Kiguru v Muhia (Sued in the Capacity of the Legal Administrator of the Estate of Muhia Thuku) & 2 others (Environment & Land Case 16 of 2024) [2024] KEELC 6852 (KLR) (Environment and Land) (17 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6852 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA

ENVIRONMENT AND LAND

ENVIRONMENT & LAND CASE 16 OF 2024

MC OUNDO, J

OCTOBER 17, 2024

(FORMERLY NAKURU ELC LC 91 OF 2013)

BETWEEN

STEPHEN NJOROGE KIGURU ..... PLAINTIFF

AND

GEOFFREY KAHIGA MUHIA (SUED IN THE CAPACITY OF THE LEGAL ADMINISTRATOR OF THE ESTATE OF MUHIA THUKU) .... 1ST DEFENDANT

JOSEPH MUCHIRI ..... 2ND DEFENDANT

KORU NGORANI ..... 3RD DEFENDANT

RULING

1. Before me for determination is an Application by way of Notice of Motion dated the 26th October, 2023, brought pursuant to the provisions of Order 12 rule 7 of the Civil Procedure Rules, Section 3, 3A, 1A and 1B of the *Civil Procedure Act* and Articles 50 and 159 of *the Constitution* where the Applicant sought that the dismissal Orders made on 19th October, 2023 in respect of the his Application dated 29th September 2023 be set aside so that the Application can be restored for inter-parties hearing. He also sought the costs of the instant Application be in cause.

2. This Application is supported by the grounds in the Supporting Affidavits of equal date, sworn by Joseph Karanja Mbugua, an Advocate of the High Court having the conduct of the Applicant's matter who deponed that the Application dated 29th September, 2023 had been set down for hearing inter-parties on 19th October, 2023 at the Nakuru ELC No. 1 before Honorable Justice A. Ombwayo as per

the day's cause list. That instead, the court file had been taken to Nakuru ELC No. 2 before honorable M.A Odeny J despite the instant matter not featuring in the said court's cause list for that particular day.

3. That thereafter, he had logged in to virtual proceedings in Nakuru ELC No. 2 wherein he had heard the court dismiss the Application for lack of prosecution, with costs to the Defendant. The counter-claim was then confirmed for hearing for the 7th November, 2023. That unfortunately, his attempt to address the court had been unsuccessful due to the failure of his laptop's audio button. That subsequently, the failure to participate in the prosecution of the Application dated 29th September, 2023 on the 19th October, 2023 had neither been deliberate nor out of sheer disrespect or disregard of the court.

4. That it was only just and fair that the Application dated 29th September, 2023 be restored for inter-parties hearing before the counter-claim could be set down or hearing. That the Respondent would suffer no prejudice were the instant Application allowed since he had not even filed a Replying Affidavit to the Notice of Motion dated 29th September, 2023.

5. That further, the Law and *the constitution* dictated that matters be heard on merit rather than being struck out or dismissed on technicalities. That accordingly, it was only fair that the Application dated 29th September, 2023 be heard and determined in the first instance before the counter-claim could be set down for hearing since the decision on the said Application would have an effect on whether or not the Plaintiff's claim against the Defendant should be restored for hearing, before the court could embark on hearing the counter-claim.

6. The Application was opposed by the 2nd Respondent's Replying Affidavit dated 15th April, 2024 which was sworn by Joseph Muchiri, the 2nd Defendant herein who deponed that the Plaintiff had been in contempt of court having been ordered on 2nd May, 2023 to pay a sum of Kshs 10,000/= before the next hearing date. However, when the matter had come up for hearing on 19th October, 2023, the Plaintiff and/or his Advocate had failed to comply with the said orders. That accordingly, the Plaintiff's disobedience of the court order had violated the principles of equity since he had come to court with unclean hands and was thus not deserving of the right of audience in the same court that had issued the aforementioned orders. That further, there had been no suit by the Plaintiff since the Court had struck out his suit on 18th October, 2022 for non-attendance.

7. That the Plaintiff had been lethargic in prosecuting the instant case as evidenced by the number of times the court had either dismissed the main suit and/or application for want of prosecution. That the Plaintiff and/or his Advocate had failed to appear in court on 19th October, 2023 hence the cause list could not be used as an excuse since the instant matter was meant to be heard in ELC Court 2 in Nakuru and not Court 1 or 3. That indeed, it was in the nature of the Applicant and/or his Advocate not to appear in court. The main suit having been dismissed on 19th October, 2022 for non-attendance. That the Plaintiff had later lodged an Application dated 29th September, 2023 after almost 1 year to reinstate the dismissed suit which Application had also been dismissed on 19th October, 2023 for want of prosecution thus prompting them to file the instant Application.

