



Awinja ((Suing as the legal representative of the Estate of Selina Ayieko - Deceased)) v Awinja (Deceased) & 3 others (Environment & Land Case 158 of 2016) [2024] KEELC 7434 (KLR) (7 November 2024) (Ruling)

Neutral citation: [2024] KEELC 7434 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 158 OF 2016
EC CHERONO, J
NOVEMBER 7, 2024

BETWEEN

WILBERFORCE MULAMBA AWINJA PLAINTIFF
(SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SELINA
AYIEKO - DECEASED)

AND

WILFRED AWINJA (DECEASED) 1ST DEFENDANT
CONCEPTA NAKHUMICHA AWINJA 2ND DEFENDANT
GODFREY OYARO AWINJA 3RD DEFENDANT
KENNEDY NEHEMIAH AWINJA 4TH DEFENDANT

RULING

1. This court has been called upon to determine the plaintiff/Applicant's Notice of Motion application dated 18th October, 2023 in which he seeks the following orders;
 - i. That the Honourable court be pleased to grant leave to the Firm of Momanyi Manyoni & Company Advocates to come on record for the Plaintiff/Applicant in place of Natwati & Company Advocates.
 - ii. That the Honourable court be pleased to set aside the orders made on the 3rd day of October 2023 dismissing the suit herein and reinstate the suit for hearing and determination on merit.
 - iii. That the costs of this application be provided for.
2. The application is premised on grounds apparent on the face of the said application supported by the affidavit of Wilberforce Mulamba Awinja sworn the same date.



3. The said application is opposed with a Replying affidavit sworn on 8th March, 2024 by Kennedy Nehemiah Awinja on his behalf and that of Concepta Nakhumicha Awinja and Godfrey Oyaro Awinja.

Applicants Summary of Facts.

4. In his supporting affidavit, the Applicant deposed that the suit herein was filed by his late mother Selina Ayieko Awinja (deceased) who passed on before the case was resolved. He stated when this case was dismissed on 3rd day of October, 2023, his hitherto lawyer on record had not informed him that the case was listed for hearing. The Applicant further stated that his absence on 3rd October, 2023 was not deliberate since his advocate on record did not inform him and that he has been keen to proceed with this case being a land dispute affecting his family.
5. He stated that the defendants will not be prejudiced if the case is reinstated for hearing and determination on merit.

Respondents Summary of Facts

6. The 4th Respondent in his replying affidavit deposed that the plaintiff/Applicant has not been keen to proceed as he has not set it down for hearing since it was filed in 2016 and 8 years later to the date of its dismissal. He stated that on 1st December, 2021 the court directed the plaintiff to file their statements and documents within 14 days but the plaintiff did not comply with the same and when the case came up for hearing on 17/5/2023, it was adjourned at the instance of the plaintiff. The Respondents further stated that this case also came up for hearing on 13/07/2023 but was again adjourned on grounds that counsel for the plaintiff/Applicant was indisposed and when it came up for hearing again on 2/10/2023, counsel for the plaintiff sought an adjournment on grounds that the plaintiff/applicant had not complied with the directions given by this court on 1st December, 2021 but the court declined and dismissed this case for want of prosecution.
7. He stated that the plaintiff/Applicant blames her hitherto advocate for failure to notify him of the hearing date without explaining why he has never complied with the directions given by this court on 1st December, 2021 and that the plaintiff has not demonstrated any efforts made to follow up the progress of his case with his advocate. He stated that cases belong to parties and that it is the plaintiff/Applicant's responsibility to follow up the progress of his case and that blaming the advocate does not suffice.
8. The Respondent further deposed that the current e-filing system enables parties to the suit to be notified through their individual mobile phone numbers of any progress of their cases including the hearing date(s). In summary, the Respondent deposed that the application is not merited and that he would be greatly prejudiced if this case is reopened having been dragged to court for the last 8 years with the plaintiff showing no interest in his own suit and that litigation must come to an end.

