



REPUBLIC OF KENYA



**Ithiga v Mwangi (Environment & Land Case 170 of 2014)
[2025] KEELC 305 (KLR) (30 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 305 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 170 OF 2014
OA ANGOTE, J
JANUARY 30, 2025**

BETWEEN

JOSEPH MWANGI ITHIGA PLAINTIFF

AND

PETER MUNGAI MWANGI DEFENDANT

RULING

1. Before this Court for determination is the Plaintiff/Applicant's Motion dated the 21st November, 2023 brought pursuant to the provisions of Sections 1A, 1B and 3A of the [Civil Procedure Act](#) and Order 12 Rule 7 of the Civil Procedure Rules seeking the following reliefs:
 - i. That the Honourable Court be pleased to set aside the orders made on the 10th July, 2023 dismissing the Plaintiff/Applicants' suit.
 - ii. That the Honourable Court be pleased to reinstate the Plaintiff/Applicants' suit for hearing.
 - iii. That the costs of this Application be in the cause.
2. The Application is based on the grounds on the face of the Motion and supported by the Affidavit of Joseph Mwangi Ithiga, the Plaintiff/Applicant herein. He deponed that the firm of Musyoki, Mogaka and Co Advocates, previously represented him in this matter; that on 10th July, 2023, the matter was due for hearing and that neither him nor his previous Counsel attended Court leading to the matters dismissal for non-attendance.
3. According to Mr Ithiga, his previous Counsel had set the matter down for hearing but had not communicated the same to him; that despite being aware of the date, his Counsel did not attend Court; that this was the first time the matter was coming up for hearing and the same has had no previous adjournments and that he is keen on prosecuting the matter and would like it to proceed to full hearing.



4. He contends that when he visited his former Counsel seeking the status of the matter, he was not given the necessary information leading to him engaging new Counsel who discovered the matters dismissal.
5. In response to the Motion, the Defendant/Respondent, Peter Mwangi swore a Replying Affidavit on the 16th May, 2024. He deponed that this is an old matter marred by the Plaintiffs indolence and abuse of court process; that the Plaintiff has continuously failed to prosecute the matter only to later show up with new Counsel alleging inaction by previous Counsel and that the present Counsel is the Plaintiff's third Advocate.
6. According to Mr Mwangi, the Plaintiff has only been keen on filing Motions to stay orders issued in CMCC No 1585 of 2013 where the Court issued orders in his favour, to wit, permanent injunctive orders restraining the Plaintiff from the suit property, and orders directing the Plaintiff to grant him vacant possession and damages for repudiation of contract and that the Court has on two occasions, albeit on duplicate Motions(stay of execution), declined the Plaintiffs' Motions as evinced in the Rulings of 8th December, 2017 and 4th July, 2019.
7. Mr Mwangi asserts that the hearing of the main suit has never taken off due to multiple adjournments occasioned by the Plaintiff; that the last hearing date of 10th July, 2023 was taken by consent of the parties and that the Plaintiff failed to show up despite correspondence to his Counsel informing him that the hearing would proceed at 12:30 pm.
8. He contends that the suit was effectively dismissed for want of prosecution over a year ago and the Plaintiffs assertion that he only learned of its dismissal when he visited his former Counsel is a show of indolence which the Court ought not entertain; that the Plaintiff is using his strained relationship with Advocates as an excuse to frustrate the wheels of justice, misleading the Court with baseless allegations whereas he is forced to continue retaining his lawyers, incurring costs in the process and that this Motion is unmerited and should be dismissed.

Submissions

9. The Plaintiff/Applicant filed submissions on the 6th September, 2024. Counsel submitted that Order 12 Rule 7 of the Civil Procedure Rules grants this Court jurisdiction to set aside or vary a judgement or order upon such terms it considers just; that in the circumstances, the Plaintiff has deponed that he was not informed of the hearing date by his Counsel, leading to his absence on the said date and that he only learned of the matters dismissal after engaging new Counsel to establish its status after the previous Counsel declined to do so.
10. Counsel asserts that the Plaintiff has provided sufficient reason warranting the setting aside of the dismissal order; that as expressed by the Court in *Sheikh t/a Hasa Hauliers vs Highway Carriers Ltd [1988] eKLR*, mistakes of counsel should not be visited upon his client; that the Plaintiff is ready to pursue the matter to its logical conclusion and that the Motion has been filed timeously and the Defendant has not demonstrated that it will suffer any prejudice should the Motion be allowed.
11. The Defendant/Respondent filed submission on the 25th September, 2024. Counsel submitted that the power to dismiss a suit for want of prosecution is governed by Order 17 Rule 2(1) of the Civil Procedure Rules and pursuant thereto, a suit is qualified to be dismissed for want of prosecution if either party makes no application or takes any steps at least one year preceding the presentation of a notice to show cause for dismissal by the Court or an application by a party who seeks to dismiss the same.
12. Counsel submitted that the present suit was dismissed on the 10th July, 2023; that the events leading to the dismissal was the Plaintiffs' non-attendance on the aforesaid date; that the Plaintiff has severally



used the change of counsel to delay this matter and that in *Teachers Service Commission vs Ex-parte Patrick M Njuguna*[2013]eKLR, the Court noted that whereas it would constitute a valid excuse for a litigant to claim she had been let down by Counsel, it is trite that the case belongs to the litigant and it is upon them to constantly check up on the progress of their case.

