



Kahawa Sukari Residents & Plot Owners Welfare Association (Suing through Mary W Ngugi Mwaniki, Julius Wokabi and Dickson Maina Miano) v Kahawa Sukari Limited & 5 others; County Government of Kiambu (Interested Party) (Environment & Land Case 29 ‘B’ of 2021) [2024] KEELC 14070 (KLR) (19 December 2024) (Ruling)

Neutral citation: [2024] KEELC 14070 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 29 ‘B’ OF 2021**

JG KEMEI, J

DECEMBER 19, 2024

BETWEEN

**KAHAWA SUKARI RESIDENTS & PLOT OWNERS WELFARE ASSOCIATION
(SUING THROUGH MARY W NGUGI MWANIKI, JULIUS WOKABI AND
DICKSON MAINA MIANO) PLAINTIFF**

AND

**KAHAWA SUKARI LIMITED 1ST DEFENDANT
UPTOWN AGENCIES LTD 2ND DEFENDANT
JAMES MWANGI WAGURA 3RD DEFENDANT
LUCY WARUGURU WAGURA 4TH DEFENDANT
THE CHIEF LAND REGISTRAR, NAIROBI 5TH DEFENDANT
THE NATIONAL LAND COMMISSION 6TH DEFENDANT**

AND

THE COUNTY GOVERNMENT OF KIAMBU INTERESTED PARTY

RULING

The Plaintiff’s Application dated 6/6/2024

1. Vide this Motion, the Plaintiff craves for Orders THAT;
 - a. Spent.



- b. This Honorable Court Ruling dated 5th June 2024 dismissing the Plaintiff's Application dated 2nd May 2024 be set aside.
 - c. The Plaintiff's Application dated 2nd May 2024 be heard together with the Interested Party's Application dated 7th May 2024.
 - d. The costs of the Application be provided for.
2. The Application is based on the grounds that the Plaintiff filed an Application dated 2/5/2024 seeking reinstatement of this suit and that the said Application was fixed for hearing on 5/6/2024 when the Plaintiff's Counsel inadvertently failed to attend Court. The Application is supported by the Affidavit of even date of Titus Ogamba Nyakundi, the Plaintiff's Counsel on record. He annexed a copy of his diary extract cancelling the hearing date of 5/6/2024 as 'TON-01'.
 3. The Application is not opposed save for the undated written submissions filed by the law firm of Mwamuye, Kimathi & Kimani Advocates on behalf of the 3rd and 4th Defendants.
 4. It was submitted that the Plaintiffs are not entitled to the orders sought having failed to comply with the orders of this Court issued on 6/2/2024 requiring them to file their trial bundle within 45 days. That the matter was adjourned severally at the instance of the Plaintiffs and failure to attend Court on 5/6/2024 bespeaks of their lack of interest in prosecuting the suit. The Court was urged to dismiss the Application with costs.
 5. The germane issue for determination is whether the Application is merited.
 6. The legal underpinnings for seeking reinstatement orders is provided under Order 12 Rule 7 of the Civil Procedure Rules that:-

“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.”
 7. The Orders sought are discretionary in nature. An Applicant is obliged to sufficiently explain to the Court his failure to attend Court on the hearing date. The Plaintiffs' Counsel has explained that the non-attendance was due to an inadvertent mistake having misunderstood Court directions issued on 21/5/2024 regarding the hearing of the two Applications by the Interested Party and 7/5/2024 and Plaintiffs' Motion dated 2/5/2024. That this led him to the cancellation of the entry in the diary for 5/6/2024 as shown by annexure 'TON-01' when the Plaintiffs' Application was dismissed. This averment has not been rebutted by contrary evidence.
 8. Should the door of justice be closed to the Plaintiffs for the mistake of Counsel? I think not. In this regard, I am guided by the holding in *Belinda Murai & Others - v- Amos Wainaina* (1978) LLR 2782 (CALL) where Madan, JA (as he then was) stated:

“A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by Senior Counsel. Though in the case of Junior Counsel the Court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The Court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.”



