



**Republic v Cabinet Secretary, Ministry of Lands and Settlements & another;  
Kitili (Interested Party); Nthiwa (Exparte Applicant) (Judicial Review  
Application 5 of 2021) [2023] KEELC 21429 (KLR) (9 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21429 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITUI**

**JUDICIAL REVIEW APPLICATION 5 OF 2021**

**LG KIMANI, J**

**NOVEMBER 9, 2023**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF THE LAW REFORM ACT**

**AND**

**IN THE MATTER OF THE LAND ADJUDICATION ACT CAP 284 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE CABINET SECRETARY FOR LANDS**

**AND**

**IN THE MATTER OF THE DISTRICT LAND ADJUDICATION  
AND SETTLEMENT OFFICER KITUI DISTRICT(NOW COUNTY)**

**AND**

**IN THE MATTER OF THE CONSTITUTION  
OF KENYA ARTICLES 23,40,48 & 50 THEREOF**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**CABINET SECRETARY, MINISTRY OF LANDS AND  
SETTLEMENTS ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**MUKILYA KITILI ..... INTERESTED PARTY**



AND

MAINGI MASIKA NTHIWA ..... EXPARTE APPLICANT

### RULING

1. The Ex-parte Applicant filed the Notice of Motion dated 27<sup>th</sup> March 2023 seeking the following orders:
  1. That the orders of 16/3/2023 dismissing the applicant's application herein dated 2/2/2023 be set aside and the application reinstated for hearing on its merit.
  2. That such other or further orders as may meet the ends of justice may be made by the Honourable Court.
  3. That costs be provided for
2. The grounds in support of the application are that the application dated 2/2/23 was dismissed for want of prosecution and non-attendance in court by counsel on 16/3/2023 due to reasons explained in the supporting affidavit. The applicant stated that he would suffer immeasurably and irreparably if the application is not reinstated and heard on merit. He further urged that the mistakes of counsel should not be visited upon the ex-parte applicant and that no prejudice will be occasioned to the Respondents if the application is reinstated as the said application was ex parte.
3. The application is supported by two affidavits sworn on 27<sup>th</sup> March 2023, by Martin M. Muithya Advocate and Boniface Kyenza, a licensed court process server. The advocate stated that the application was initially scheduled for hearing on 22<sup>nd</sup> February 2023 but due to challenges with internet connectivity the application was adjourned to 16<sup>th</sup> March 2023. That on 16<sup>th</sup> March 2023 he was unwell and he called Mr. Daniel Kithome Advocate at about 8.15 A.M. and gave him instructions to hold his brief and prosecute the application. They agreed that copies of documents in the suit would be handed over to Mr. Kithome by one Boniface Kyenza a process server. He prayed that the application be allowed due to the fact that if the same was not allowed it would be the end of the road for his client.
4. Boniface Kyenza on his part stated that on the day of the hearing, counsel for the ex-parte Applicant herein, Mr. Martin M. Muithya called him and informed him that he was unwell and asked him to hand over the filed copy of the affidavit of service to one Mr. Kithome to hold his brief and that he did hand over the document before the court started. When the matter was called out in court, the said advocate was not present to hold brief and therefore the application was dismissed.

#### **The Interested Party's Grounds of Opposition**

5. Counsel for the Interested Party filed Grounds of Opposition dated 16<sup>th</sup> May 2023 opposing the application stating that it is unmeritorious and untenable scandalous, frivolous, vexatious and an abuse of the Court process as the Applicant has been indolent leading to the dismissal of his various applications for reinstatement of the suit. The Applicant has also not equally raised a good reason on why he failed to attend court on material dates.
6. Counsel stated that the case belongs to the Applicant who has a duty to ensure that the right action is taken in his/her case. The Counsel's deliberate non-attendance and mistake cannot be stated to suffice setting aside or review of orders for dismissal to the honorable court. That further the Application is made in bad faith as it is an attempt to violate the Respondent's right to administrative action that is expeditious, lawful, reasonable and procedurally fair.



