Wesela v Biketi (Environment and Land Appeal 14 of 2021)
[2024] KEELC 6151 (KLR) (23 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6151 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND APPEAL 14 OF 2021

FO NYAGAKA, J

SEPTEMBER 23, 2024

BETWEEN

WEKESA WANJALA WESELA ..... APPELLANT

AND

CHARLES WEKESA BIKETI ..... RESPONDENT

RULING

1. By a Notice of Motion dated 21/11/2023 the Appellant moved this Court under Sections 1A, 1B, 3A, and 63(e) of the *Civil Procedure Act* and Order 12 Rule 7 of the Civil Procedure Rules and Article 50(1) and 159 of *the Constitution* of Kenya. The applicant sought the following orders:-

    1. ...spent

    2. The appeal to be reinstated for hearing and determination on merit.

    3. Directions be taken as to admission of the appeal, filing of the record and hearing (sic).

    4. Any further directions as the court shall deem fit.

    5. Costs be in the course.

2. The application was based on four (4) grounds being that the appeal was listed for mention on 25/10/2023. It was dismissed for non-attendance. The Notice was served but the clerk in charge of receiving mails never opened or brought it to the attention of counsel. The Appellant was still interested in the matter and it was in the interest of justice that the appeal hearing reinstated.

3. The background of the application is important to lay down at this stage. It is that on 29/11/2021 the Appellant filed a Memorandum of Appeal dated 26/11/2021. After that he never took any steps to file the decree appealed from as provided for under Order 42 Rule 2 of the Civil procedure Rules or Order 42 Rule 11 by cause it, within 30 days, to be listed before the judge for directions under Section 79B

of the *Civil Procedure Act*. Following that, on 12/10/2023 this Court issued a notice to show cause why the appeal should not be dismissed for want of prosecution. The noticed to show cause was fixed for hearing on 25/10/2023 but served by the Deputy Registrar of this court via email on 12/10/2023 at 3:28 PM.

4. By the 25/10/2023 the Appellant had not shown cause by way of an Affidavit or other way why the Appeal should not be dismissed. Therefore, the court dismissed it with no order as to costs, thereby prompting the instant application.

5. The application was supported by the affidavit sworn by one John Walter Wanyonyi, learned counsel for the Appellant. He repeated the contents of the grounds and added that he was in conduct of the matter on behalf of the Appellant. When going through his mails he discovered that the court had forwarded to his office a mail attaching a Notice for 25/10/2023. He attached and marked JWW1 a copy of the email.

6. Unfortunately, he did not log in on the same date because he had a Ruling which was subsequently postponed because the Court was not sitting. At the same time he had matters in the High Court and the Court at Kimilili. He deputized Clerk to be on the alert by going through the Cause List on a daily basis. His Court Clerk confirmed to him that the only matter listed was the Ruling in ELC No. E001 of 2023 between Jane Yego and Solomon Kitur.

7. After retrieving the e-mail on 13th November, a public holiday, he confirmed the details of the case and he checked on the Cause List and confirmed that the matter indeed had been listed for 25/10/2023. Upon perusing the court file he noticed that the Appeal had been dismissed. The Appellant was still interested in the appeal as the subject matter was land which was contentious. He prayed that the appeal be reinstated because the mistake committed was honest and not deliberate.

8. The application was opposed through an affidavit sworn by the Respondent on 27/03/2024. He deposed that the application was full of lies and meant to mislead the court. To grant orders which would prejudice him. On the material date the matter was placed before the court. The Appellant was not being honest that he retrieved the e-mail on 13/11/2023. He had been indolent and therefore, the court rightfully exercised its power to dismiss the appeal. The Appeal had been filed more than two years yet it had never been served upon him. The Appellant had not taken any credible steps towards the prosecution of the appeal. This delay prejudiced the Respondent because judgment was delivered in his favour and to the 06/10/2021.

9. The application was disposed of by way of written submissions. The Appellant filed on 03/07/2024 his which were undated. The Responded, filed his dated 10/06/2024 on 02/07/2024. This court shall infuse the contents of both rival submissions as it determines the issues raised.

10. The Court has carefully considered the application, the law and the written submissions of the rival parties. It will not need to repeat the content of the submissions, and the authorities that the parties have relied on. The Court is of the view that only two issues lie for determination before it. The first is whether the application is merited. The second one is who to bear the costs of the application.