Applicants Written Submissions

9. The Applicant through the firm of Momanyi Manyoni & Company advocates submitted on whether the application meets the threshold for the grant of the orders for Judicial review and reinstatement of the suit. On that issue, the learned counsel answered in the affirmative and submitted that there are sufficient reasons to warrant the court to review its orders. He submitted that the failure by the Applicant to appear before the court on 3rd October, 2023 was not a wilful act on his part but was caused by the failure on the part of his counsel on record to inform him that the case had been set down for hearing on the material day. He further submitted that the mistake of an advocate should



not be visited upon the innocent client. Reliance was placed in the case of Sheikh T/A Hasa Hauliers v Highway Carriers Ltd (1988) eKLR

10. The learned counsel also submitted that there is sufficient reason shown to invoke this court's inherent powers to review its decision to ensure that it does not result in a miscarriage of justice by dismissing the Applicants suit and that the Applicant stands to suffer irreparable loss and it will be manifestly unjust to drive him from the seat of justice without being heard. It is further submitted that the instant application was brought without undue delay. He relied in the following cases; Jim Rodgers Gitonga Njeru v Al-Husnain Motors Limited & 2 Others (2018) eKLR; Naftali Opondo Onyango v National Bank of Kenya Ltd (2005) eKLR, Sheikh v Gupta & Others NAIROBI HCC NO. 916 (1969) E.A, Philip Keipto Chemwolo & Another v Augustine Kubende (1986) KLR; CMC Holdings Ltd v James Mumo Nzioki (2004) eKLR, Edney Adaka Ismail v Equity Bank Ltd (2014) eKLR; Lilian Akinyi Abuto & Another v Peter Kinyanjui Gitau & 2 Others (2021) eKLR and Ambrose Rachier, Okome Arwa, Francis Olalo & Another v Development Bank of Kenya (2021) eKLR.

Respondent's Write Submissions

11. The Respondents through the Firm of M/S V.A Lunani & Co. Advocates submitted that the Plaintiff/Applicant lack interest in for failing to proceed for hearing for eight long years. She argued that the plaintiff was not desirous in proceeding in this as he failed to comply with directions given by the court particularly on 1/12/2021. Reliance was placed in the case of *Republic v Cabinet Secretary, Ministry of Lands and Settlement and Another, Kitili (Interested Party Nthiwa (Ex-parte Applicant) (Judicial Review Application 5 of 2021)* (2021 KEELC 21429 (KLR))
12. The learned Counsel also submitted that this is the plaintiff's case and not his counsel and that the plaintiff has not shown any follow up he made with his counsel to know the progress of the case. She further submitted that the plaintiff/Applicant did not also file or annex an affidavit sworn by his hitherto advocate on record confirming that she failed to inform the plaintiff about the hearing date. She stated that it is not enough for the plaintiff/Applicant to simply lay blame on his former counsel without any prove whatsoever and that with the current e-filing system, parties can check the status of their cases on the court e-filing system in addition to receiving text message notifications from the court. Reliance was placed in the following cases; Josphat Mabilia Akoyo v George Mabele Sifuna & John Odhiambo (2022) KLR and Elizabeth Wakarii Njiru v Kamuri Mubuta & 6 Others (2019) eKLR
13. In conclusion, the learned Counsel submitted that the plaintiff/Applicant has been lax in the conduct of this case and on 2/12/2023, this court rejected the plaintiff/Applicant's counsel application for adjournment and since the plaintiff was absent, the case was dismissed for want of prosecution.