13. It was submitted that as regards the possibility of prejudice, it is upon the Plaintiff to show how he would be prejudiced should the Motion not be granted which he has failed to do and that the Plaintiff has already vacated the suit property and his only intent in the suit is to vex the Defendant over the same.
14. Counsel urged that the Defendant continues to bear the costs and time of retaining his Counsel in a matter that has come to an end and that the Motion is unmerited and should be dismissed. Reliance in this respect was placed on the cases of *Joshua Chelego Kulei vs Republic & 9 Ors* [2014] eKLR and *Nzoia Sugar Company Limited vs West End Kenya Sugar Limited* [2020] eKLR.

Analysis and Determination

15. Having considered the Motion and the responses, the sole issue that arises for determination is:
 - i. Whether there are sufficient reasons to warrant the reinstatement of the suit?
16. Vide the present Motion, the Plaintiff seeks to reinstate the present suit which was dismissed for non-attendance on the 10th July, 2023. The Defendant opposes the same.
17. Order 12 Rule 7 of the Civil Procedure Rules, 2010 gives this Court discretion to reinstate a suit that has been dismissed and stipulates 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.”
18. The exercise of this discretion is not intended to aid a person who deliberately seeks to obstruct justice but to avoid hardship resulting from an accident, or excusable mistake or error. This position was expressed in the case of *Shah vs Mbogo & Another* (1967) EA 116, where the Court of Appeal of East Africa held that:

“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.”
19. More recently, the Court of Appeal in *Patriotic Guards Limited vs James Kipchirchir Sambu* [2018] eKLR stated that:

“...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.”
20. The Court in *Wachira Karani vs Bildad Wachira* [2016] eKLR appreciated that the threshold to be met by an Applicant seeking to have the Court set aside its orders as aforesaid is the demonstration



of sufficient cause. As to what constitutes sufficient cause, the Court of Appeal in the case of BML v WM [2020] eKLR, stated thus:

“What amounts to sufficient cause depends on the circumstances of each case and the court is called upon to exercise its discretion depending on the said circumstances. Musinga, JA in the case of The Hon. *Attorney General v the Law Society of Kenya & Another, Civil Appeal (Application) No. 133 of 2011* (ur) defined sufficient cause to be:

“Sufficient cause” or “good cause” in law means:the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused”. See BLACK’S LAW DICTIONARY, 9th Edition, page 251. Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”

Similarly, the Supreme Court of India in the case of Parimal v Veena [2011] 3 SCC 545 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.”

21. By way of brief background, the Plaintiff instituted this suit on the 17th February, 2014 seeking as against the Defendant, Kshs 9,000,000/=, general damages and costs of the suit. His claim arises from a landlord-tenant relationship between himself and the Defendant and an oral agreement pursuant to which he alleges to have carried out permanent construction on the suit property- L.R No Nairobi/Block 126/194. He seeks the value of his construction and the value of immovable properties carted away in what he claims was illegal distress for rent.
22. On his part, the Defendant while conceding to the tenancy and the oral joint venture agreement states that the agreed upon rent was in consideration of the Plaintiff’s contribution; that in breach of the joint venture, the Plaintiff failed to pay the monthly rental proceeds as agreed and further began making unauthorized external alterations to the suit property and that the levy of distress was lawfully carried out and there was no agreement as regards reimbursement for developments on the property.
23. The record shows that on the 10th July, 2023, the matter was due for hearing. Neither the Plaintiff nor his Counsel were present leading to the dismissal of his case. The Plaintiff is asking this Court to



reinstate the same contending that his failure to attend Court was occasioned by his Counsel and he is keen on proceeding with the same.

