



Victory Centre (Suing through Philip N Karanja, Richard Masai, Peter Kinuthia, Rose Mwangerika) v Kandimuwa Limited; Ministry of Lands and Settlement & another (Interested Parties) (Environment & Land Case 1124 of 2013) [2024] KEELC 7228 (KLR) (31 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7228 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1124 OF 2013**

**OA ANGOTE, J
OCTOBER 31, 2024**

BETWEEN

**VICTORY CENTRE PLAINTIFF
SUING THROUGH PHILIP N KARANJA, RICHARD MASAI, PETER
KINUTHIA, ROSE MWANGERIKA**

AND

KANDIMUWA LIMITED DEFENDANT

AND

**MINISTRY OF LANDS AND SETTLEMENT INTERESTED PARTY
NAIROBI COUNTY GOVERNMENT INTERESTED PARTY**

RULING

1. Vide a Motion dated the 29th April, 2024, brought pursuant to the provisions of Articles 50 and 159(2) (d) of *the Constitution*, Section 3 of the *Environment and Land Court Act*, Section 1A, 2 and 3A of the *Civil Procedure Act* and Order 51 Rule 1 of the Civil Procedure Rules, the Plaintiff/Applicant seeks the following reliefs:
 - i. That this Honourable Court be pleased to revoke its Orders of 2nd November, 2023 dismissing the Plaintiff's suit with costs and reinstate the Plaintiffs' suit.
 - ii. That upon the grant of prayer No 4 above, this Honourable Court be pleased to set aside the proceedings before this Honourable Court of 2nd November, 2023 and commence hearing of the suit de novo.



- iii. That the Honourable Court be pleased to issue any other further order that it deems fit in the circumstances of the case.
 - iv. That the costs of this Application be provided for.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Wincate Gatiru Njogu, a trustee of the Plaintiff/Applicant of an even date. She deponed that on 2nd November, 2023, the matter came up for hearing of the main suit as well as the hearing of the application by their previous Counsel, M/S Wakiaga & Co Advocates to cease acting for them and that the Court allowed Counsel to cease acting and directed that the matter proceeds for hearing of the main suit at 11:00am on the same day.
 3. The Plaintiff's trustee deponed that its Counsel having been discharged, the Plaintiff represented by its Chairman; Bishop Philip N Karanja (now deceased) was called upon by the Court to prosecute its case and that Bishop Phillip declined to do so being unable to prosecute the matter.
 4. The Plaintiff's trustee stated that in an act greatly prejudicial to the Plaintiff, the Court declined to grant it leave to seek legal representation, dismissed their suit and allowed the Defendant's Counterclaim to proceed; that the Plaintiff's right to a fair trial was violated because it was unable to not only prosecute its case, but cross-examine the Defendant and defend itself against the Counterclaim.
 5. She deponed that in a bid to remedy the situation, the Plaintiff instructed the firm of OBLAW & Co Advocates who filed a Motion on the 8th February, 2024 seeking a stay of proceedings as well as reinstatement of its suit; that the Motion was certified urgent on the 23rd February, 2024 and the Court directed that it be heard on the 12th March, 2024 and that on the 11th March, 2024, the Plaintiffs' new Counsel filed a Notice of Change of Advocates and served it on the Defendant's Advocate on 12th March, 2024 when the matter was coming up for hearing of the aforesaid Motion.
 6. According to Ms Njogu, on the hearing of the Plaintiff's Motion on the 12th March, 2024, their Counsel suffered technical hitches; that by the time the same was resolved and they were able to address the Court, the Defendant's Counsel had mis-informed the Court that the Plaintiff had no Counsel on record, that all applications by them had been withdrawn and that the matter could proceed to judgment on its Counterclaim and that subsequently, the Court directed that the Court be moved formally as Counsel for the Defendant had left the session immediately after addressing the Court.
 7. It was urged that the Motion would have been brought sooner had it not been for the death of the Plaintiff's trustee who passed away during the pendency of the proceedings on 21st March, 2024 necessitating the Plaintiff's internal re-organization; that the deceased was subsequently replaced as a trustee vide a resolution passed on 27th April, 2024 and that justice dictates that the Motion is allowed. According to the Plaintiff, no prejudice will be suffered by the Defendant because it will be given equal opportunity to amend its pleadings, prosecute and cross-examine the Plaintiff's witnesses in line with Article 50 of *the Constitution*.
 8. In response, the Defendant/Respondent, through its Director James Kamwere Muriuki swore a Replying Affidavit on 24th May, 2024. He deponed that the Plaintiff has not demonstrated sufficient cause warranting the review of the orders of dismissal of the Plaintiff's case and that the Court exercised its discretion in declining the adjournment for reasons that the matter was an old matter and the date was taken in the presence of all the parties and their Advocates.
 9. He deponed that the Plaintiff's Advocate filed a Motion to cease acting on the 1st November, 2023 which the Plaintiff was served with vide a letter of an even date; that the Plaintiff, despite having prior knowledge of its position as to representation did not take any steps to seek further representation and



