**Mwatsuma (Suing on his behalf and on behalf of 20 others) v Bulkon Builders Limited (Environment & Land Case 113 of 2019) [2024] KEELC 4472 (KLR) (5 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4472 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ENVIRONMENT & LAND CASE 113 OF 2019**

**SM KIBUNJA, J**

**JUNE 5, 2024**

**BETWEEN**

**JAPHETH MRAMBA MWATSUMA (SUING ON HIS BEHALF AND ON BEHALF OF 20 OTHERS) ..... PLAINTIFF**

**AND**

**BULKON BUILDERS LIMITED ..... DEFENDANT**

**RULING**

1. The defendant moved the court vide the notice of motion dated the 1st February 2024, seeking for an order for the defendant to demolish all the structures on plot No. 367/11/MN, suit property, under the supervision of Deputy Commissioner and OCPD, Kisauni. The application is based on the eight grounds on its face and supported by the affidavit of Nileshkumar Bhimji Harji, director, sworn on the 1st February 2024. The application is opposed by the plaintiff through the grounds of opposition dated the 5th April 2024. It is the defendant's case inter alia that the court had on 13th November 2019 ordered that the plaintiffs be restrained from dealing or carrying out development on Plot No. 367/II/MN, the suit property; that despite the said orders the plaintiffs erected some structures and carried out some developments on the suit property; that the suit has now been dismissed and it is fair and just that the structures be demolished; that this court has the power to prevent the abuse of the court process; that the plaintiff has no respect for this court or the rule of law. The plaintiffs' grounds of opposition are inter alia that the suit was dismissed on 31st January 2024 as result of technical hitches; the plaintiffs have since filed the aforementioned application for reinstatement; the plaintiffs have been residing on the suit property during the entirety of the lives; the suit currently stands dismissed and hence the defendant's application cannot be determined in the absence of this suit.

2. The plaintiff subsequently filed the application dated the 7th February 2024, seeking for the order of 31st January 2024 dismissing the suit for non attendance to be reviewed and or set aside; that the suit reinstated and heard on merit. The application is premised on the seven grounds on its face and

supported by the affidavit of Leonard N. Shimaka, advocate sworn on the 7th February 2024. The application is opposed by the defendant through the replying affidavit of Sanjeev Khagram, sworn on the 5th April 2024. The application was premised on the seven grounds on its face and the supporting affidavit by counsel Leonard N. Shimaka to the effect that this court dismissed the suit on 31st January 2024 for non-attendance by the plaintiffs; that they were ready to proceed with hearing and had three witnesses; that there were internet fluctuations which resulted in him not being able to virtually log in to the court session on that date on time. In response the defendant deposed that the hearing date of 31st January 2024 was taken by consent and the court session started sometime after 9.00 am when the matter was called out, but there was no response; that no evidence has been adduced by the plaintiff to show the reasonable steps taken to ensure that they were present in court on the material date, or even evidence to show that the counsel had internet fluctuations, which evidence could been obtained from the internet provider; that counsel for the plaintiff has not disclosed the time of his login for purposes of transparency; that counsel did not contact him to inform him of the hitches; that the plaintiff had filed petition E002 of 2024 on 26th January 2024 without disclosing that this suit is pending; that Mr. Shimaka, counsel for the plaintiff, has formed a habit of coming up with the excuses of technical hitches, which the Court of Appeal had found in another case whose decision was annexed as serious.

3. The plaintiff later filed a notice of intention to act in person dated the 10th April 2024, and a supplementary affidavit sworn by himself on the 29th April 2024, in answer to the replying affidavit of Sanjeev Khagram.

4. The court gave directions on the 8th April 2024 on filing and exchanging submissions on the two applications. The learned counsel for the plaintiff and defendant subsequently filed their submissions dated the 11th April 2024 and 12th April 2024 respectively, which the court has considered.

5. The following are the issues for determinations in the two applications under considerations:

    a. Whether the plaintiff has tendered a reasonable explanation for their non attendance on the hearing date. Differently put, whether the plaintiff has made a reasonable case for the dismissal order of 31st January to be set aside and suit reinstated for hearing.

    b. Whether the defendant has made a case for demolition order of the structures on the suit property to issue.

    c. Who pays the costs in each of the applications?

6. The court has carefully considered the grounds on each of the two applications, grounds of opposition, affidavit evidence submissions by counsel and come to the following findings:

    a. The plaintiffs' application has invoked sections 1A, 1B and 3A of the *Civil Procedure Act* chapter 21 of Laws of Kenya, and Order 12 Rules 1 & 2 of the *Civil Procedure Rules*. Order 12 Rules 1 & 2 provides for situations where none of the parties, and where only the plaintiff attends court respectively. In this suit, the record confirms that the suit was on the 9th October 2023, fixed for hearing on the 31st January 2024 in the presence of the parties' counsel. The record further confirms that on the hearing date, 31st January 2024, only Mr. Khagram, counsel for the defendant, was present and he moved the court for the suit to be dismissed with costs

for the non-attendance of the plaintiffs and their counsel. This was in accordance with Order 12 Rule 3(1) that provides that:

> "If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court."

The matter was called out during the virtual session that precedes the time allocation for confirmed hearings, and neither the plaintiffs nor their counsel were present. The plaintiffs and or their counsel had not communicated to the court or the defendant's counsel of any predicament or challenges they were facing or causing a delay for their appearance before the court before the virtual session commenced. That as the defendant had not admitted any of the plaintiffs' claim, and no good cause was presented to the court not to dismiss the suit, the same was dismissed with costs.

b. Reinstatement of a suit is a discretionary power exercised by the court under several provisions of law such as Article 159 (2) of the *Constitution* on the principles of judicial authority; sections 1A, 1B and 3A of the *Civil Procedure Act*, Chapter 21 of Laws of Kenya. .Section 3A provides that:

> "Saving of inherent powers of court. Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

The factors which the court ought to take into account, when considering whether or not, to grant orders on reinstatement of a suit were addressed in the case of *Ivita v Kyumbu* [1984] KLR 441 where the court stated:

> "The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."

