers and surveyors, descended on the suit land and started



- placing beacons on it in a bid to execute a decree given on July 20, 2017, in Nakuru HCCC No 11 of 2004.
7. As a result of the foregoing, the applicant retained the firm of M/s RO Nyamweya & Co Advocates to secure their interests in the suit land and they filed a suit, Nakuru ELC No 9 of 2019, which was dismissed by the court. Consequently, they moved to this court to challenge the ELC decision and filed an application for stay of execution dated August 2, 2019.
 8. The said application was set down for hearing on February 3, 2021, when the court dismissed it on grounds of non-attendance by their advocates, dismissal of which they only became aware towards the end of April, 2022 when the respondent visited the suit land in the company of the police ready to take possession. They thus retained new advocates, M/s Mukite Musangi & Co Advocates, who filed this application to reinstate the dismissed application.
 9. Further, it is deposed that they are aware that they are out of time, in making the instant application for reinstatement, reasons wherefore they are also seeking orders for enlargement of time. They urge that the order for enlargement of time is merited on the basis that the delay was occasioned by lack of diligence on the part of their then advocates and that this court should restrain itself from punishing it for the misdeeds of its former advocates.
 10. The applicants depose further that, should this court agree with their prayers for enlargement of time and reinstatement of the dismissed application, the court should then preserve the substratum of the intended appeal as evinced by the notice of appeal dated July 30, 2019, by granting injunctive orders. That without the injunctive orders, there is a possibility that the respondent will proceed to enforce the decree in Nakuru HCCC No 11 of 2004.
 11. The appeal is stated to be premised, *inter alia*, on the following grounds:
 - a. That the applicant was never a party to the proceedings in Nakuru HCCC No 11 of 2004 and therefore the decree emanating from the suit should not be enforced against it;
 - b. That enforcement of the decree in Nakuru HCCC No 11 of 2004 as against the applicant would result in an injustice as it would condemn the applicant unheard contrary to the rules of natural justice as contained under article 50(1) of the Constitution;
 - c. That enforcement of the said decree as against the applicant would result in an injustice as it would infringe upon rights of a third party, Standard Chartered Limited, which has an interest over the land by virtue of holding a charge over it;
 - d. That the applicant is the registered proprietor of the entire suit parcel, the property having been purchased from I&M Bank through a power of sale and the land having been sold free from any encumbrance or caveat in favour of the respondent: in that regard, the applicant is rightfully a beneficiary of the doctrine of '*bona fide* purchaser for value without notice' as regards the 9.43 acres claimed by the respondent.
 12. Lastly it is deposed that the applicant stands to lose their hard- earned investments spent on establishing the business if the injunction is not issued.
 13. The application is opposed by the respondent, vide a replying affidavit sworn by Gadson Gatari on May 19, 2022, in which he avers that the respondent entered into a sale agreement with Sarkish Flora Limited, where it was agreed that the suit land would be sold to the purchaser at a sum of Kshs 7,200,000/=. The purchaser was to pay Kshs 1,500,000/= and convert some purchase price into shares in Sarkish Flora Limited. Sarkish failed to fulfil both conditions on their part.



14. The respondent deposes that his father (the deceased), came across an advertisement in the papers indicating that Deloitte Consulting Limited was taking over as Receiver and Manager, and successfully filed suit in Nakuru High Court Case No 11 of 2004, to take a claim on his share of the land. That it has been impossible for them to develop the suit land as the applicant's guards prevent them from taking over.
15. He further deposes that the applicant ought to have filed the application to reinstate the dismissed application within 30 days, and it is too late in the day for the applicant to come to court when its advocate was duly served and chose not to appear. He asserts that the applicant is guilty of laches for not following up its case with its advocate.
16. The respondent also avers that in any case there are no houses built on the suit land, and therefore, the applicant will not suffer any prejudice.

Submissions

17. This application was canvassed by a way of written submissions that were highlighted orally in the virtual court. M/s Mukite Musangi & Company Advocates, filed submissions dated May 20, 2022 on behalf of the applicant, while those of the respondent are dated May 18, 2022 and were filed on their behalf by M/s Nancy Njoroge Kairu & Co Advocates.
18. The applicant submits that the prerequisites for granting the relief of rescinding the orders issued on the February 3, 2021 were satisfied. These are firstly, that this court has the residual power to revisit the impugned orders of February 3, 2021 and secondly, that this court occasioned the applicant great prejudice following the issuance of the impugned orders aforesaid. The applicant reiterates that the misdeeds of the applicant's then Advocate Mr Reuben Ogachi Nyamweya t/a M/s RO Nyamweya & Co Advocates should not be visited upon them.
19. Placing reliance on the case of *Kasturi Ltd vs Thogo* (Civil Application 372 of 2018) [2021] KECA 88 (KLR) Civ 22 October 2021), the applicant has urged this court to enlarge time for the application for reinstatement of the application dated August 2, 2019 to be heard because they are out of time. It is argued that the delay was occasioned by lack of diligence on the part of the applicant's then advocates, who were believed at all material times to have the appeal under their control and on whose professionalism and competence the applicant was wholly dependent for the handling of the matter, including communication on the progress of the case.
20. On the injunction, it is submitted that the instant application has met the threshold for grant of temporary injunction as enunciated in the *locus classicus* case of *Giella vs Cassman Brown* (1973) EA 358 and reiterated by this court in *Nguruman Limited vs Jan Bonde Nielsen & 2 others* CA No 77 of 2012 (2014) e KLR.
21. In opposition, the respondent contends that the present application does not meet the requisite requirements of the law applicable for reinstatement of dismissed matters under rule 102 of the *Court of Appeal Rules*. Further, that the applicant has not supplied sufficient reason(s) for such reinstatement and is blaming its former Counsel M/s RO Nyamwea & Co Advocates for non-attendance of court on February 3, 2021, without disclosing to the court the nature of engagement it had with its advocates, with regard to when and how it last communicated with the advocates over its matter.
22. The respondent also contends that the applicant is a juristic person as opposed to an ordinary person or a layman and as such it ought to have been aware of their matter in terms of tracing the process of their own application with its lawyer on record. For this argument they rely on the decision in *Tana and Athi*



Rivers Development Authority v Jeremiah Kimigbo Mwakio & 3 others (2015) e KLR where the court cited with approval the case of *Habo Agencies Limited v Wilfred Odhiambo Musingo* (2015) eKLR.

Determination

23. We have considered the application, the grounds in support thereof, the rival submissions of the parties, the authorities cited and the law. The applicants are seeking a motley of prayers in the application before us. First, they seek an order for enlargement of time. In the same breath they seek an order for injunction and go further to also seek another order for stay of execution of the impugned ruling.
24. It is common ground that the applicant filed the instant application out of time. Rule 56(3) and (4) of the *Court of Appeal Rule, 2010* provides as follows:
- "3. Where an application has been dismissed under sub-rule (1) or allowed under sub rule (2), the party in whose absence the application was determined may apply to the court to restore the application for hearing or to re-hear it, as the case may be, if he can show that he was prevented by any sufficient cause from appearing when the application was called on for hearing.
 4. An application made under sub-rule (3) shall be made within thirty days of the decision of the court, or in the case of a party who would have been served with notice of the hearing but was not so served, within thirty days of his first hearing of that decision."
25. This court differently constituted dismissed the applicant's application dated August 2, 2019 for want of prosecution on February 3, 2021. The instant application for reinstatement was filed on May 6, 2022, more than a year after the application was dismissed. They became aware of the dismissal in April, 2022 and filed this application within 30 days of becoming aware of the dismissal. Rule 56(4) of the *Court of Appeal Rules* is couched in mandatory terms, that the application for reinstatement shall be made within 30 days of the decision.
26. Consequently, before the applicant's application for reinstatement can be heard, the applicant must first obtain the order for enlargement of time. Rule 53 of *Court of Appeal Rules 2010* provides that:
- "1. Every application, other than an application included in sub-rule (2), shall be heard by a single judge: provided that any such application may be adjourned by judge for determination by the court.
 2. This rule shall not apply to-
 - a. An application for leave to appeal;
 - b. An application for stay of execution, injunction, or stay of further proceedings;
 - c. An application to strike out a notice of appeal or an appeal; or
 - d. An application made as an ancillary to an application under paragraph (a) and (b) or made informally in the course of a hearing."
27. We however pause to observe that there is no bar to the court entertaining an application made as ancillary to an application under rule 53(ii) (a) or (b). This would however limit the applicant's chances of review if dissatisfied, whereas a reference can be made from the decision of a single judge to the court.



28. We therefore order that the application for enlargement of time be placed before a single judge to be heard to determine whether it is merited or not, before the other prayers sought by the applicant can be considered.

29. We make no orders as to costs.

DELIVERED AND DATED AT NAKURU THIS 8TH DAY OF DECEMBER 2022

F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