8. That this Application was an abuse of the court process and ought to fail. The reasons given for non-attendance as advanced by the Plaintiff/Applicant's Advocate were unsatisfactory, the 11 months wait before lodging the said application to reinstate the main suit was a clear indication that the Plaintiff had no interest in pursuing h claim, thus it would be a waste of court's valuable time to allow the application. That it was in the spirit of the principle of ''justice delayed is justice denied'', that the instant matter be dispensed expeditiously hence the dismissal of the instant Application with costs was, in this case, in the best interest of justice.

9. The 1st and 3rd Respondents did not file any response to the Application. Subsequently parties were directed to file their respective written submissions to dispose the application for which the Plaintiff/ Applicant, vide his written submissions in support of his Application placed reliance in the decided case of Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & another [2018] eKLR to submit that the court should in the interest of justice shy away from dismissing the his Application un-heard and that, while placing reliance on the provisions of Section 3A of the *Civil Procedure Act* as well as on the decided case *Miarage Co Ltd v Mwichuiri Co Ltd [2016] eKLR - Civil Appeal 40 of 2013*, that the court was clothed with a wide discretion on whether or not to reinstate a dismissed suit which discretion ought to be exercised judiciously.

10. That pursuant to the provisions of Article 159 (2) (d) and Sections 1A and 1B of the *Civil Procedure Act*, his Application warranted the orders sought, since the court's duty was to do justice without undue regard to procedural technicalities. Further reliance was placed in the decided case of Sangram Singh v Election Tribunal, Koteh, AIR 1955 SC664 at 711 cited in the case of Gerita Nasipondi Bukunya & 2 others v Attorney General [2019] eKLR to submit that he had a good Application which raised triable issues and which ought to be heard on merit.

11. That the principle of natural justice demanded that the Applicant be given an opportunity to be heard. That subsequently, it was in the court's discretion to set aside the orders that had been issued on 19th October, 2023 to avoid the injustice or hardship resulting from the dismissal. That the court grants him the prayers sought in his Application dated 26th October, 2023.

12. The 2nd Defendant/Respondent through his submissions dated 1st July, 2024 framed his issues for determination as follows; -

    i. Whether the dismissal of the Application dated 29th September, 2023 was warranted.

    ii. Whether the instant application is ill-willed, an afterthought, bad at law and an abuse of court process.

13. On the first issue for determination as to whether the dismissal of the Application dated 29th September, 2023 was warranted, he submitted that whereas the Applicant was seeking an equitable remedy disguised as an appeal for an order for reinstatement, he had failed severally to either comply with court orders or attend to the matter. He placed reliance in the decided case of Lubulellah & Associates Advocate s v N K Brothers Limited [2014] eKLR to stress that one of the fundamental principles of equity was that of approaching the court not only with clean hands but also taking cognizance that delay defeats equity; equity aids the vigilant and not the indolent. That therefore, the equitable plea sought by the Applicant in asking the court to uphold and reinstate an application that had been dismissed for non-attendance of the main suit was to be frowned upon.

14. That litigation being a judicious, decision making process, ought to come to an end thus to avoid endless litigation which waste the court's time, all litigants must then exhibit expeditious intent to bring their various causes before court to an end.

15. Reliance was placed in the decided case of William Koross (Legal personal Representative of Elijah C.A Koross) v Hezekiah Kiptoo Komen & 4 others [2015] eKLR to submit that the actions of trying to have the same subject matter resurrected multiple times was offensive to the principles of res judicata which ordinarily ought to counter indolent parties from bringing their causes before court multiple times.

16. That the Applicant herein had failed to appear before the court twice to plead its case despite having a clear idea of the probable consequences that would befall him if he failed to demonstrate that he

not only had a serious cause but that he was also willing to responsibly pursue it. That instead, the Applicant had opted to issue flimsy reasons for non-appearance including blaming a gadget for the cause for his failure to tender an adequate argument on its case before the court.

