



**Mghenyu & 4 others v Kenya Wildlife Services; Taita Hills and Salt Lick Wildlife Resort Limited & 3 others (Interested Parties) (Acting on Their Behalf and on Behalf of Mngama Game Sanctuary) (Environment & Land Case 6 of 2023) [2024] KEELC 4500 (KLR) (Environment and Land) (6 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4500 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VOI  
ENVIRONMENT AND LAND  
ENVIRONMENT & LAND CASE 6 OF 2023**

**EK WABWOTO, J**

**JUNE 6, 2024**

**BETWEEN**

**MBULI MWALIKO MGHENYU ..... 1<sup>ST</sup> PLAINTIFF  
STANLEY KATUU MWABULA ..... 2<sup>ND</sup> PLAINTIFF  
JAVAN KIRUBAI MWAKISAGHU ..... 3<sup>RD</sup> PLAINTIFF  
HERMAN MWANGEMI RIGHA ..... 4<sup>TH</sup> PLAINTIFF  
JOSEPHAT MVOI MWANGOME ..... 5<sup>TH</sup> PLAINTIFF**

**AND**

**KENYA WILDLIFE SERVICES ..... DEFENDANT**

**AND**

**TAITA HILLS AND SALT LICK WILDLIFE RESORT  
LIMITED ..... INTERESTED PARTY  
BERNARD MSAWUGHI NYANGE ..... INTERESTED PARTY  
AGNES MAKIO MWASHIGAGI ..... INTERESTED PARTY  
GABRIEL FRAJI MWIKAMBA ..... INTERESTED PARTY  
ACTING ON THEIR BEHALF AND ON BEHALF OF MNGAMA GAME  
SANTUARY**



## RULING

1. By a Notice of Motion dated 23<sup>rd</sup> February 2024 the Plaintiffs seeks the setting aside, variation and review of the order made by this court on 19<sup>th</sup> December 2023 dismissing the suit for non-attendance. The application was premised *inter alia* on the grounds that; the suit was dismissed on 19<sup>th</sup> December 2023 without according them an opportunity to be heard and that the Plaintiffs arrived in court late after the matter had been dismissed for non-attendance.
2. The application was also supported by the Affidavit sworn by Mwazighe Micar Advocate on 23<sup>rd</sup> February 2024. It was averred that the Plaintiffs arrived in court when the matter had been dismissed and that the same was contrary to the Plaintiffs right to be heard and that the court ought not to have dismissed the matter since the court had made a disclaimer that a new judge would be reporting in Voi in March 2024 and in any case no matter was supposed to proceed for hearing on the said date. It was also averred that no prejudice would be occasioned to the Defendant should the application be allowed.
3. The application was opposed by the Defendant and the Interested Parties. The Defendant filed a Replying Affidavit sworn on 7<sup>th</sup> March 2024 by Zainabu W. Salim its Senior Warden. It was deposed that the Plaintiffs were aware of the hearing date of 19<sup>th</sup> December 2023 but failed to attend court, the Plaintiffs had also been granted an opportunity to amend their plaint but failed to amend the same and neither had they complied with the directions issued by the court, The Plaintiffs had more than one year to comply with the directions of the court issued on 12<sup>th</sup> October 2022.
4. The 1<sup>st</sup> Interested Party filed an Affidavit sworn by Jacob Ngatia its Sanctuary Manager on 26<sup>th</sup> March 2024. He deposed that the firm of Mwazighe & Co. Advocates were not on record on 19<sup>th</sup> December 2023 when the suit was dismissed and hence the evidence of Mr. Mwazighe Advocate is inadmissible. The Plaintiff's advocates on record as at 19<sup>th</sup> December 2023 were Wlfred K. Babu & Company Advocates who have not sworn any Affidavit. The Plaintiffs cannot blame their previous advocates for their non-attendance. The Plaintiffs had equally failed to comply with the orders of the court issued on 12<sup>th</sup> October 2022 requiring them to amend their plaint and no explanation has been given for non-compliance of the said orders.
5. The 2<sup>nd</sup> Interested Party Bernard Msawughi Nyange also filed a Relying Affidavit sworn on 9<sup>th</sup> April 2024 opposing the said application. It was averred that the applicant was aware of the hearing date but chose not to attend court.
6. Parties also filed written submissions in respect to the application. The Plaintiff filed written submissions dated 23<sup>rd</sup> April 2024, the Defendant filed written submissions dated 7<sup>th</sup> May 2024 while the Interested Party filed written submissions dated 5<sup>th</sup> April 2024 which the court has duly considered.
7. Having carefully considered the application, the rival affidavits, the submissions and authorities relied on and the law cited, it is my view that the issues for determination whether the Application is merited.
8. The Plaintiff seeks to set aside the orders of this court given on 19<sup>th</sup> December 2023 which dismissed the suit for non-attendance and failure to comply with the court orders issued on 12<sup>th</sup> October 2022 and 25<sup>th</sup> September 2023.
9. The decision of whether to or not to allow an application for setting aside an order for dismissal of a suit due to non-attendance of a Plaintiff is within the wide discretion of the court. This discretion has to be



