



**Ngaine v District Land Adjudication and Settlement Officer, Igembe
District and others & 2 others (Environment and Land Judicial Review Case
14 of 2014) [2024] KEELC 13412 (KLR) (20 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13412 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 14 OF 2014
CK NZILI, J
NOVEMBER 20, 2024**

BETWEEN

STANLEY M NGAINE APPLICANT

AND

**DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER, IGEMBE
DISTRICT & OTHERS 1ST RESPONDENT**

KABERIA M'MUCHEKE 2ND RESPONDENT

PETER KABIRA 3RD RESPONDENT

RULING

1. By an application dated 23.5.2019 the court is asked by the exparte applicant to reinstate the notice of motion dated 21.5.2014 which was dismissed for non-attendance on 15.11.2015 for hearing on merits. The reasons are contained on the face of the application and in a supporting affidavit of Henry Kurauka advocate sworn on 23.5.2019. The exparte applicant avers that there was no prior or adequate notice to the hearing scheduled for 15.11.2018. Further, he avers that pursuant to the directions given on 2.3.2017, written submissions had already been filed and that all that was remaining was the issuance of a judgment date.
2. The exparte applicant avers that an error, mistake, or oversight of his advocate, which is excusable, should not be visited upon him. Further, the exparte applicant avers that the reinstatement of the notice of motion for hearing on merits will not prejudice the respondent; otherwise, if not, he shall stand to suffer irreparable loss and damages.
3. In the supporting affidavit, counsel on record for the applicant, Mr. Kurauka advocate, explains that he is based in Nairobi and therefore, could not easily access information relating to the listing of matters for hearing without prior notice. Further, learned counsel states that he was not notified that the matter



was scheduled for hearing on 15.11.2018 and could, therefore, not be present. He urges the court to reinstate the motion for hearing on merits. Reliance was placed on *Pithon Waweru Maina vs Thuku Mugiira (1982-1988) 1 KAR 171*.

4. The 2nd respondent oppose the application through an affidavit of Kaberia M'Mucheke sworn on 18.8.2020 on the basis that the applicant's lawyers were duly served with a hearing notice by way of EMS as per the address appearing in his pleadings followed by a proper affidavit of service on record which the trial court used as a basis to find there was a proper service for 15.11.2018.
5. The 2nd respondent denies that by the time the application was dismissed, there were any directions to dispose of the matter by way of written submissions so as to absolve the applicant from attending court for the main hearing. Again, the 2nd respondent avers that the application lacks merits, it was filed after an unexplained inordinate delay; was an afterthought, and that litigation must come to an end.
6. The record of the court shows that the applicant filed this matter under a certificate of urgency on 12.5.2014. Subsequently, on 14.5.2014, the applicant obtained leave to commence judicial review proceedings seeking orders of certiorari and prohibition to quash and stop the implementation of a decision made on 22.2.2014, by the 1st respondent out of an Objection Case No.1762 regarding Parcel No.1665 Akirangondu "A" Akirangondu – Laare Division. Leave was to act as a stay of the implementation of the said decision.
7. Upon issuance of the orders dated 16.5.2014, the applicant filed a notice of motion dated 21.5.2014.
8. The 2nd respondent was served and filed a replying affidavit sworn on 2.9.2014, while the interested parties filed written submissions dated 11.12.2014. Similarly, the ex parte applicant filed written submissions dated 5.12.2014. The 1st respondent, despite several directions given to put in a replying affidavit, none was filed by 19.7.2018.
9. After several mentions, it appears that a hearing date was given for 15.11.2018, on 19.7.2018, in the absence of the ex parte applicant. The respondents were directed to serve the hearing notice upon the other parties absent on that day. It appears that Rose Wanjohi swore an affidavit on 4.10.2018 saying that she served a hearing notice dated 4.10.2018 through EMS to Kurauka & Co. Advocates Chester House 1st Floor, RM 1 Koinange Street P.O Box 17586 0100 Nairobi. The EMS sheet was annexed thereto. Evidence of the date, receipt, or delivery of the EMS is lacking.
10. The parameters to apply on whether to reinstate or not to reinstate a dismissed suit were discussed in *John Nahashon Mwangi vs Kenya Finance Bank Ltd (in liquidation) (2015) eKLR*.
11. The court said that the fundamental principles of justice are enshrined in Articles 50 and 159 of *the Constitution*, on the right to be heard and the need to serve substantive justice to all parties. In *Barnabas Maritim vs Manywele Korgoren & another (2016) eKLR*, the court said that the discretion to set aside its order for dismissal of a case for non-prosecution was discretionary and must be exercised judiciously, based on justification given by the applicant for the delay in prosecuting the matter.
12. As for dismissal for non-attendance in *Ngugi vs Thogo (Civil Application 372 of 2018 (2021) KECA 88 (KLR) (22nd October 2021 (Ruling))*, the blame for non-attendance was attributed to an alleged convoluted, imprecise and misleading communication from the Court of Appeal registry, with regard to the correct date on which the application was scheduled for hearing which was neither the applicant nor her advocate had control over. The court cited *Joseph Kinyua vs. G.O Ombachi (2019) eKLR*, that it was more preferable if litigation was brought to an end after all parties have been heard on merit and substantive justice administered, the very rules of the court that provides for timelines for the performance of an act, also allow the court to exercise discretion and extend the time within which