- chose to wait until the day of the hearing, to use the same as an excuse to seek an adjournment; that the right to representation is not absolute and lack of representation does not render proceedings defective and that the Court properly exercised its discretion in declining the adjournment.
10. The Defendant urged that the Court record will bear him witness that the Plaintiff has never been ready to proceed and every time the matter has been listed for hearing, it has sought an adjournment; that in particular, on the 4th February, 2013, they applied for more time to put in a Supplementary Affidavit and that on the 25th February, 2014-28th November, 2014, they hoodwinked the Court that they were engaging in out of Court negotiations which were not forthcoming.
 11. It was deposed that on 23rd February, 2014 and 20th April, 2014, the Plaintiff had not filed the Supplementary Affidavit; that on 8th September, 2019, the Plaintiff had not complied with pre-trial directions; that on 14th May, 2019, the Plaintiff changed Advocates to act in person and thereafter appointed new Counsel and on 24th February, 2020 & 24th July, 2020, they had not complied with the Court's directions.
 12. It was deposed that on 24th September, 2020, following the dismissal of the Plaintiff's suit, the Court gave directions for hearing of the Defendant's Counterclaim by way of formal proof; that on 9th May, 2022, the Plaintiff applied for an adjournment to enjoin the Attorney General on behalf of the Land Registrar and the Nairobi City Council and that on 23rd May, 2023, the Plaintiff applied for an adjournment purporting to have been served late.
 13. According to counsel on 1st November, 2023, the Advocates filed a Motion to cease acting whereas the matter was listed for hearing on the 2nd November, 2023; that the Plaintiff used the aforesaid Motion to seek an adjournment and that the Court allowed the Plaintiff's Counsel's Motion to cease acting but directed the Plaintiff's representative to proceed with the case which he refused to do leading to its dismissal for want of prosecution.
 14. According to Mr Muriuki, the Plaintiff has been taking advantage of the adjournments to continue occupying and erecting more structures on the suit property as well as procuring and processing fraudulent titles; that the Plaintiff was not denied a right to a fair trial but waived the same; that equity aids the vigilant and not the indolent and that the Defendant also has a constitutional right to a fair and speedy trial.
 15. The Defendant urged that the Plaintiff's trustee died in March, 2024, four months after the orders were issued, which delay had not been explained; that the pleadings bear witness that the Plaintiff had three trustees, two of whom could have continued with the matter hence the death of one trustee is an excuse and that the Motion lacks merit and should be dismissed.
 16. The Interested Parties did not participate in the Motion. The parties filed submissions and lists of authorities which I have considered.

Analysis and determination

17. Having considered the Motion, THE response and submissions, the issue that arise for determination is whether the Plaintiff has established sufficient cause warranting reinstatement of its suit, and if so, what are the appropriate orders to issue.
18. The Plaintiff has asked this Court to reinstate its suit which was dismissed on 2nd November, 2023 and have the matter proceed de novo. On the said date, when the matter came up for hearing, Counsel for the Plaintiff indicated that they had filed a Motion to cease acting and sought directions in that regard.



19. The Court indicated that due to the age of the matter, and noting that the hearing date was taken in the Plaintiff's presence, it would not entertain an adjournment. Subsequently, the Plaintiff's Counsel was discharged from the record and the Plaintiff was asked to proceed to prosecute its claim.
20. The Plaintiff's representative, Mr Phillip, indicated that he would not proceed without Counsel. The Court subsequently proceeded to dismiss the Plaintiff's suit on account of the Plaintiff's failure to prosecute and directed that the Counterclaim proceeds for hearing.
21. The Court's power to dismiss a suit for non-prosecution/non-attendance is provided under Order 12 Civil Procedure Rules, 2010. Order 12 Rule 7 of the Civil Procedure Rules, 2010 gives relief to a party whose suit has been dismissed hereunder by providing thus;

“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.”
22. As correctly stated by the parties, this position was enunciated by the Court of Appeal of East Africa in the case of *Shah vs Mbogo & Another* (1967) EA 116, where the learned justices held as follows:

“The discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”
23. More recently, the Court of Appeal in the case of *Patriotic Guards Limited vs James Kipchirchir Sambu* [2018] eKLR stated thus:

“...It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”
24. As to what constitutes sufficient cause, the Court will be guided by the decision of the Court of Appeal in *Wilson Cheboi Yego vs Samuel Kipsang Cheboi* [2019] eKLR, where the Court stated thus:

“But what is 'sufficient cause'? It is a question of fact and the court has to exercise its discretion in the varied and special circumstances of each case.”
25. The Plaintiff contends that its inability to proceed with the case on the day of the hearing was occasioned by its Counsel who abandoned it on the eve of the hearing day; that its representative, due to his inability to prosecute the matter, declined to proceed with the same despite having been called upon to do so by the Court and that rather than give it an opportunity to seek representation, the Court dismissed its suit highly prejudicing it.
26. On his part, the Defendant maintains that the Plaintiff has severally been unwilling to proceed with the matter using different delaying tactics in this regard; that in these particular circumstances, the Plaintiff was aware that it did not have Counsel and ought to have made requisite arrangements in that respect; that having declined to prosecute its case despite having been given a chance to do so, it cannot claim breach of its right to a fair trial and that in any event, the present Motion has been brought inordinately late.



27. Turning first to the question of whether the Motion has been brought inordinately late, the Court is alive to the general principle that what constitutes delay is a matter of fact and dependent on the circumstances of the case and that any delay must be explained.
28. The Court of Appeal in *Njoroge vs Kimani (Civil Application Nai E049 of 2022)* [2022] KECA 1188 (KLR) (28 October 2022) (Ruling) speaking to the distinction between excusable and non-excusable delays albeit in a Motion seeking leave to file a Memorandum and Record of Appeal out of time stated thus:

