



**Equity Bank Kenya Limited v Chief Land Registrar & another; Gathecha (Interested Party)
(Miscellaneous Application 69 of 2017) [2023] KEELC 807 (KLR) (13 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 807 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
MISCELLANEOUS APPLICATION 69 OF 2017
JG KEMEI, J
FEBRUARY 13, 2023**

BETWEEN

EQUITY BANK KENYA LIMITED APPLICANT

AND

CHIEF LAND REGISTRAR 1ST RESPONDENT

ERIC KAGONDU MURATHIMI 2ND RESPONDENT

AND

LYDIAH WANJIKU GATHECHA INTERESTED PARTY

RULING

1. This matter was heard and determined on the November 16, 2018 where the court issued judgment as follows;
 - a. That judgment be and is hereby entered for the applicant and the interested party.
 - b. That an order be and is hereby issued directing the 1st respondent to cancel the encumbrance registered as entry No 131328/2 in relation to the property known as IR No 131328 – LR No 24053/3.
 - c. Each party to bear its own costs.
2. Vide a motion dated the January 21, 2020 the applicant filed an application seeking orders that it be allowed to institute contempt of court proceedings against the Chief Land Registrar, the 1st respondent herein for having breached and interfered with the court orders issued on the November 16, 2018 and that inter alia the 1st respondent be summoned to explain why he should not be arrested and committed to civil jail for the period of 6 months or as deemed for by the court for breaching court orders.



3. The record shows that on the May 6, 2020 the court directed the parties to serve and fix the application for hearing *interpartes* on the June 15, 2020. Further mentions were on October 12, 2020, December 15, 2020, April 26, 2020 and on June 30, 2020 when in the absence of the parties the court directed that since the matter is concluded and the parties have failed to appear in court, the file be filed away among the concluded files.
4. The above order prompted the filing of the motion dated the June 23, 2022 before me seeking orders to vary set aside and or review orders issued by the court on the June 30, 2021.
5. The application is premised on the grounds therein and the supporting affidavit sworn by Esther Wambui, the advocate and counsel acting for the applicant. She stated that on the April 26, 2021 the matter was scheduled for mention however she experienced challenges with the internet connection and was unable to connect with the virtual court and later followed up with the registry through various correspondences seeking to have the matter mentioned before the Judge but the file was missing. That when she finally located the file she fixed the matter for mention on the March 18, 2022. That the failure to attend court was not intentional and the applicant shall be prejudiced with the orders of June 30, 2021 as its application dated the January 21, 2020 remains unheard.
6. On the October 13, 2022 the application was argued orally in court. The applicants counsel relied on the supporting affidavit and all the material on record and urged the court to allow the application.
7. Mr Omondi Counsel for the interested party urged the court to disallow the application as it was unmerited and brought on impulse. That the delay in filing the application was inordinate and such is testament of the disinterest of the applicant in prosecuting the application. Mr Omondi informed the court that he had filed a replying affidavit but i am unable to trace the same on record.
8. Having considered the application, the oral arguments of the parties the key issue is whether the application is merited.
9. Order 12 rule 7 [Civil Procedure Rules](#) the court has discretion to set aside a judgement or ruling upon terms. It states 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.”
10. It is trite that discretion must be exercised by the court judiciously and not capricious or whimsically.
11. I have considered the explanation tendered by the applicant’s counsel that the she experienced challenges with internet connectivity. It is normal for online court sessions to be interrupted for various reasons. I therefore find the reason plausible.
12. On the issue of delay of 12 months that the applicant took to file the application, I have perused through the correspondences by the applicant to the registry requesting for the file to be mentioned before the court and I am satisfied that the applicant took necessary actions to activate the matter. The interested party was clear that the delay has prejudiced his client given the delay in filing the application. I am of the view that any prejudice may be ameliorated by costs.
13. In the upshot the application is allowed but with throw away costs payable by the applicant to the interested party in the sum of Kshs 5,000/-.
14. The application is allowed.
15. Costs shall be in the cause.



DELIVERED, DATED AND SIGNED AT THIKA THIS 13TH DAY OF FEBRUARY, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Wamboi for Plaintiff

1st and 2nd Defendant - Absent

Interested Party - Absent

Court Assistants – Esther / Kevin