to comply in the event of non-compliance. The court observed that Article 159 of *the Constitution* requires the court to administer substantive justice, while the overriding objective requires giving justice equally to all the parties for the ends of justice to be met. Further, the court said that there should also be considerations of the nature of the substratum of the litigation and the need to establish if reasonable grounds have been preferred for reinstatement and the prejudice to be suffered by the opposite party.

13. The applicant has invited the court to intervene on the basis that there was no proper notice, the mistake was excusable, it should not be visited upon him, he had made attempts to prosecute his application by filing written submissions, and there will be more prejudice to him if he is not heard on merits, unlike the prejudice to the opposite parties, sufficient and plausible cause for non-attendance to prosecute the application has been offered and that there was proper service of a hearing notice for 15.11.2018.
14. In *Wachira Karani vs Bildad Wachira* (2016), eKLR Mativo J, as he then was observed that sufficient cause was a question of fact and the court has to exercise its discretion in the varied and exceptional circumstances in the case at hand, for there cannot be a straight jacket formula for universal application. In *Ronald Mackenzie vs Damaris Kiarie* (2021) eKLR, the court said that justice was justice for both the plaintiff and the defendant. The respondents have not expressed what prejudice they are likely to suffer despite the inordinate delay. See also *Philip Chemwolo & another vs Augustine Kubende* (1982-1988) 1 KAR.
15. The failure to reinstate the notice of motion shall definitely drive the applicant out of the seat of justice. See *Ivita vs Kyumbu* (1984) KLR 441. Dismissal of a suit is a draconian measure. There is no evidence that the applicant has in the past conducted himself in a matter to show disinterest in prosecuting the motion.
16. Order 17 Rule 2 (6) of the Civil Procedure Rules and Section 3A, of the *Civil Procedure Act*, reserve an inherent power of the court to make such orders as are necessary for the ends of justice to be met or to prevent abuse of the court process. See *Rose Njoki King'au & another vs Shaba Trustees Ltd & another* (2018) eKLR.
17. The inherent power of the court means that courts are there to administer justice by balancing between the rights and interests of different parties, but within the confines of the law to ensure that the ends of justice are met. See *Equity Bank Ltd vs West Link MBO Ltd* (2013) eKLR and *Board of Governors; Moi High School Kabarak & another vs Malcolm Bell* (2013) eKLR.
18. The discretion to set aside an *ex parte* judgment is intended to be exercised to avoid injustice or hardship resulting from an accident, inadvertence and excusable mistake, but not to assist a party who has deliberately or, whether by evasion to obstruct or to delay the cause of justice. See *Shah vs Mbogo & another* (1967) E.A 116.
19. Looking at the history of this matter, I am satisfied that the applicant merits his day in court. Justice can still be rendered in spite the delay since, as submitted by counsel for the applicant, the substratum of the proceedings is still intact. The upshot is that I reinstate for hearing on merits the notice of motion dated 21.5.2014. Since parties had filed responses and written submissions save for the 1st respondent, I direct that written submissions be filed within 7 days. Costs in the cause.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 20TH NOVEMBER, 2024

HON. C K NZILI



JUDGE

In presence of

C.A Kananu

Kurauka for the applicant