9. In an Application of this nature, an Applicant appeals to the discretion of the Court. The Court must caution itself not to exercise its discretion in a manner that will result in an injustice. This position was affirmed in the case of Richard Ncharpi Leiyagu Vs. Independent Electoral Boundaries Commission & 2 Others [2013] eKLR, where the Court of Appeal stated:

“We agree with those noble principles which go further to establish that the Court’s discretion to set aside an *ex parte* Judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. We have considered the reasons that were offered by the appellant regarding their failure to attend Court on the 10th June, 2013 with anxious minds. We have asked ourselves whether failure to attend Court on 10th June, 2013, constituted an excusable mistake, an error of Judgment regarding Counsel’s failure to diarize the date properly or was it meant to deliberately delay the cause of justice.”

10. The 3rd and 4th Defendants did not demonstrate the prejudice they stand to suffer should the Application be allowed. The circumstances of this case are sufficient to persuade the Court that the non-attendance by the Plaintiffs at the hearing of the dismissed Application was not a deliberate attempt to obstruct or delay justice.
11. The upshot of the forgoing is that the Plaintiffs’ Application dated 6/6/2024 is allowed and the order of 5/6/2024 dismissing the Application dated 2/5/2024 is set aside. The Application dated 2/5/2024 is hereby reinstated for hearing on merit.
12. Costs be in the cause.

Plaintiffs’ Application dated 2/5/2024

13. By this Motion, the Plaintiffs’ in the main urge the Court to set aside the Orders of 6/2/2024 issued by this Honourable Court and consequential orders dismissing the suit on 29/4/2024. They also seek leave for the firm of Ogamba Nyakundi & Co. Advocates to come on record for the Plaintiffs.
14. It is based on the grounds that the Plaintiffs were not aware of the Court’s directions issued on 2/6/2024 and are therefore not to blame for their non-compliance; that the mistake of Counsel should not be visited on the Plaintiffs; the suit concerns several parcels of public land alleged to have been irregularly allocated for private use; the Plaintiffs will suffer grave prejudice if the suit is dismissed yet the Defendants and Interested Party have not filed their Statements of Defence.
15. The Motion is further supported by the affidavit of even date of Edward Kiganjo the Plaintiffs’ Vice chairperson. He deponed that he was present in Court on 29/4/24 for other related suits ELCLC E025 of 2023 and ELCLC E038 of 2023 on invitation by Ogamba Nyakundi & Co. Advocates when the instant suit was also mentioned. That he was unaware of the directions issued on 6/2/2024 and upon consulting their former Counsel Kamau Kinga & Co. Advocates, he was told the instant suit stood dismissed. That the Plaintiffs have appointed the current firm of Advocates hence the Application.
16. The Application is unopposed. Suffice to state that the 3rd and 4th Defendants filed undated submissions in objection which I have read and considered.
17. The singular issue for determination is whether the Application is merit.
18. The Court record shows that on 20/11/2023 directions for hearing this suit were taken in the presence of Mr. Kimani for the Plaintiffs and Mr. Mbogo for the 1st – 4th Defendants. The Court directed the



parties to file and serve their paginated trial bundles and a mention date was set for 6/2/2024 for fixing a hearing date.

19. On 6/2/2024 the Plaintiffs' Counsel was absent when the Court directed that the Plaintiffs to file their trial bundles within 45 days failing which their suit stood dismissed. These orders were self-executory and the consequent dismissal of 29/4/2024 was as a result of their non-compliance hence the instant Application.
20. The Plaintiffs contend that they were unaware of the said directions as their former Counsel Kamau Kinga Advocates failed to act/inform them. Indeed, the record shows that the last appearance by Advocate Kimani was on 20/11/2023 and there being no contrary objection to this averment, I am persuaded that the Plaintiffs have shown that mistake of their former Counsel ought not be visited on them. The deponent avowed that he sought time to appoint new advocates but he was informed that the request was overtaken by events. Nevertheless, they have appointed the firm of Ogamba Nyakundi Advocates who took up the matter and filed the instant Motion.
21. The legal provisions for setting aside dismissal orders is provided under Order 12 Rule 7 of the Civil Procedure Rules that;
 - “7. Setting aside Judgment or dismissal [Order 12, rule 7.]
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.”
22. It emerges from the above provision that a Court has the discretion to set aside a default Judgment. In the case of Patel Vs. EA Cargo Handling Services Ltd (1974) EA 75, the Court held that:
 - “There are no limits or restrictions on the Judge's discretion except that if he does vary the Judgment, he does so on such terms as may be just. The main concern of the Court is to do justice to the parties and the Court will not impose conditions on itself or fetter wide discretion given to it by the rules, the principle obviously is that unless and until the court has pronounced Judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure.”
23. It is trite that such discretion is intended to be exercised judiciously to avoid injustice or hardship but not to assist a person who is guilty of deliberate conduct intended to obstruct or delay the course of justice. See the case of Mbogo and Another Vs. Shah [1968] E.A. 93. The Plaintiffs have to my mind adduced a plausible explanation as to why they failed to comply with the timelines for filing their trial bundle as directed by the Court on 6/2/2024. Absent any objection or evidence to show that the instant Application is a delaying tactic to conclude the matter, I am of the view that the Application has merit.
24. In the upshot the Application is allowed on terms;
 - a. The Plaintiffs to file & serve their trial bundle within 45 days from this date;
 - b. The Defendants and Interested Party have corresponding leave to file their respective bundles upon service.
 - c. Failure to comply with (a) above the Application stands automatically dismissed.



- d. Costs be in the cause.

Interested Party's Application dated 7/5/2024

25. The Application seeks Orders that;
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. The orders issued on 6/2/24 and 29/4/24 and all consequential orders issued therein be set aside.
 - e. The Interested Party's counter claim dated 22/4/24 marked exhibit JJC2 be deemed as properly filed and served.
 - f. The Interested Party's counter claim dated 22/4/24 be set down for hearing on merit.
 - g. In the alternative to prayer (d) above this entire suit be reinstated and heard on merits.
 - h. Costs be provided for.
26. The Application is based on the grounds on its face and supported by the Affidavit of even date sworn by J.J Cheserek, the Interested Party's Legal Counsel. The gist of the case is that the Interested Party has been actively involved in the litigation of this suit since its filing in Milimani Court. That the Interested Party was not aware that suit was transferred to this Court and attendant proceedings of 20/11/23, 7/2/24 and 28/2/24 as no notices were served upon it. That the subject suit land is public land which is alleged to have been grabbed by the 2nd, 3rd and 4th Defendants and it is in the public interest that the suit be reinstated and heard on merit. Further the deponent averred that she fell ill in the month of November 2023 and proceeded on medical leave as shown by annexure JJC1. That the Defendants despite knowledge of the present suit have proceeded to file other suits THIKA ELCLC E025 of 2023 and ELCLC E038 of 2023 against the Interested Party claiming ownership of some of the properties being litigated herein. She also annexed a copy of the Interested Party's Defence and Counter claim as JJC2 and urged the Court to allow its Application as drawn.
27. The 1st Defendant opposed the Application through the firm of Solomon Mugo & Co Advocates and filed Grounds of Opposition dated 20/5/2024 on grounds that;
 - a. The Applicant lacks locus standi to seek reinstatement of the dismissed suit.
 - b. The presumed defence and counter claim do not have a legal substratum, the same having been filed after effectual dismissal of the primary suit.
 - c. The Interested Party defence and counter claim are misconceived and bad in law, the Applicant having been only an Interested Party in the dismissed suit.
 - d. The Application does not meet the legal prerequisites for the grant of an order of stay.
 - e. The Honorable Court is functus officio for the purposes of hearing the subject Application.
 - f. The Application is served on the wrong parties.
 - g. The same is otherwise an abuse of the Court process, a waste of precious judicial time and ought to be dismissed with costs.



28. Similarly, the 3rd and 4th Defendants through the firm of Mwamuye Kimathi & Kimani Advocates filed their Grounds of Opposition dated 12/6/24 raising the following grounds;
- a. That the Application is frivolous, incompetent and an abuse of Court process as the Application has no foundation to stand on.
 - b. The Interested Party's Application is bad in law given that the Court's jurisdiction to hear and determine the Application given that the Court became functus officio after the suit herein was dismissed on 29/4/2024.
 - c. That the Court's directions by Hon. Eboso of 20/11/2023 were clear that unambiguous where the Honorable Court directed that the Plaintiff file its trail bundle within 45 days failing which the suit stood dismissed. The 45 days' timeline lapsed on 4/1/2024 and therefore the Plaintiff and/or interested party ought to have filed an Application to reopen the case or appeal the Court's decision.
 - d. That the instant Application is bad in law given that an Interested Party cannot frame its own fresh issues or introduce new issues for determination of the Court or even make substantive prayers. As such the Interested Party cannot make a prayer for review or reinstatement of the suit.
 - e. That in any event, the Interested Party's counterclaim filed on 22/4/2024 is bad in law given that an Interested Party cannot counterclaim against a Defendant, a counterclaim can only be against the Plaintiff. Furthermore, the purported counterclaim was filed out of time and without leave of the Court.
 - f. That the Interested Party's counterclaim is bad in law given that a county government has no locus to counterclaim for public land since the mandate to manage public land falls squarely under the National Land Commission.
 - g. That the Application is otherwise an abuse of Court process and a violation of the provisions of the law.
 - h. That the Application is otherwise fated for dismissal with costs to the 3rd and 4th Defendants.
29. The Application was disposed by way of written submissions pursuant to directions taken on 13/6/2024.
30. Only the 3rd and 4th Defendants filed undated submissions in compliance of the said directions. Two issues were drawn for determination; whether the Interested Party is entitled to the orders sought and who should bear the costs. Answering the 1st issue on the negative, reliance was placed on of Section 1A (3) the *Civil Procedure Act* requiring a party to assist the Court to further the overriding objective under the Act. That the Plaintiffs having failed to comply with the Court direction issued on diverse dates and ultimately the resultant dismissal order, the Court became functus officio. That the Interested Party's move to file a defence and counterclaim is improper as it is not a party to the proceedings. Citing the definition of an Interested Party under Rule 2 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms, Practice and Procedure Rules, 2013) and the decision in Njuguna Vs. Mbugua & 2 Others [2024] eKLR, it was posited that an Interested Party may not frame new issues in a suit because they are not a primary or principal party in the suit.
31. On the issue of costs, the 3rd and 4th Defendants beseeched the Court to dismiss the Application and award them costs.



32. The germane issue for determination is whether the Application is merited.
33. Flowing from the determination of the Plaintiffs' Applications above, the prayers for setting aside and reinstatement of the suit have been allowed. The equivalent prayers herein are therefore moot for consideration and are marked as spent.
34. On the objection to the Interested Party's locus standi, I note that the Interested Party has been a participant in the suit right from 2/2/2022 when the suit was still at Milimani Court and therefore the objection is unmerited.
35. Can an Interested Party frame its own issues for determination? The answer is traced in the Supreme Court decision in the case of Methodist Church in Kenya Vs. Mohammed Fugicha & 3 Others [2019] eKLR where it held;

“Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the Court.”

36. A glean of the Interested Party's counterclaim reveals that the 1st Defendant in the counterclaim is the owner of the land parcel known as L.R No 10901/20 measuring approx. 1200 acres which the 1st Defendant sought to subdivide and the permission was granted by the Interested Party on condition that some parcels of the land are reserved for public use. That some of the said parcels have allegedly been grabbed by the Defendants and the Interested Party seeks a declaration that such subdivisions and illegal acquisitions be declared null and void. To my mind these averments do not raise a fresh set of claim which is distinct from the Plaintiffs' case as contained in the plaint dated 10/5/2021 concerning the same subject land, L.R 10901/20 and the prayers therein.
37. The upshot of the forgoing is that the Application dated 7/5/2024 is merited and it is allowed in terms of prayers (d), (e) and (f).
38. Each party to bear their own costs herein.
39. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 19TH DAY OF DECEMBER, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Nyakundi for Plaintiff

Mbogo for 1st Defendant

2nd Defendant – Absent

Oguye HB Kimani for 3rd and 4th Defendant

5th and 6th Defendants - Absent

Court Assistant – Phyllis

