



Mutyaene v Miriti & 4 others; Mutura & another (Interested Parties) (Environment & Land Case E002 of 2020) [2023] KEELC 16358 (KLR) (22 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16358 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E002 OF 2020
CK YANO, J
MARCH 22, 2023**

BETWEEN

REUBEN KIOKO MUTYAENE PLAINTIFF

AND

HELLEN KIUNGA MIRITI 1ST DEFENDANT

NAHASHON KOOME 2ND DEFENDANT

THE LAND REGISTRAR, MERU CENTRAL 3RD DEFENDANT

THE LAND SURVEYOR MERU COUNTY 4TH DEFENDANT

THE HON. ATTORNEY GENERAL 5TH DEFENDANT

AND

NTALALA ERIC MUTURA INTERESTED PARTY

MT. KENYA COMMUNITY BASED ASSOCIATION (CBO) INTERESTED PARTY

RULING

1. The application for determination is the notice of motion dated October 5, 2022 in which the plaintiff/ applicant is mainly seeking to set aside the orders made on October 3, 2022 dismissing the applicant's application dated June 15, 2022 for non -attendance and have the application reinstated for hearing and determination on merit.
2. The application is stated to be brought under section 3, 13 and 19 of the *Environment and Land Court Act*, rules 1 and 20 of the *Practice Directions on proceedings of the Environment and Land Court*, section 1A, 1B, 3, 3A, 22, 27, 80, 91, 95 and 100 of the *Civil Procedure Act*, order 12 rule 7, order 42 rule 6,



- order 51 rules 14(3) and 15 of the Civil Procedure Rules, articles 22, 23, 25 (c), 27 (1) (2) 35, 40, 43, 46, 47, 48, 50(1) 159(2) and 259 of the Constitution of Kenya and all other enabling provisions of the law.
3. The grounds upon which the application is predicated are inter alia that the application dated June 15, 2022 was slated for inter parties hearing on October 3, 2022 and the 1st and 2nd respondents had been duly served. That as from 9.00 a.m. on the material day while at his residence in Nakuru, the applicant tried unsuccessfully to log into the Microsoft teams virtual links of the court but was kept waiting in the lobby and by the time he was admitted to the meeting, the court was at the tail end handling the last matter in the day's cause list and the session was unfortunately shut down before the applicant could address the court.
 4. The applicant states that he wrote to the court to be advised of the directions in the matter and he read from the e filing portal "public information Kiosk" that the application was dismissed. The applicant avers that his failure to attend and prosecute the application was not occasioned by him, but was out of his control and not of his making. The applicant states that he is ready to proceed with the inter parties hearing of the application either vivo voce and or by way of written submissions if the court so directed.
 5. The application is supported by an affidavit sworn by the applicant on October 5, 2022 and the annexures thereto and whose deposition basically explains out the grounds upon which the application is predicated among others.
 6. In opposing the application, the 1st and 2nd respondent filed a replying affidavit on November 3, 2022 sworn by Hellen Kiunga Miriti, the 1st respondent herein. Briefly, the 1st and 2nd respondents contend *inter alia*, that the applicant has not demonstrated any persuading reason why the dismissed application should be reinstated. It is stated that the applicant is lying before this honourable court on issues which the court has already pronounced itself over and rendered itself functus officio. They prayed that the application be dismissed with costs.
 7. The application was canvassed by way of written submissions. The applicant filed his submissions on December 1, 2022 while the 1st and 2nd respondents filed theirs on December 14, 2022.
 8. I have considered the application, the response as well as the submissions filed. The issue for determination is whether the court should set aside its orders of October 3, 2022 dismissing the applicant's application dated June 15, 2022 and have the same reinstated for hearing.
 9. The record shows that this matter was listed for the hearing of the application dated June 15, 2022 on October 3, 2022. When the matter came up virtually via Microsoft teams before this court, Mr Kirimi advocate for the 1st and 2nd respondents appeared in court but the applicant who is acting in person was absent as well as the other respondents. Pursuant to an application made by Mr Kirimi the court dismissed the application for non -attendance.
 10. Order 12 rule 3 of the Civil Procedure Rules allows the court to dismiss a suit for non -attendance while rule 7 allows an aggrieved party to set aside that order and reinstate the suit or application. The reason given by the applicant for his non-attendance on October 3, 2022 is that he was kept waiting in the virtual lobby and by the time he was admitted, the matter had already been dismissed.
 11. From the material before court, I am satisfied that the failure to attend court was not intentional or deliberate on the part of the applicant. In my view, the failure to attend court within time has sufficiently been explained and the same is excusable. Moreover, the application herein was filed expeditiously after only about four days and therefore there was no undue delay in bringing the application. Hence the applicant ought not be shut out from exercising his statutory right to be heard on the matter on merit.



12. As already stated, order 12 rule 7 of the *Civil Procedure Rules* allows a court to set aside an order of dismissal and reinstate the matter for hearing. Therefore 1st and 2nd respondent's argument that the court is *functus officio* cannot stand.
13. Apart from the above, I think the applicant has convoluted the other prayers with the application for reinstatement of the dismissed application. I think it would have been prudent for the applicant to wait for the determination of the application seeking to set aside the orders of dismissal and bring a separate application for the other prayers. As it is, the application is no doubt convoluted. Accordingly, I decline to make a determination of prayers 4, 5 and 6 of the application at this stage.
14. Given the above, I am satisfied that prayers 2 and 3 of the notice of motion dated October 5, 2022 are merited. The application is allowed in terms of prayers 2 and 3. The order made on October 3, 2022 dismissing the application dated June 15, 2022 is set aside and the application is reinstated for hearing on merit.
15. Costs shall be in the cause.
16. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 22ND DAY OF MARCH 2023

C.K YANO

JUDGE