“Excusable delays are delays that are unforeseeable and beyond the control of the party. Non-excusable delays are delays that are foreseeable or within the party’s control. Obviously, the distinction between these two is significant in that it determines whether a party is liable for the delay.
29. It is undisputed that the Plaintiff’s suit was dismissed on 2nd November, 2023 whereas the present Motion is dated the 29th April, 2024 approximately 6 months thereafter. The Defendant is categorical that this delay is inordinate and unexplained.
30. On its part, the Plaintiff states that after its suit was dismissed, it hired new Counsel who filed the Motion of 8th February, 2024 having only received proceedings in late January; that the Motion did not proceed on the date it was due, due to technical hitches coupled with the Defence Counsel misinforming the Court that it had no Counsel on record and that the Motion had been withdrawn and that one of its Trustees also passed on during the pendency of the proceedings further aggravating the situation.
31. Having considered the evidence in this respect, it is noted that after the dismissal of the Plaintiff’s case, it instructed new Counsel, Oblaw & Co Advocates who came on record on 8th February, 2024 and filed a Motion seeking a stay of proceedings and reinstatement of the suit. On 12th March, 2024, when the Motion was due for hearing, there was initially no appearance for the Plaintiff. Counsel for the Defence noted they had filed submissions and asked for a judgement date which was given.
32. Later, Counsel for the Plaintiff addressed the Court stating that they had come on record and had a pending application. The Court is satisfied the explanation given for the delay that happened between 2nd November, 2023 to 12th March, 2024. However, 29th April, 2024 is still approximately a month and a half after the proceedings of 12th March, 2024. Why this delay? The Plaintiff states that its Chairman and one of the trustees passed on necessitating re-organization. The evidence shows that the said Trustee died on 21st March, 2024, nine days thereafter, and an emergency meeting was held on the 27th April, 2024 after which the Motion was filed two days later.
33. The Defendant has not demonstrated, as alleged, that even without the deceased, the Plaintiffs’ other trustees had sufficient locus to proceed with the matter. In the circumstances, the Court is inclined to find that the delay in the filing of the present Motion was occasioned by factors primarily outside the Plaintiff’s control and is excusable.
34. Moving to the merits of the Motion, the first port of call is a consideration of the entirety of the proceedings. By way of brief background, the Plaintiff instituted this suit vide a Plaint on 19th September, 2013, (later on amended in 2022), filed contemporaneously with a Motion seeking injunctive reliefs.
35. Vide the Plaint, the Plaintiff seeks to assert ownership of L.R. 11344/R-PART. The matter was first before the Court on 20th September, 2013 wherein the Motion was set down for inter-partes hearing



- on 8th October, 2013. On the said date, the Defendant was absent and the Motion was fixed for hearing on 4th December, 2013 wherein the Defendant sought leave to file a Replying Affidavit and the Plaintiff a Supplementary Affidavit. They were granted time to file the foregoing documents and the matter set for mention on 25th February, 2014.
36. The matter next came up on 25th February, 2014, 3rd April, 2014 and 28th May, 2014 where the parties having sought time to negotiate indicated that they had not settled. On 27th November, 2014, the Motion was fixed for hearing on 23rd February, 2015 where leave was once again granted to the Plaintiff to file a further affidavit and submissions. As at the next date on 20th April, 2015, there was no compliance by the Plaintiff. The Court directed that it would not give any further mention dates and directed that a date be taken in the registry.
 37. The matter took a hiatus until the 15th March, 2018, when the matter was fixed for mention on 18th September, 2018. On the said date, the Court issued directions for pre-trial compliance and directed that the matter proceeds on 30th April, 2019. Both parties were present and the Defendant sought more time to comply. The matter was next in Court on 8th October, 2019 where the Plaintiff, acting in person was absent. Counsel for the Defendant stated that they were amenable to another date.
 38. On 14th November, 2019 when the matter was next in Court, Counsel for the Plaintiff stated that he had just come on record. He sought for two weeks to comply which prayers were granted. As at the 24th February, 2020, when the matter was next in Court, the Plaintiff had yet to comply and a final pre-trial was scheduled for the 19th May, 2020 on which date none of the parties appeared. The matter was next set for the 22nd July, 2020.
 39. There was no appearance for the Plaintiff on the aforesaid date and the Court directed that the matter be mentioned on 24th September, 2020. On the said date, there was no appearance by the Plaintiff. The Court was informed that the Plaintiff's suit had been withdrawn on 24th April, 2019. The Court directed that the Defendant's counterclaim proceeds for hearing on 24th May, 2021. On the said date, the Plaintiffs' Counsel indicated that he had just been instructed and sought for 21 days.
 40. There was no representation for the Plaintiff on the next date being the 9th November, 2021. Counsel for the Defendant indicated that they had been served with the Plaintiff's documents and the matter was scheduled for hearing on the 9th May, 2022.
 41. On this date, both the Plaintiff and the Defendant sought to adjourn the matter. The Plaintiff's Counsel indicated that he wished to file a proper verifying affidavit as well as to enjoin the Attorney General and Nairobi City County while the Defendant sought to substitute a key witness who had passed on.
 42. Ultimately, the parties consented to have the Plaintiff file an Amended Complaint enjoining the Chief Lands Registrar and Attorney General in the proceedings. The parties were granted 45 days to file and exchange their documents and statements within 45 days and the hearing was scheduled for 31st October, 2022.
 43. On 31st October, 2022, both the Plaintiff and the Defendant were ready to proceed but the 2nd Interested Party was not and the matter was adjourned on its account. On the next date, being the 23rd May, 2023, the Plaintiffs' Counsel, initially indicated that they were ready to proceed but noted that they had only been served with the 2nd Interested Party's Defence earlier in the morning. The Court adjourned the matter, giving the Plaintiff leave to file a response to the 2nd Interested Party's Defence.



