



**Kimani v Kimata (Environmental and Land Originating Summons
E015 of 2021) [2024] KEELC 7280 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7280 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E015 OF 2021
A OMBWAYO, J
OCTOBER 31, 2024**

BETWEEN

JAMES NGIGI KIMANI PLAINTIFF

AND

PETER WACHIRA KIMATA DEFENDANT

RULING

1. James Ngigi Kimani, applicant has come to this court praying that this Honorable Court be pleased to set aside the ex-parte judgment delivered on 14th March 2024 together with the decree and any other consequential orders arising therefrom and that the plaintiffs' case which was dismissed on 18th December 2023 be reinstated for hearing. The costs of the Application be in cause.
2. The application was made on grounds that the suit was instituted by the plaintiff against the Respondent/ Defendant vide an originating summons dated 29th July 2021. The plaintiff has been in adverse possession of the Defendants' Land formerly Dundori/ Mugwatha Block 2184(Koilel) (hereafter referred to as suit property). now subdivided into new Nos 3208-3218 for a period of over 12 years.
3. The plaintiff seeks to be registered as the Proprietor of Parcel Nos Dundori/Mugwathi Bloc 2/3208 3218 (Koilel) formerly Dundori/ Mugwatha Block 21841Koilel. The defendant denied the foregoing facts and filed the Replying affidavit and a counter claim seeking inter alia that an order for eviction be given against the plaintiff and his servants from the parcel of land Dundori mugwathi Block 2/3208 - 3218 (Koilel).
4. The plaintiff was unable to litigate his case due to the fact that he was unaware that his advocate left for rehabilitation and thus not knowing the procedures of the court failed to prosecute his case. The Plaintiff/ Applicant filed defence to counter claim but after the Defendant/Respondent case but was unable to prosecute his case.



5. The court delivered its judgement on 14th March 2024 and ordered the Plaintiff/Applicant to give vacant possession of LR.No.Dundori/Mugwati Block 2/3208 to the Defendant/Respondent within 90 days failure to which an eviction order was to be issued.
6. Following the court orders issued in the judgement the plaintiff has filed this application and he seeks the court to allow the application on the grounds that the same is meritorious and has been brought before this court in good faith.
7. The Plaintiff/ Applicant is apprehensive that the Defendant/ Respondent may by herself or persons acting on his behalf seek to execute the judgement, decree and/or any other consequential orders. This will result to the undesired eviction of the plaintiff causing injustice being that he was not heard in the proceedings.
8. The Plaintiff/Applicant believes that he has an arguable case and thus should be allowed to prosecute his case without the threat of execution.
9. The applicant invites the court to consider the substantial distress that will happen to the Plaintiff/ Applicant vacating his place of abode for a period of over 30 years.

He invites court take note of the developments undertaken by the Plaintiff/Advocate including the planting of trees which have since then matured as a sign of the time that has lapsed since the occupation of the land. According to the applicant, it is in the interest of the administration of justice that this honorable court grants him the orders sought herein. This Honorable Court has discretion to issue orders for stay of execution, set aside the judgement delivered on 14th March 2024 court exercise discretion in favour of the Plaintiff/Applicant. The supporting affidavit reiterates the grounds of the application.

10. In the replying affidavit the respondent states the application is misconceived brought after unreasonable delay and meant to frustrate the defendant from enjoying the fruits of his judgment. The plaintiff was in court when the suit was dismissed but never raised any objection. Despite his counsel failing to appear before court on 18th July, 2023 the plaintiff never sought alternative legal representation but instead choose to retain the same counsel to represent him.
11. The respondent laments that the plaintiff and/or his counsel never took any steps to have his case reinstated.
12. When the matter came up for hearing on 31st January 2024 the plaintiff and his counsel participated in the matter and they never sought leave to have their case reinstated.
13. The respondent contends that the Judgment in this matter was delivered on 14th March 2024 and the plaintiff was given 90 days to give vacant possession of Dundori/Mugwathi Block 2/3208. Since the delivery of judgment the plaintiff never took any steps to have his case reinstated or set aside the said judgment.
14. The plaintiff waited until 15th July, 2024 after the lapse of the 90 days to institute this instant with a view to frustrate respondent from enjoying the fruits of his judgment. The plaintiff's application is dated 4th July 2024 while the consent to come on record on behalf of the plaintiff after judgment is dated 12th July 2024 together with the notice of change.
15. The respondent contends further that this application is defective as at the time of drawing this application on 4th July 2024 counsel now on record had not obtained consent to act on behalf of the plaintiff from the previous counsel on record.



16. The plaintiff/ applicant has not provided any reasonable and justifiable basis for the court to exercise its discretion and grant the orders sought in the application. No evidence has been tendered to prove that the then counsel on record for the plaintiff was unwell and admitted in rehabilitation when the matter was dismissed for non-attendance. Lack of diligence and/or casualness or sloppiness by the plaintiff and/or his then counsel on record cannot be equated to genuine mistake or error.
17. I have considered the application, reply and rival submissions in this matter and do find that the plaintiff's suit was dismissed on 18th July 2024. He was in court when the suit was dismissed. Judgment on the counter-claim was given on 14th March 2024. The factors taken into account or consideration for the purpose of reinstatement of suits are numerous, and were addressed in *Ivita v Kyumbu* [1984] KLR 441 (Chesoni J), 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.” *Ivita v Kyumbu* [1984] KLR 441 (Chesoni J) was followed in *Jim Rodgers Gitonga Njeru v AlHusnain Motors Limited & 2 others* [2018] eKLR (Muchemi J), where the court said:

“It is my view that such would be valid considerations in an application for dismissal of suit for want of prosecution, which in this case has already been done; and it is manifest from the record that the reason why the suit was dismissed in the first place was that the Court was satisfied there was inordinate delay of 3 years for which there was no explanation.”

18. In *James Mwangi Gathara & another v Officer Commanding Station Loitoktok & 2 others* [2018] eKLR (Nyakundi J), 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.”

19. Reinstatement of a suit is at the discretion of the court, which discretion ought to be exercised in a just manner, as was held in *Bilba Ngonyo Isaac v Kembu Farm Ltd & another & another* [2018] eKLR



((J.N. Mulwa J)), which echoed the decision of the court in *Shah v Mbogo & Another* (1967) EA 116 (Harris J), where the court stated on the matter of discretion:

“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 deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.” One of the issues that usually confront the courts with respect to dismissal of suits for delays and the subsequent applications for reinstatement, is the need for expeditious conclusion of suits. In *Mobile Kitale Service Station v Mobil Oil Kenya Limited & another* [2004] eKLR (Warsame J) where it was held:

“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.”

20. The applicant states that his advocate was unwell and admitted in rehabilitation Centre. This court finds that the plaintiff advocate was admitted in a rehabilitation center on 23rd November 2023 three months after the plaintiff suit was dismissed. The suit was dismissed in the presence of the plaintiff. He has not explained what action he took between 18th July 2023 and the time when his lawyer was admitted to a rehabilitation center. The applicant was aware that his suit was dismissed for his non-attendance and that of his advocate but took no action. The application was filed on 15th July 2024 almost one year after the suit was dismissed and 4 months after judgement. I do find that the reasons given for the obviously unreasonable delay are not sufficient. The applicant cannot place blame on the sickness of his lawyer, Olaly Chache because he knew about the same and should have instructed another counsel within reasonable time to reinstate the suit. I do find that there are no good reasons for the delay in filing the application for reinstatement of the suit. The application is dismissed with costs.

SIGNED BY: HON. JUSTICE ANTONY O. OMBWAYO