### **The Ex-parte Applicant's submissions**

7. Counsel for the Ex-parte Applicant submitted that the failure of the counsel to appear for the hearing was not deliberate and only because he had instructed another counsel to appear but had failed to do so.
8. Counsel also noted that the application had been made just after the former had been dismissed, showing that there was no undue delay.
9. It is counsel's position that dismissal is a drastic and draconian step, which should only be arrived at by the Court as a last resort, since that will be the end of the road for the ex-parte applicant, who will never get the chance to be heard on the main application. They relied on the case of Victory Construction Co. vs A.N Duggal(1962)E.A at page 697 and the case of Rawal vs The Mombasa Hardware Ltd.
10. Counsel submits that the subject matter is land, a highly emotive issue and that is the reason why the court should gravitate towards exercising its discretion in favour of reinstating the application rather than dismissing it.

### **Interested Party's submissions.**

11. Submitting on whether the court should set aside its dismissal orders issued on 16/3/2023, the Counsel for the Interested Party stated that the conduct of the Counsel for the Ex-parte Applicant demonstrates that they chose the path of being indolent and that they have not sufficiently explained the delay in prosecuting the latter application and the previously dismissed application.
12. The Interested Party also submits that there is no proof of such allegations that counsel for the ex-parte applicant made arrangements with one Mr. Kithome advocate to hold his brief relying on Section 107 of the Evidence Act.
13. It was also noted that the process server who swore an affidavit stating that he was in court when the matter was called out could have made an effort to have the file placed aside at the time.
14. Counsel relied on the case of Edney Adaka Ismail-vs Equity Bank Ltd(2014)eKLR where the Court held that the Applicant has the duty to ensure the right action is taken in his case as well as the case of Savings and Loans Limited vs Susan Wanjiru Muritu Nairobi HCCS No.397 of 2002 where the court held that a case belongs to a litigant and not her advocate.
15. Counsel also submitted that the applicant has approached the court with unclean hands due to indolence and has failed to serve the other Respondents with his application and pleadings despite court directions given on 4<sup>th</sup> May 2023 as there is no affidavit of service on the same and urged the Court to be guided by the decision in the South African case of Beverage Bottlers(S.A) Ltd in liquidation and Abode Enterprises Pty let(2009)SASC 272. They therefore urge the court to exercise its discretion against the application and dismiss it with costs to the Interested Party.

### **Analysis and Determination**

16. The court record shows that this is not the first time the applicant's application has been dismissed for non-attendance by Counsel. The chronology of events in this matter shows that the same was transferred from the Environment and Land Court at Machakos and was first mentioned before this court on 14<sup>th</sup> December 2021 when the Advocate for the applicant was absent. The matter was mentioned again on 25<sup>th</sup> January 2022, 9<sup>th</sup> February 2022 and on 9<sup>th</sup> March 2022 when the court directed that a Notice to Show Cause be issued to explain why the substantive Chamber Summons should not be dismissed for want of prosecution. The same was set for hearing on 26<sup>th</sup> April 2022.



17. On 26<sup>th</sup> April 2022 in spite of service of the Notice to Show Cause by the court registry, the applicant's Counsel did not attend court and consequently the application dated 2<sup>nd</sup> December 2020 was dismissed.
18. A notice of change of advocates was filed by a new Counsel for the Ex-parte Applicant, Messrs Martin M. Maithya. At the same time on 20<sup>th</sup> November 2022 he filed an application dated 20<sup>th</sup> October 2022 under certificate of urgency seeking to set aside the orders issued on 26<sup>th</sup> April 2022 dismissing the applicants main application and to have the application heard on merit. The said application was not certified urgent but was set for hearing on 26<sup>th</sup> January 2023. On the said date there was no attendance by the applicant and the said application was dismissed.
19. On 7<sup>th</sup> February 2023 the applicant filed an application dated 2<sup>nd</sup> February 2023 under certificate of urgency. The application was not certified urgent but was given a date for inter partes hearing on 22<sup>nd</sup> February 2023. On the said date the court was unable to hear the Counsel for the applicant as he appeared virtually at various times in the course of the day and at 12.10 P.M the application was stood over to 16<sup>th</sup> March 2023.
20. On 16<sup>th</sup> March 2023 when the application came up for hearing Mr. Mwanzia Advocate attended court on behalf of the interested party. Counsel for the applicant did not attend court and for that reason the application dated 2<sup>nd</sup> February 2023 was dismissed. Subsequently Counsel for the applicant filed an application dated 27<sup>th</sup> March 2023 seeking to have the orders of 16<sup>th</sup> March 2023 be set aside and the application dated 2<sup>nd</sup> February be re-instated for hearing on merit. This is the application subject matter of this ruling.
21. Counsel for the Applicant has brought this application pursuant to Order 12 Rule 7, which provides 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.”
22. The Court had earlier dismissed the ex-parte applicant's applications in keeping with Order 12 rule 1 which states that:
 

“If on the day fixed for hearing, after the suit has been called on for hearing outside the court, neither party attends, the court may dismiss the suit.”
23. Counsel for the Ex-parte Applicant explained his position that he had instructed one Mr. Kithome Advocate to hold his brief on the material hearing day since he had been unwell but the said advocate failed to do as instructed. He urged the Court that the mistakes of an advocate should not be visited upon the ex-parte applicant and urged the court to give his client the chance to be heard.
24. However, counsel for the Interested Party relied on the case of Savings and Loans Limited v Susan Wanjiru Muritu Nairobi (Milimani) HCCS No. 397 of 2002 which was quoted by Justice Okwany in *International Air Transport Association & another v Roskar Travel Limited & 3 others (Civil Case E457 of 2020)* [2022] KEHC 200 (KLR) (Commercial and Tax) (17 March 2022) (Ruling) as she held as follows:
 

“In Savings and Loans Limited v Susan Wanjiru Muritu Nairobi (Milimani) HCCS No. 397 of 2002 Kimaru, J expressed himself as follows: “Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates failure to attend Court on the date the application was fixed for hearing, it is trite that a case belongs



to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour is an indictment on the defendant. She had been indolent and taking into account her last conduct in the prosecution of the application to set aside the default judgment that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant. (emphasis added)"

I hold similar view that it is not enough for a party to simply blame an advocate for a mistake but the party must show tangible steps taken by him in following up his matter."

25. In the case of *Utalii Transport Co. Ltd and 3 Others -vs- N.I.C. Bank and Another (2014)* eKLR, the court held that:

"It is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court."

It is also the duty of the parties to assist the court to adjudicate on the matters brought before it expeditiously as was held in *Gideon Sitelu Konchella vs Daima Bank Limited (2013)* eKLR where the court while citing the case of *Mobil Kitale Service Limited vs Mobil Oil Kenya Limited*, held that:-

"It is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice by delay would be a thing of the past. Justice would be better served if we dispose of matters expeditiously ....the overriding objection of this Act and Rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act."

26. The court has set out the chronology of events that clearly demonstrates laxity by the applicant in prosecution of the suit. The events also show that even if this Court were to exercise its discretion to set aside its orders given on 16<sup>th</sup> March 2023 and reinstate the application dated 2<sup>nd</sup> February 2023, the effect would be that the substantive chamber summons dated 26<sup>th</sup> April 2020 and the application dated 20<sup>th</sup> October 2022 will still remain dismissed for non-attendance. The said act will amount to acting in vain.
27. The law regarding exercise of the Court's discretion is now settled. From the holding of Judge Harris (as he then was), where he had this say in the case of *Shah vs Mbogo [1967] EA 116 and 123B*:-

"The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice."

28. In the courts view the reasons given for non-attendance on the hearing date are not sufficient to warrant the exercise of the discretion of this court. The counsel instructed to attend the hearing on behalf of Counsel for the applicant did not swear an affidavit to confirm what the two deponents in support



of the application stated. Counsel for the applicant and the applicant have portrayed themselves as persons not keen to prosecute the suit but are an instrumental in delay and obstruction of the course of justice.

29. It must be remembered that justice cuts both ways and the other parties to this suit are entitled to an end to litigation.
30. From the foregoing the court finds that the application dated 27<sup>th</sup> March 2023 lacks merit and the same is hereby dismissed with costs to the interested party.

**DELIVERED, DATED AND SIGNED AT KITUI THIS 9<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**HON. L. G. KIMANI**

**ENVIRONMENT AND LAND COURT JUDGE - KITUI**

**Ruling read virtually and in open court in the presence of-**

Musyoki C/A

Maingi h/b for Mutia for the Interested Party

N/A for the Applicant.