44. The foregoing narration is indicative of a lackadaisical approach by the Plaintiff in the manner in which it prosecuted its case, occasioned by frequent absences, and change of Counsel, all of which have led to this matter dragging on for almost 10 years.
45. Nonetheless, on the day the matter was due for hearing, the Court discharged Counsel who had vide a Motion sought to cease acting. While the Plaintiff does not dispute that it was aware of the Counsel's intention in this respect, having been served with Motion, it is noted that the Motion was filed and indeed served on 1st November, 2023, one day before the hearing.
46. While this cannot be said to constitute mistake of Counsel as the Plaintiff submits, it left the Plaintiff in a precarious position on the eve of the hearing. Even if the Plaintiff was to obtain Counsel within a day, it is unlikely Counsel would have been ready to proceed.
47. The Plaintiff has heavily submitted on the right to representation which it asserts it was deprived of while the Defendant contends that this right is not indefeasible especially in the circumstances of the case. The Court agrees that parties are entitled to representation, but this should be weighed against the Defendant's rights to a fair trial.
48. As aforesaid, the prosecution of this matter has been less than ideal. However, considering that the Plaintiff's Counsel filed the Motion to cease acting on the eve of the hearing, and taking cognizance of the parties' rights to be represented by Counsel of their choice, which right extends to them declining to proceed where they feel under represented, the Court is inclined to give the Plaintiff one last chance.
49. In the end, the Court finds that the Plaintiff has established sufficient cause warranting the reinstatement of its suit dismissed on the 2nd November, 2023.
50. As aforesaid, the Court has acceded to the Plaintiffs' plea to have the suit reinstated. It seeks, subsequent to this, that the proceedings of 2nd November, 2023 be set aside and the matter proceeds de novo.
51. Having allowed the plea to reinstate the Plaintiff's suit, and noting the proceedings, the Court opines that good order and justice dictates that the matter proceeds de novo.
52. In the end, the Court exercises its discretion in favour of the Plaintiff granting it one last opportunity to prosecute its suit and makes the following final determination;
 - i. The Plaintiff's suit be and is hereby reinstated.
 - ii. The Court does hereby set aside the proceedings of 2nd November, 2023.
 - iii. The hearing of this suit to commence de novo, and in any event within this term, unless ordered otherwise.
 - iv. The Plaintiff shall bear the costs of the Motion.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 31ST DAY OF NOVEMBER, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mrs. Amwama holding brief for Kiprop for 2nd Interested Party.

Mr. Chege for Mr. Mungai for Plaintiff/Applicant



Mr. Ongeru holding brief for Kamau for Defendant

Court Assistant: Tracy