11. Before I begin the determination of the issues I have stated above, I need to set the record straight since it will form the basis of understanding that the instant application is misconceived. When the matter came up on 25/10/2023 it was not dismissed for non-attendance but for want of prosecution. This means that the Applicant had filed the Appeal dismissed but had not taken steps to prosecute it in accordance with the law. It therefore means that an application such as this whose goal is to reinstate the Appeal should neither be brought under Order 12 Rule 7 of the Civil Procedure Rules as the Applicant did nor should an Applicant make such a prayer as was done herein.

12. I begin by considering the first issue. In an Application of this nature, the law is that where a matter has been dismissed for want of prosecution, to succeed to set aside the order, the Applicant ought to demonstrate that he/she had, prior to the dismissal, good reasons for failure to prosecute the matter. It means that, even where the party did not attend court to demonstrate how they had shown the cause, they already had the cause before the Court.

13. And how is cause shown? The Applicant should present before the court facts that the court would consider sufficient cause for not dismissing the matter. It has to go beyond an explanation from the bar, because, where the party intends to convince the court that there is cause, the party may even be cross examined to determine the veracity and weight of the assertion. Therefore, the cause has to be shown by way of Affidavit, or evidence on oath, sworn by party who intends to show cause or a duly authorized representative. It is not and can never be enough for learned counsel to come before the court and state from the Bar that the reasons for failure to prosecute the matter were this or other. This is because it puts the adverse party at an uneven ground in the endeavor to show that cause existed for failure to prosecute. To do so would be an ambush and would render the proceedings unfair, that is to say, against the constitutional right of a litigant to fair trial. Such information has to be communicated in advance to the other for possible interrogation.

14. In the instant application, by the time the Appeal came up for the Appellant to show cause why it should not be dismissed, there was no attempt at all by him to show cause: simply put, he had not sworn an Affidavit explaining the circumstances that prevented him from prosecuting the appeal. Furthermore, to date he has not done so. That means that even when he made the instant application he did not annex any affidavit or information to show the material he would have wished to place before the Court on 25/10/2023 to show cause. He only deposed that he has an interest in pursuing the appeal whose subject matter is land which is contentious. The question the court poses here is: is there a subject that is less contentious than another whenever parties come to the court? Is there a subject which any party can stand before a court of law and say, "your honour, I am before you over this matter but it is not a serious one, after all"? Any court informed about such a subject should dismiss summarily the claim before it because it is being taken for a ride or its process being abused. Such an argument as the Appellant wants this Court to believe leads to a conclusion that all other subjects before courts other than land should be treated lightly and actually be dismissed whenever parties present them. For instance, if a claimant is dismissed from work and sues the employer. Does it mean such a claim is not contentious? The Appellant cannot be taken to be serious with this argument.

15. That said, the failure by the Applicant to demonstrate even at this stage that he had a cause which could have been shown to the court at the time the matter was dismissed puts him the same position as a Defendant against whom an ex-parte judgment is entered, who applies to set the judgment aside but does not annex a draft defence to demonstrate that he had a defence with raises triable issues. Such a party would hardly expect the court to set aside the interlocutory judgment. It is deemed that such a party does not have a defence at all and only wants to waste the court's time. So, it is in the instant Applicant: there was no cause.

16. In this Application learned counsel for the Applicant deponed that on the material date his clerk misled him that the matter was not cause listed before this court save only for a Ruling in ELC No. E001 of 2023 hence he could not log in to show cause. Further, that he only discovered on 13/11/2023 that indeed the matter had been cause listed.

17. In regard to the above deposition, first it is clear that the deposition differs materially from the grounds upon which the Applicant moved this Court. The fourth ground is that "the clerk in charge of retrieving emails never opened and brought the same to the attention of the counsel." If indeed the

email was never opened and brought to the attention of learned counsel, how would it be possible that learned counsel would, on the material date, deputize the clerk to not only check through the cause list or even log into the court session on the material date but he did not? This distortion of facts does not comport with a party who is saying the truth, and equity demands that he who comes to it must do so with clean hands. Clean hands include presenting the truth as it is and avoiding lies by all means. Herein, the Applicant has not come to court with clean hands.

18. The upshot is that the Application lacks merit. It is hereby dismissed. The second issue is therefore simple and in terms of Section 27 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, flows from the finding on the first. Costs follow the event. The Application having being lost, the costs shall be to the Respondent

19. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIA TEAMS PLATFORM ON THE 23RD DAY OF SEPTEMBER, 2024.

HON. DR.IUR FRED NYAGAKA

JUDGE, ELC KITALE

In the presence of:

Keya for the Appellant

No Appearance for Respondent.