Legal Analysis and Decision

14. I have considered the application, the supporting as well as the replying affidavit, the submissions by counsel for both parties and the applicable law. The Applicant in the current application is seeking to set aside the orders of this Honourable court issued on 3rd day of October, 2023. The application is brought under order 12 Rule 7 of the Civil Procedure Rules. According to the Applicant, he was unable to attend court for hearing on the said date as he was not informed by his former advocate.
15. While opposing the said application, the Respondents stated that the plaintiff/Applicant has not been keen to prosecute this case since it was filed in 2016 and that the suit had been fixed for hearing on several occasions but adjourned at the instance of the plaintiff/Applicant. They stated that no sufficient reasons have been given by the Applicant for setting aside the orders of this court dismissing this suit on 3/10/2023.



16. It is not in contention this this suit came for hearing on 3/10/2023. It is not also in contention that after the case was called out, one Mr. Sabwami advocate stated that he had instructions to hold brief for M/S Natwati for the Plaintiff. The learned counsel informed the court that M/S Natwati advocate was unwell and that she had not filed her witness statement and list of documents. The application was strenuously opposed by M/S Lunani advocate for the Defendants/Respondents. Upon considering the application, rival arguments and submissions by the learned counsels, this court disallowed the application for adjournment for reasons on the court record. Mr. Sabwami for M/S Natwati indicated that he did not have any further instructions and since the plaintiff/applicant was not in court, this suit was dismissed with costs for non-attendance and for want of prosecution under order 17 Rule 2 of the Civil Procedure Rules.
17. This application has been brought under 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.”
18. As can be seen from the court record, this suit was dismissed on 3/10/2023 after an application for adjournment by a Mr. Sabwami who was holding brief for M/S Natwati for the plaintiff/Applicant was disallowed. This suit was dismissed after the plaintiff/Applicant failed to testify and or call his witnesses after the adjournment was disallowed. This suit was dismissed under order 17 Rule 2 of the Civil Procedure Rules.
19. The decision whether or not to allow an application for setting aside judgment or dismissal of a suit due to non-attendance of a plaintiff is within the wide discretion of the court. This discretion has to be exercised judiciously as was stated in the case of Shah v Mbogo (1979) E.A 116 where it was held thus;

---this 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 has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.”
20. In order to exercise its discretion in favour of the applicant, the applicant has to satisfy the court that there is sufficient cause or reason to warrant setting aside the dismissal orders.
21. In the instant case, the Plaintiff/Applicant claimed that his former advocate did not inform him of the hearing of the case on 3/10/2023. That explanation in my view is not sufficient ground to set aside the dismissal order. In my respective view, cases belong to litigants and not advocates. As such, a litigant is under a duty to check his/her case with their advocate from time to time. However, he did not demonstrate any cogent efforts he made to follow up his case with the former advocate. All he did was to say that his former advocate did not inform him of the hearing date on 3/10/2023.
22. Even if there could have been a mistake on the part of the advocate, not all mistakes of advocates absolve parties from blame when they occur. Some of the mistakes border on professional negligence which are remedied by actions as between the parties and their advocates while leaving the innocent adverse parties or their rights intact.
23. Given the above analysis, it is my view that a party who wishes the court to grant him an order reinstating a dismissal of a suit such as before this court should demonstrate beyond any shadow of doubt that his application merits rather than lay blame on his former advocate.



24. Given the above analysis, it is my finding that the reasons given for non-attendance by the plaintiff/applicant on the hearing date are not sufficient to warrant the exercise of the discretion of this court. The former Advocate for the plaintiff/Applicant did not swear an affidavit to the effect that she made a mistake by failing to inform the plaintiff/Applicant of the hearing of the case on 3/10/2023.
25. From the foregoing, I find that the Notice of Motion application dated 18th October, 2023 is devoid of merit and the same is hereby dismissed. Since the parties are close relatives, I order each party to bear their own costs.
26. Orders accordingly.

READ, DELIVERED AND SIGNED AT BUNGOMA THIS 7TH NOVEMBER, 2024.

HON. E.C CHERONO

ELC JUDGE

In the presence of;

1. M/S Nanzushi H/B for M/S Lunani for the Respondents.
2. Mr. Orute H/B for Mr. Manyoni for Applicant.
3. Bett C/A.