17. As to whether the dismissal of the suit was warranted, the 2nd Respondent reiterated that the main suit had been dismissed because of the Applicant's failure to adhere to court directions. That interestingly, the Applicant had applied to have the main suit reinstated yet failed to enter appearance in the said application leading to the dismissal of the same. That the Applicant has now made the instant application aimed at taking the court in a whirlwind in a stark display of indolence hence the same should be dismissed.

18. On the second issue for determination as to whether the instant application was ill-willed, an afterthought, bad in law and an abuse of the court process, the Respondent submitted that the same sought to resurrect an application which was aimed at resurrecting the main suit. That whereas *the Constitution* and various precedents vehemently decried the dismissal of causes on account of procedural technicalities, the same framework had insisted on litigious responsibility to alleviate the misuse of the provisions of the Oxygen Principles. Reliance was placed in the decided case of Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 others Civil Appeal No. 25 of 2002 [2009] KLR 229 where the Court of Appeal had denoted the instances which amounted to an abuse of the court process.

19. That the action of bringing a cause to the court and thereafter failing to adhere to the court's directions was akin to challenging the jurisdiction of the very court approached and thus, the dismissal of the main suit was warranted. That subsequently, an application to resuscitate the same based on flimsy reasons was outrightly bad in law and an abuse of the court process. That the Applicant had thus failed to acquiesce to the court's judicious determination by following up a dismissed application aimed at instituting a dismissed suit with the instant application.

20. That the Applicant's application was an afterthought whose significance could not be immediate since he already had two chances to defend his suit. That accordingly, granting the Applicant herein a third chance by reinstating the dismissed causes would not only be aiding an afterthought but also a vexatious venture aimed at annoying the other party and subjecting the court to endless litigation and thus an abuse of the court process. He placed reliance on the decision in the case of Kivanga Estates Limited v National Bank of Kenya Limited [2017] eKLR to submit that the instant application had failed to show any extraordinary reason, apart from the past two dismissals that should shield it from dismissal for being ill-willed, malicious and not anchored on any sound principles of law hence the same should be dismissed.

21. The 3rd Defendant/Respondent on the other hand vide his submissions dated 5th June, 2024 summarized the factual background of the instant matter to submit that there was nothing to be reinstated as the main suit had been lost several years ago when the Applicant had failed to pursue his cause of action, thus the instant application should be dismissed.

Determination

22. The Applicant had filed an Application dated 29th September, 2023 seeking to set aside the court's order of 18th October 2022 where his suit had been dismissed for want of prosecution. Subsequently, this Application had also been dismissed on 19th October, 2023 for non-attendance. The Applicant has now filed the instant application seeking to set aside the orders dismissing his Application dated 29th September, 2023 so that it can be heard inter-parties. The application has been opposed by the 2nd Respondent.

23. It should however be noted that whereas the 3rd Defendant/Respondent filed submissions, the same would not be considered by the court in the absence of a Replying Affidavit which is a foundational pleading as was held by the Supreme Court in Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR, where the court held as follows;

> ''A Replying Affidavit is the principal document wherein a respondent's reply is set and the basis of any submissions and/or List of Authorities that may be subsequently filed. Absence this foundational pleading, the Replying Affidavit, it follows that even the Written Submissions purportedly filed by the 1st Respondent on 17th August, 2018 are of no effect. Curiously, we further note that even the said Written Submissions are not dated, though this possibly might not have been fatal had the foundational document, the Replying Affidavit, been in order. From a perusal of the Written Submissions, it is clear to us that they are substantially based and relies on the undated and unsworn Replying Affidavit. Also, there are no Grounds of Objection raising any specific points of law of any preliminary or jurisdictional nature. The upshot is that as the 2nd and 3rd Respondents had categorically stated that they do not oppose the application, the Court will be excused for therefore deeming the application as being unopposed entirely.''

24. Subsequently, I find the issues arising for my determination as follows.

    i. Whether there has been raised sufficient ground to set aside the dismissal order and if so;

    ii. Whether the Application dated 29th September, 2023 should be reinstated for inter-parties hearing.

25. The law applicable for setting aside judgment or dismissal is Order 12 Rule 7 of the Civil Procedure Rules which provide as follows;

> ''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.''

26. Setting aside a judgment or order for dismissal is a matter of the discretion of the court, as was held in the case of Esther Wamaitha Njihia & 2 others vs. Safaricom Ltd [2014] eKLR where the court citing relevant cases on the issue held inter alia:-

> ''The discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel vs E.A. Cargo Handling Services Ltd.) the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah vs. Mbogo). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the Plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration vs Gasyali. It also goes without saying that the reason for failure to attend should be considered."

