



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muthoki & 2 others v Mosica Properties Company Ltd (Environment & Land Case 76 of 2019) [2024] KEELC 3572 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3572 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 76 OF 2019**

**A NYUKURI, J  
APRIL 11, 2024**

**BETWEEN**

**JOYCE MUTHOKI ..... 1<sup>ST</sup> PLAINTIFF**

**MARGARET MWONGELI MUTINDA ..... 2<sup>ND</sup> PLAINTIFF**

**IRENE NTHENYA NDUVA ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**MOSICA PROPERTIES COMPANY LTD ..... DEFENDANT**

**RULING**

1. Before court is a Notice of Motion dated 20<sup>th</sup> March 2023 filed by the plaintiffs/applicants seeking the following orders;
  - a. Spent
  - b. That the honourable court be pleased to set aside an order of dismissal made on 31<sup>st</sup> January, 2023 for sufficient cause.
  - c. That the bundle of documents dated 3<sup>rd</sup> March, 2023 be admitted as the plaintiff's list of documents.
  - d. Costs do abide the application.
2. The application is based on grounds on the face of it and supported by the affidavit of one Irene Nthenya Nduva, the 3<sup>rd</sup> plaintiff in this suit. She deposed that the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs have since passed on and they were in the process of substituting them. She further averred that when the matter was filed in 2019, the parties engaged in negotiations. She also stated that in November 2022 when the matter was in court, the applicant's advocate's call dropped when he was addressing the court, hence



he did not get the directions given. It was her averment that they were not aware that the matter was coming up on 31<sup>st</sup> January 2023 neither were they served.

3. She asserted that the respondents illegally and fraudulently transferred the suit property to themselves purporting to buy it from their brother. She also stated that she had already prepared a list of documents ready to comply with a pretrial and fix a hearing date and that it was fair that the matter be determined on merit and avoid technical knockouts against the spirit of Article 159 of the Constitution and sections 1A, 1B and 3A of the Civil Procedure Act; and further that she had a grant that could enable her to proceed with the matter as it is.
4. The application is opposed. Vide a replying affidavit sworn on 28<sup>th</sup> April 2023, by John Makusi Simiyu the director of the respondent, the respondent opposed the application and alleged that the allegation that the applicant was not notified accordingly was far-fetched and a desperate attempt for the court to entertain indolence on the part of the applicant. It was the deponent's averment that when the hearing date of 31<sup>st</sup> January 2023 was issued, the court record shows that both parties were present and that the allegation of a dropped call before the next hearing date bespoke of a litigant whose conduct is lethargic in conducting the suit, with lack of interest in prosecuting the case.
5. It was the respondent's contention that a suit belongs to the plaintiff and as such, the plaintiff was under obligation to be proactive in ensuring that once the suit was presented in court, they undertook measures to ensure that it was prosecuted to its logical conclusion. He averred that the applicant had been indolent in not substituting the deceased plaintiffs even after being given timelines to do so. He also deposed that the applicant had failed to prosecute/prove the allegation that the respondents have illegally and fraudulently transferred the suit property. He concluded by stating that a party who does not actively prosecute their case should not have their indolence entertained by the court so as to avoid crowding the judicial system and wasting the court's precious time.
6. The application was canvassed by way of written submissions. The applicant filed their submissions dated 21<sup>st</sup> September 2023 on 22<sup>nd</sup> September 2023 whereas the respondents filed their submissions dated 7<sup>th</sup> November 2023 on 8<sup>th</sup> November 2023.

