



**Gacheri v M’Murithi & 2 others (Environment & Land Case
55 of 2011) [2023] KEELC 15722 (KLR) (22 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15722 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 55 OF 2011**

CK NZILI, J

FEBRUARY 22, 2023

BETWEEN

JOYCE GACHERI PLAINTIFF

AND

ZAKARIA KIRUJA M’MURITHI 1ST DEFENDANT

JOSEPH MBAABU SIMON 2ND DEFENDANT

CHARLES KIOGORA MUKINDIA 3RD DEFENDANT

RULING

1. The court is asked to review, vary or set aside its orders which issued on October 25, 2021 and reinstate the suit for hearing. The reasons as contained in the supporting affidavit by Joyce Gacheri, the plaintiff / applicant sworn on July 7, 2021 are that:-the suit was dismissed for non-compliance with alleged court directives; the previous lawyers had not informed her of the court orders; instructions to cite for succession proceedings the proposed party so as to substitute the deceased had been issued to the former lawyers; the citation was still pending; the subsequent lawyers she had hired also failed to inform her or act on time; the non-appearance was not deliberate or intentional; the delay is not inordinate and that mistakes of the former lawyers on record should not be visited upon her.
2. Charles Kiogora Mukindia, the 3rd defendant on behalf of the respondents has opposed the application through a replying affidavit sworn on January 16, 2022. The basis of the opposition is that the applicant has not been keen to prosecute the suit for the last 11 years, which suit started at the Land Disputes Tribunal in 2002; that the applicant has been seeking adjournments and always blaming the three former law firms on record for inaction; it has taken the applicant a whole year before moving the court; that the court record shows that the suit has been mentioned many a times in the absence of the applicant. That the case belongs to the applicant and not her lawyers on record. That justice delayed is justice denied. That no explanation for the delay or inaction has been offered since there are no



medical reports attached or affidavits by the former lawyers. That the respondents have exhausted their resources attending court with the applicants abusing the court process. That litigation must come to an end and that it was only because of the bill for taxation that the applicant has awoken from her slumber.

3. Under Order 12 Rule 7 as read together with Order 17 Rule 4 of the Civil Procedure Rules provides that the court has powers to review and or set aside an order dismissing the suit on such terms as are just. In this suit, the record indicates that on March 25, 2019, the plaintiff applied for an adjournment to substitute the 1st defendant who was said to have died on June 29, 2013.
4. The matter was mentioned on May 30, 2019, July 8, 2019, August 19, 2019, September 24, 2019, October 29, 2019, December 18, 2019, February 25, 2020, May 13, 2021 and on June 24, 2021 before the Deputy Registrar until an order was made that the applicant was not keen to substitute the deceased 1st defendant. In most, if not all those instances the applicant was absent in court. Similarly, when the matter came up before this court on October 25, 2021, the applicant was not in court nor were her advocates on record. The court therefore dismissed the suit for non-compliance with court directives issued on March 25, 2019.
5. From the court record it appears the applicant sought for the typed proceedings on November 17, 2021. She waited until July 7, 2022 to move the court for the setting aside of the dismissal order.
6. Since March 23, 2019 when the matter was taken out of the hearing list, the applicant lay blame on the court first for ignoring the facts that she had complied with all its orders and directives and secondly, on misadvice by her former advocates on record. As a show of compliance with court directives, the applicant has attached annexure marked JG “2” a citation Nkubu in PMCC No. 47 of 2019 filed on August 5, 2019 and some medical reports dated October 25, 2021 attached as JG “3”.
7. In the case of Shah v Mbogo & another (1967) EA 116, the court held that the discretion to set aside an order or decree is intended to be exercised in order to avoid an injustice or hardship resulting from an inadvertence or excusable mistake but not designed to assist a party who had deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.
8. In Johnson Muturi Njogo v Joseph Njogo Mathenge and 2 others (2008) eKLR, the court held that it would decline an application for the reinstatement of a suit if there is evidence that both the advocate and the plaintiff were indolent.
9. In Peter Kinyari Kihumba v Gladys Wanjiru Migwi & another CA Civil Application No Nairobi 121 of 2005 the court held that the counsel on record for the applicant had adopted a casual attitude to the litigation in a land matter which ought to have been handled with the sensitivity and diligence it deserved, which conduct the court could not countenance.
10. In John Nabashon Mwangi v Kenya Finance Bank Ltd (in Liquidation) [2015] eKLR, the court took the view that it was a constitutional right for a party to be heard for substantial justice to be attained and the dismissal of suits should be sparingly used as this drives away the litigant from the seat of judgment and that if reasonable grounds exist, the court should exercise its discretion but at the same time consider the prejudice to be suffered by the defendant upon the reinstatement against the prejudice to be suffered by the applicant if reinstatement is not made.
11. Further, in Utalii Transport Co Ltd & 3 others v NIC Bank & another (2014) eKLR the court took the view that it was the primary duty of the plaintiff to prosecute his claim since he was the one who had dragged the defendants to court.



12. In the case of *Patriotic Guards Ltd v James Kipchirchir Sambu* (2018) eKLR, the court held that the discretion to set aside an order must be exercised judiciously and not capriciously based on certain legal principles or according to the circumstances of each case, within the paramount needed by the court to do real and substantial justice to the parties.
13. Applying the foregoing guiding principles, the applicant is the one who sought to adjourn the matter in order to substitute the 1st defendant. The court acceded to that request and gave the applicant more than 2 ½ years to do so. The applicant abused the said opportunity and failed to appear before the Deputy Registrar for more than six times until the file was forwarded to this court for further orders.
14. To date, the application for citation is said to be still pending over four years after it was filed. The applicant has not explained why this inordinate delay. Similarly, since the 1st defendant passed on in 2013 the suit against him has already abated. The court is also cognizant of the fact that prior to this, a decree of this court was made on September 29, 2003 in HC Misc. No. 201 of 2003 over the same suit land.
15. The applicant has been guilty of indolence. Even when the orders of the court were made in the applicant's favour it appears she did not take them seriously.
16. As much as the court is being asked to be guided by the overriding objective to come to the aid of the applicant, the applicant she is also expected to be vigilant and not to be the cause of this unnecessary delay. The medical report attached does not in any way explain the delay and or the inaction. The mindsets of litigants who think that the court is a parking bay for their matters has to change.
17. As stated in *Utalii (supra)* litigants should therefore stand guided that they must embrace themselves to up the gear for speed and vigilance will now be the trend and that the wheels of justice shall no longer be turning on the trust of a team engine. The court is therefore not persuaded that the applicant deserves its discretion. The application dated July 7, 2022 is hereby dismissed with costs. Save for prayer for leave to come on record granted on January 17, 2023.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 22ND DAY OF FEBRUARY, 2023

In presence of:

C/A: Kananu

Thangicia for applicant

Kiruai for respondent

HON. C.K. NZILI

ELC JUDGE