27. The Court of Appeal for Eastern Africa in the case of Mbogo vs. Shah [1968] EA 93, held that for the court to set aside a judgment/order, it must be satisfied about one of the two things namely:-

    a. either that the Defendant was not properly served with summons; or

b. that the Defendant failed to appear in court at the hearing due to sufficient cause.

28. I have considered the reasons as presented by the Applicant in his quest to set aside the order of 19th October, 2023 to the effect that his Application dated 29th September, 2023 had been set down for hearing on 19th October, 2023 at the Nakuru ELC No. 1. That the file had however been taken to the Nakuru ELC court No. 2 despite the matter not featuring in the said court's cause list for the particular day. That whereas he had logged into the virtual proceedings in Nakuru ELC Court No. 2, his attempt to address the court had been unsuccessful pursuant to the failure of his laptop's audio button. That subsequently, his failure to participate in the prosecution of the Application dated 29th September, 2023 on 19th October, 2023 had neither been deliberate nor out of sheer disregard of the court.

29. The 2nd Respondent opposed the Applicant's application for reasons that the Plaintiff/Applicant had been in contempt of court having been ordered on 2nd May, 2023 to pay a sum of Kshs 10,000/= before the next hearing date which orders had not complied with by the time the matter came up for hearing on 19th October, 2023. That further, there had been no suit by the Plaintiff since the Court had struck out his suit on 18th October, 2022 for non-attendance, the Plaintiff having been lethargic in prosecuting his case.

30. That the Plaintiff and/or his Advocate had failed to appear in court on 19th October, 2023 and the cause list could not be used as an excuse as the instant matter had been scheduled to be heard in Nakuru ELC Court No. 2 and not in Court No.1 or 3. That the instant Application was an abuse of the court process and ought to fail because the reason given for non-attendance as advanced by the Plaintiff's Advocate was unsatisfactory.

31. Based on the explanation herein advanced by the Applicant's Counsel, I have taken the liberty to peruse through the court's record to satisfy myself as to whether the dismissal of the suit was as a result of an accident, inadvertence, excusable mistake, an error or otherwise so as to determine whether the Applicant had established sufficient cause to have the order set aside.

32. Indeed, according to the cause list attached and annexed as JKM 1, the Applicant's Application dated 29th September, 2023 came up for hearing on 19th October, 2023 at the Nakuru Environment and Land Court No.1 wherein the same had been placed before Nakuru Environment and Land Court No. 2 which court had dismissed it for non-attendance. The Applicant's Counsel has lamented on his inability to address the court after he had managed to join the court virtually which information has not been disputed.

33. The Supreme Court of India in the case of Parimal vs Veena 2011 3 SCC 545 attempted to describe what sufficient cause constituted when it observed that: -

> "Sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously."

34. I have asked myself whether the failure of the Applicant's Counsel to prosecute its Application dated 26th September, 2023 due to the mix up of the matter in the cause list and failure of his laptop's audio button during the virtual proceedings had constituted sufficient cause or whether it was meant to deliberately delay the cause of justice and I find that the turn of events as herein enumerated had constitute a sufficient cause to warrant exercise of the court's discretion.

35. The test to be applied is whether the Applicant's Counsel had honestly and sincerely intended to prosecute the matter. Sufficient cause is thus the cause for which the Applicant could not be blamed for his inaction. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances. It is my finding that in the case at hand, the Applicant's Counsel has demonstrated a sufficient cause for failing to prosecute his Application dated 26th September, 2023.

36. The Court of Appeal in the case of Richard Nchapi Leiyagu vs. Independent Electoral & Boundaries Commission & 2 others [2014] eKLR expressed itself as follows:-

> " we agree with the noble principles which goes further to establish that the court's discretion to set aside ex parte Judgment or Order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice."

37. In the present suit, I find that the Applicant had not deliberately failed to prosecute his Application dated 29th September, 2023. I therefore find that the present Application is a proper one for the exercise of the court's discretion to set aside the dismissal orders. I also find that the Respondents will not be prejudiced by the exercise of such discretion. Accordingly, the application seeking to set aside the dismissal orders made on the 19th October, 2023 in respect of the Applicant's Application dated 29th September, 2023 is allowed wherein the same is herein reinstated for inter-parties hearing.

    Costs shall be in cause.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 17TH DAY OF OCTOBER 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE