



M’Aciuri & 2 others v John (Suing as the Administrator of the Estate of M’Amburukua M’Muketha (Deceased)) & another (Environment and Land Appeal E025 of 2024) [2024] KEELC 6959 (KLR) (24 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6959 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E025 OF 2024
CK YANO, J
OCTOBER 24, 2024**

BETWEEN

**M’MBOROTHI M’ACIURI 1ST APPELLANT
TIGANIA EAST & WEST DISTRICT LAND ADJUDICATION AND
SETTLEMENT OFFICER 2ND APPELLANT
ATTORNEY GENERAL 3RD APPELLANT**

AND

**KARITHI JOHN (SUING AS THE ADMINISTRATOR OF THE ESTATE OF
M’AMBURUKUA M’MUKETHA (DECEASED)) 1ST RESPONDENT
M’ITARU M’NAITULI 2ND RESPONDENT**

RULING

1. This ruling relates to the notice of motion application dated 2nd July, 2024 in which the appellants/ applicants are seeking orders to set aside and/or vacate the orders made on 2nd July, 2024 dismissing the application dated 15th April 2024 and reinstate the said application for hearing. Mr. Kaume Mukiira advocate learned counsel for the appellants/applicants in the supporting affidavit dated 2nd July, 2024 has inter alia, deponed that on the material day he logged in before Hon. Justice Nzili who had previously on 9th May 2024 given directions that the application be heard on 2nd July, 2024 before this court. The deponent stated that he remained logged in before that court until the court finished with the cause list and was asked whether he had any matter before that court and he pointed out that he had this case. Learned counsel for the applicants deponed that he was asked to wait for the file to be retrieved from the registry. He stated that as he was waiting, one Mr. Omari advocate told him that his case had already been dismissed by this court. That he immediately rushed before me and raised the issue. It is counsel’s contention that it was not his mistake as there were no clear directions on which



court the matter was to proceed. He further contends that the matter in issue is a serious land matter that has dragged over years and is highly emotive. It is the applicants' contention that it is in the interest of justice that this court sets aside and/or vacate the orders of dismissal of the application and have it reinstated for hearing and determination. The applicant's counsel has annexed a copy of the directions given on 9th May 2024.

2. The application is opposed by the respondents through a replying affidavit dated 11th July, 2024 sworn by Calrpeters Mbaabu advocate learned counsel for the respondent wherein he deponed that the application is hinged on deliberate distortion and misrepresentation of facts.
3. The respondents' counsel deponed that Hon. Nzili J. had not handled this matter before. That the first time the learned judge dealt with the matter was when he handled the dismissed application in chambers as the duty court. That even the order giving an inter partes hearing date of the dismissed application did not state that it was to be heard by Hon. Nzili J. The respondent's counsel pointed out that these days, cause lists are posted online in advance of the hearing dates so that advocates and litigants can access them beforehand and be aware of the court in which their matters will be heard. That the ELC cause list for 2nd July, 2024 was posted online in the week ending on Friday 28th June 2024 which showed that the matter herein was listed at Nos 5, 10 and 12 before this court. That the matter was not listed before court 2.
4. Mr. Carlpeters Mbaabu advocate deponed that on 2nd July, 2024, he appeared before Hon. Nzili J. and handled his matter which was listed as the second in the cause list of that court, and did not see or hear Mr. Kaume advocate address that court. Learned counsel for the respondents stated that he later appeared in this court to handle the matter herein.
5. It was further deponed by Mr. Mbaabu advocate that the respondents have fully executed the decree of the lower court by obtaining title deeds to the suit lands, taking exclusive possession of it, fenced it, besides building a house thereon upon the applicant voluntarily vacating therefrom after judgment. That it is therefore not true that applicant is about to be evicted as alleged. Learned counsel for the respondents has annexed copies of the order made in chambers, cause list for 2nd July, 2024, title deeds, photographs, affidavit and judicial authority and prayed for the application to be dismissed with costs to the respondents.
6. I have considered the application as presented and the response. The only issue for determination is whether the applicant has satisfied this court to exercise its discretion to set aside the orders of dismissal and reinstate the application dated 5th April 2024 for hearing and determination on merit
7. The constitutional underpinning on conclusion of matters in a timely manner is contained in Article 159 of the *constitution*. It is also the duty of the court to ensure that matters are concluded expeditiously and without inexcusable delay. Section 1A and 1B of the *Civil Procedure Act* as well as Section 3 of the *Environment and Land Court Act* are relevant with regard to that. Section 3A of the *Civil Procedure Act* also gives the court wide discretion over matters before it, including the determination of applications such as the one now before court. I must add that it is within the general discretion of the court to set aside any order issued by it ex-parte, so long as sufficient cause has been shown for the exercise of such discretion. It is my view that a valid consideration in an application for setting aside a suit or an application that has been dismissed for non-attendance or for want of prosecution will be the reason given for non-attendance and whether any party would suffer prejudice if the matter is reinstated for hearing and determination on merit.



8. In *CMC Holdings Limited v Nzioki* [2004] eKLR 173, it was held that;

“In law, the discretion that a court of law has, in deciding whether or not to set aside *ex parte* order... was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would .. not be proper use of such a discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle. We do not think the answer to that weighty issue was to advise the appellant of the recourse open to it, as the learned magistrate did here. In doing so, she drove the appellant out of the seat of justice empty handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate.”

9. Accordingly, the court would be interested in finding out the applicants’ explanation for not attending court and whether any prejudice will be suffered by either the applicants or the respondents should the *ex-parte* orders be set aside and the suit reinstated for hearing and disposal on the merits. In this regard, the applicants, stated in their supporting affidavit that on 2nd July, 2024 counsel logged in before Hon. Justice Nzili and remained there until that court finished with its cause list and only to learn from Mr. Omari Advocate that the application had already been dismissed by this court. That Counsel immediately rushed before this court and raised the issue. That it was not counsel’s mistake as there were no clear directions in which court the matter was to proceed in.

10. On the question of prejudice, the applicants state the matter in issue is a serious land matter that has dragged over the years and is highly emotive. That it is in the interest of justice that the court sets aside and/or vacates its orders dismissing the application and reinstate the application for hearing and determination on merit.

11. It is instructive that in the case of *Ivita v Kymbu* (1984) KLR 441 it was made explicit that it is the duty of the respondent to demonstrate the prejudice alleged by it. The respondents must satisfy the court that they will be prejudiced by the delay by showing that justice will not be done in the case due to the prolonged delay on the part of the applicants.

12. The ultimate goal and purpose of the justice system is to hear and determine disputes fully. It follows that no person who has approached the court seeking an opportunity to ventilate their grievances fully should be locked out.

13. Accordingly, I would take the view that, in the circumstances hereof, no prejudice would befall the respondents which cannot be remedied by an award of costs; and that to the contrary, it is the applicants who would be greatly prejudiced by being driven from the seat of justice without a hearing, where their application to be dismissed.

14. In the result I find merit in the application dated 2nd July, 2024 and the same is allowed as prayed.

15. It is so ordered.

DELIVERED, DATED, AND SIGNED AT MERU THIS 24TH DAY OF OCTOBER, 2024

In the presence of:-

Court Assistant – Tupet

Mawira holding brief for Carlpeters for respondent

No appearance for M.G Kaume for appellants



C.K YANO
ELC JUDGE