exercised judiciously, as was stated the case of *Shah vs Mbogo* (1979) EA 116 quoted with approval in the case of *John Mukuba Mburu v Charles Mwenga Mburu* [2019] eKLR, where that court held thus:

“.....this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.”

10. Equally, the case of *Racheal Njango Mwangi (Suing as Personal Representative of the Estate of Mwangi Kabaiku) v Hannah Wanjiru Kiniti & another* [2021] eKLR explains it even further:

“For the Court to exercise its discretion in favour of the Applicant, he or she has satisfy it that there is sufficient cause or reason to warrant it to be put into use in setting aside the order of dismissal and subsequently reinstate the suit. Sufficient Cause was defined by the Supreme Court of India in *Parimal vs Veena* which was cited with approval in the case of *Wachira Karani v Bildad Wachira* [2016] eKLR. In the case, the said Supreme Court stated 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.

The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgment impugned before it. The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause.”

11. From a perusal of the court record herein it is evident that the Plaintiffs have demonstrated inexcusable laxity in prosecuting this case, and not only on the material date of 19<sup>th</sup> December 2023 but other days too. It is the role of the Plaintiffs and his counsel to ensure that the case proceeds for hearing without



wasting the precious court's time. In the case of *Utalii Transport Co. Ltd and 3 Others -vs- N.I.C. Bank and Another* (2014) eKLR, the court held that:

“It is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court.”

12. It is also the duty of the parties to assist the court to adjudicate on the matters brought before it expeditiously as was held in *Gideon Sitelu Konchella vs Daima Bank Limited* (2013)eKLR where the court while citing the case of *Mobil Kitale Service Limited vs Mobil Oil Kenya Limited*, held that:-

“It is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice by delay would be a thing of the past. Justice would be better served if we dispose of matters expeditiously ....the overriding objection of this Act and Rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.”

13. The Plaintiffs have not given any plausible and or sufficient reasons as to why they failed to attend the court on 19<sup>th</sup> December 2023 and further they have not explained as to why they failed to comply with the directions issued by the court on 12<sup>th</sup> October 2022 and 25<sup>th</sup> September 2023. The Plaintiffs had more than enough time to do so. Courts of law are not parking bays for suits neither are they waiting lounges for irresolute parties who are not keen in prosecuting their matters.
14. From the foregoing, this court finds that the Plaintiffs have not demonstrated any sufficient cause to make the Court set aside the orders of 19<sup>th</sup> December 2023 and reinstate the suit.
15. In the end, the application dated 23<sup>rd</sup> February 2024 is devoid of merit and the same is dismissed with an order that each party bears own costs of the application.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 6<sup>TH</sup> DAY OF JUNE 2024.**

**E. K. WABWOTO**

**JUDGE**

In the presence of:-

Mr. Mwandoto for the Plaintiffs.

Ms. Lelu for the Defendant.

Mr. Ndegwa h/b for Mr. Karina for the 1<sup>st</sup> Interested Party.

N/A for the 2<sup>nd</sup> to 4<sup>th</sup> Interested Parties.

Court Assistants; Mary Ngoira and Norah Chao.