24. The Defendant on his part asserts that the Plaintiff is only keen on vexing him and has occasioned several delays in this matter and that he is constantly laying the blame on his Counsel in an effort to deceive the Court.
25. The Court has considered the record. Pre-trial conferences commenced sometime in 2016 and as at the 7th March, 2017, both the Plaintiff and the Defendant had fully complied and the matter was ready for hearing.
26. The matter was first scheduled for hearing on the 14th June, 2017. On the said date, Counsel for the Plaintiff sought an adjournment on the basis that the Plaintiff, while in Court was unwell. The Defendants Counsel was equally not ready to proceed. The matter was next scheduled for hearing on the 2nd November, 2017. On this date too, an adjournment was requested at the behest of the Plaintiff, his Counsel being involved in an election Petition.
27. On the 8th March, 2018, when the matter next came up for hearing, Counsel holding brief for the Plaintiff's Counsel sought another adjournment on the contention that the Plaintiff was ill. The matter was next scheduled for the 30th July, 2018. The Plaintiff's Counsel was in Court. However, the Defendant's Counsel was not and the matter failed to proceed.
28. On the 12th November, 2018, none of the parties were present and the matter was scheduled for hearing on the 25th June, 2019. On this date, the Plaintiff's Counsel was not ready to proceed stating that he had yet to receive instructions from his client.
29. On the 18th July, 2019, Counsel for the Plaintiff filed a Motion to cease acting and on the 18th September, 2019, the same was set down for hearing on the 9th December, 2019. On the 9th December, 2019, parties were granted leave to canvass the Motion by way of submissions and the matter scheduled for 12th May, 2020 wherein none of the parties appeared. There was equally no appearance by the parties on the 22nd October, 2020 and the 17th March, 2021.
30. The matter was next scheduled for hearing on the 20th July, 2022 on which date it was mentioned before the Deputy Registrar. There was no appearance for the Plaintiff. On the 15th February, 2023, this Court was not sitting and the matter was mentioned before another Court [L.J Lucy Mbugua] and in the presence of Counsel for the Plaintiff, was scheduled to proceed on the 10th July, 2023.
31. On the 10th July, 2023, neither the Plaintiff nor his Counsel were present leading the Court to dismiss the matter.
32. Considering the record of the Court, it sets out a very different picture from what has been advanced by the Plaintiff. The matter has had several adjournments spanning years substantially occasioned by the Plaintiff.
33. While the Plaintiff contends that that his inability to attend Court on the 10th July, 2023 was occasioned by the fact that his Counsel had not informed him of the hearing date, this allegation has not been substantiated. In any event, it is clear that the Plaintiff's absence/unreadiness has been the norm rather than the exception.
34. It has also not escaped the Court that this Motion for reinstatement has been brought approximately 5 months after the matter was dismissal. For this too, the Plaintiff blames his former Counsel. This too is unsubstantiated.



35. It is now well settled that the primary role of following up on a matter remains with the litigants. This position was well articulated by the Court in *Utalii Transport Co. Ltd and 3 Others vs N.I.C. Bank and Another* [2014] eKLR, which stated thus:

“It is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court.”

36. Expounding on this, the Court in *Ruga Distributors Limited vs Nairobi Bottlers Limited* [2015] eKLR, cited Kimaru J’s exposition in *Savings and Loans Limited vs Susan Wanjiru Muritu Nairobi HCCC397/2002*, where he stated:

“Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocates failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case.

The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate’s failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case.”

37. It is also the duty of the parties to assist the Court to adjudicate on the matters brought before it expeditiously as was held in *Thomas Mwaura Gitau & Anor. vs Eric Muhati & 2 Others* [2012] eKLR when the learned judge quoted from the finding of Warsame J. in the case of *Mobil Kitale Service Station vs Mobil Oil Kenya Ltd HCCC No. 205 of 1990* (unreported) as follows:

“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 of matters expeditiously.”

38. The Court in *Thomas Mwaura*(supra) further noted:

“The overriding objective of this Act and the Rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.”

39. The conduct of the Plaintiff in this matter runs contra to the overriding objective calling for expeditious resolution of disputes. That a matter filed in 2014, has yet to proceed for hearing despite having been set down severally is a cause for great concern.

40. As regards prejudice, the Court is called upon to balance the same. The Defendant is concerned that he continues to retain Advocates to defend a never ending matter. He states that the Plaintiff is out of the suit property and only seeks to continue vexing him vide this suit.

41. Ultimately, considering the totality of the circumstances, the Court is not convinced that there is sufficient cause warranting the reinstatement of the suit.

42. Although dismissal of a suit is a draconian order which has the effect of driving away a litigant from the seat of justice, a litigant is equally expected to be vigilant in pursuing and ensuring that their case is prosecuted without undue delay and with all fairness to the other party. The Court wishes to reiterate



the expression by the Court in *Ecobank Ghana Limited vs Triton Petroleum Company Limited (in receivership) & Others Civil Case No. 24 of 2009 (UR)*:

“Ultimately, it may as well be customary that courts should in the interest of justice lean towards according parties to litigation the opportunity to ventilate their cases before eventual determination as opposed to what has been termed as “draconian” the move to dismiss suits precipitously. However, in the face of a Constitution that expressly advocates for justice to all and which must be dispensed without delay, and in the face of overriding principles alluded to above, the time for change of the customary mind set is here. Litigants should therefore stand guided that they must embrace themselves to up the gear, for speed and vigilance will now be the trend. The wheels of justice will no longer be turning on the thrust of a team engine.”

43. In view of the foregoing, the Court finds that the Application dated November 21, 2023 is unmerited and the same is dismissed. For avoidance of doubt, the suit stands dismissed as ordered by the court on the July 10, 2023.
44. As costs follow the event, the Plaintiff shall bear the costs of this Application.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 30TH DAY OF JANUARY, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Mburu holding brief for Gachie for Defendant/Respondent

No appearance for Plaintiff

Court Assistant: Tracy