And, in the case of *James Mwangi Gathara & another v Officer Commanding Station Loitoktok & 2 others* [2018] eKLR the court said:

> "Before I conclude this matter, I need to bring to the attention of the plaintiff the manner in which he is pursuing his rights. In my view the proceedings in this claim seems to be focusing on interlocutory applications without addressing the main dispute which brought the parties to court in the first instance. It is time the plaintiff decides categorically whether he has a claim to be heard on the merits or continuous slumbering only to rise up when he has been stripped of certain rights during the

adjudication processes. In my assessment and based on the history of this case the plaintiff is guilty of laches. I think I have said enough on this point."

It is therefore not in doubt that reinstatement of a suit is at the discretion of the court, which ought to be exercised in a just manner, as was held in the case of Bilha Ngonyo Isaac v Kembu Farm Ltd & another & another [2018] eKLR, which echoed the decision of the court in the case of Shah v Mbogo & Another (1967) EA 116 (Harris J), where the court stated on the matter of discretion as follows:

> "The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberatively sought whether by evasion or otherwise to obstruct or delay the course of justice."

c. Reinstatement of a dismissed or struck out suit usually goes hand in hand with setting aside of the order dismissing or striking it out. Order 12 Rule 7 of the Civil Procedure Rules provides that:

> "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."

The reason why court dismisses suits is to dispense justice in a timely manner as provided in the principles of judicial authority in Article 159 (2) of the *Constitution*, sections 1A, 1B and 3A of *Civil Procedure Act*, section 19 of the *Environment and Land Court Act* No. 19 of 2021 among others. In the case of *Mobile Kitale Service Station v Mobil Oil Kenya Limited & another* [2004] eKLR the court held that:

> "I must say that the Courts are under a lot of pressure from backlogs and increased litigation, therefore it is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past. Justice would be better served if we dispose matters expeditiously. Therefore, I have no doubt the delay in the expeditious prosecution of this suit is due to the laxity, indifference and/or negligence of the plaintiff. That negligence, indifference and/or laxity should not and cannot be placed at the doorsteps of the defendant. The consequences must be placed on their shoulders."

d. In the instant scenario, the least the court would have expected of the plaintiffs to do, is to tender evidence that:

i. Their three witnesses had been notified of the hearing date and that they actually came to court on that date;

ii. That their counsel, though facing technical challenges as alleged, indeed came to court or called counsel for the defendant so as to jointly seek audience of the court soon thereafter.

There was no such evidence presented through the plaintiffs' application dated the 7th February 2024.

e. Under section 1A of the *Civil Procedure Act*, the parties in a suit and their counsel have obligations "to assist the court to further the overriding objective of the Act, and to that effect,

to participate in the processes of the court and comply with directions of the court". The failure of the plaintiffs and their counsel not to attend court on the date of hearing of the suit that had been fixed in their presence, runs counter to the foregoing statutory provision. That no reasonable cause has been tendered by the plaintiffs, makes the court find the application for review, setting aside and reinstatement of the suit dated the 7th February 2024 to be without merit and is for dismissal.

f. Turning to the application dated the 1st February 2024 by the defendant, I find the proceeding of 13th November 2019 confirms that a consent order that "The plaintiffs, their agents, families, and/or any other person whether claiming through them or otherwise be and are hereby restrained from proceeding with, or carrying out, or commencing or howsoever else, constructing or developing the property LR No. 367/11/MN registered as CR No. 1015 which is the subject of this suit," was issued. The defendant has through the supporting affidavit deposed that the plaintiffs continued to put up structures on the suit property despite the said consent order, and as the suit has now come to an end, through dismissal, the court should grant their application. The plaintiffs' reply to the application was through the grounds of opposition dated the 5th April 2024. It is trite that grounds of opposition are only suitable in raising or addressing issues of law and cannot be a rebuttal to the factual issues raised by the defendant in their supporting affidavit, which therefore, remains unchallenged. The supplementary affidavit sworn by Japheth Mramba Mwatsuma, 1st plaintiff, on the 29th April 2024, was filed without leave, after directions on filing and exchanging submission were given on 8th April 2024. It is the finding of the court that granting the application will serve the justice of this case, save on judicial time and expenses instead of requiring the defendant to institute a fresh suit for eviction.

g. That that in terms of section 27 of the *Civil Procedure Act* that costs follow the events unless where the court for some good reasons order otherwise, the defendant being the successful party in both applications is awarded costs.

7. In the upshot of the foregoing determinations, the court finds and orders as follows:

a. The plaintiffs' application dated the 7th February 2024 is without merit and is dismissed with costs.

b. The defendant's notice of motion dated the 1st February 2024 has merit and is allowed in the following terms;

i. That the plaintiffs are given ninety [90] days to vacate from the plot No. 367/11/MN, suit property, and in default, the defendant be at liberty to evict them and demolish their structures in accordance with the law.

ii. That the eviction of the plaintiffs and demolition of their structures be carried out under the supervision of Deputy County Commissioner and OCPD, Kisauni.

iii. The defendant is awarded costs of the application.

Orders accordingly.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 5TH DAY OF JUNE 2024.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In the presence of:

Plaintiffs : M/s Odialo for Aseko

Defendant : Absent

Leakey – Court Assistant

**S. M. Kibunja, J.**

**ELC MOMBASA.**