### **Submissions by the applicant**

7. Counsel for the applicant submitted that the court's discretion to set aside its decision is unfettered, placing reliance on Order 51 Rule 15 of the Civil Procedure Rules as well the decision in the cases of *Shah v Mbogo & another* [1967] EA 116 and *Patel v East Africa Cargo Handling Services Ltd* [1974] TA75 and other cases. Counsel submitted that the application had been made within reasonable time. As for the failure to attend court on 31<sup>st</sup> March 2023, it was submitted for the applicant that the applicant was not aware since when the matter came up on 17<sup>th</sup> October 2022, their counsel's call had dropped and the hearing date was issued in their absence whereas the defendant did not have the courtesy of serving the plaintiff with the hearing date. It was their submission that the defendant not being ready to proceed as they had not complied with Order 11, exploited the opportunity to have the matter dismissed on technicalities instead of substantive justice.
8. On blunders and mistakes of parties, it was submitted that mistakes do occur in the process of litigation, which should not deny a party the right to be heard on merit and reliance was placed on the cases of *Philip Chemwolo & another v Augustine Kubende* [1982-1988] KAR 103 and *Murai v Wainaina (No 4)* (1982) eKLR 38.



## Submissions by the respondent

9. Counsel for the respondent raised a question of fact and submitted that the court records indicated that the applicant's counsel was present when the hearing date was issued and that his call did not drop as alleged. Relying on the case of *Rupa Savings and Credit Cooperative Society v Violet Shidogo* [2022] eKLR, counsel submitted that the conduct of the plaintiff is inexcusable and thus the court has to punish such mistakes when they arise. On substitution of the deceased plaintiffs, counsel submitted that the persons referred to in the cases cited by the applicant were never parties to the suit herein and no evidence has ever been presented in this court that there is an active application seeking to substitute the deceased.
10. Counsel submitted that a suit ought to be expeditiously concluded and as for the list of documents it was submitted that the applicant had already filed another bundle on 9<sup>th</sup> July 2019 so unless they wished to withdraw the same, the alleged new list should not be admitted.

## Analysis and determination

11. The court has carefully considered the application, the reply, the rival submissions and the record. The sole issue that arise for determination is whether the applicant has met the threshold of setting aside orders of 31<sup>st</sup> January 2023.
12. Order 12 Rule 7 of the *Civil Procedure Rules* empowers the court to set aside an order of dismissal and provides 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.
13. Order 51 Rule 15 of the *Civil Procedure Rules* grants the court jurisdiction to set aside an order made *ex parte*.
14. The principles to set aside *ex parte* orders are well settled. This court has unfettered discretion to set aside *ex parte* orders, on terms that are just, and the discretion clothed on the court must be exercised judiciously based on sufficient cause and not whimsically.
15. In the case of *Shah v Mbogo* (1967) EA 116, the court held that the exercise of the court's discretion in setting aside *ex parte* orders is to avoid injustice or hardship emanating from an 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.
16. In the instant matter, the applicant stated that her advocate's call dropped on the date the hearing date was fixed and that he was not served with a hearing notice for hearing on 31<sup>st</sup> January 2023. I have perused the record, and indeed the record shows that on 17<sup>th</sup> October 2022 when the hearing date of 31<sup>st</sup> January 2023 was fixed, this matter had been placed aside shortly for reasons that Mr. Tamata, counsel for the plaintiff was having internet and connectivity challenges. When the matter was latter called, Mr. Tamata was not in court when the hearing date was fixed. It was therefore imperative that the defence counsel serves the plaintiff's counsel with a hearing notice. However, on 31<sup>st</sup> January 2023, when the matter came up for hearing, Mr. Jumba counsel for the defendant informed court that the hearing date had been fixed by consent and therefore sought for the dismissal of the plaintiff's case for reasons of non attendance on the part of the plaintiff and his counsel who were not in court. For those reasons, I agree with the applicant that they were unaware of the hearing date when the suit was dismissed, as the date was given in the absence of their advocate who was not served with the same.



17. In the premises, I find and hold that the plaintiff's application dated 20<sup>th</sup> March 2023, is merited and the same is allowed as follows;
- a. That the order of dismissal made on 31<sup>st</sup> January, 2023 is hereby set aside and this suit is hereby reinstated for hearing.
  - b. That the bundle of documents dated 3<sup>rd</sup> March 2023 are hereby admitted as the plaintiffs' list of documents.
  - c. Costs of the application to abide the determination of the suit.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 11<sup>TH</sup> DAY OF APRIL, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

In the presence of;

No appearance for the plaintiff

No appearance for the defendant

Court Assistant – Josephine

