



**Kibukwoi v Mugo (Environment & Land Case 298 of 2017)
[2023] KEELC 16438 (KLR) (21 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16438 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 298 OF 2017
FM NJOROGE, J
MARCH 21, 2023**

BETWEEN

JOSHUA KIPRONO KIBUKWOI PLAINTIFF

AND

MARY WANJIKU MUGO DEFENDANT

RULING

Application

1. This is a ruling in respect of the Plaintiff's Notice of Motion dated February 22, 2023 which seeks the following orders:-
 - a. Spent.
 - b. That this Honourable Court be pleased to vary and/or set aside the orders of February 22, 2023 dismissing the plaintiff's suit for want of prosecution and/or non-attendance.
 - c. That this Honourable court be pleased to reinstate the suit herein for hearing and determination on merit.
 - d. That the costs of this application be provided for.

Response

2. The application is supported by an affidavit sworn by Cheloti Lucy Nekesa the Plaintiff's Advocate herein. She deposed that the matter came up for hearing on February 22, 2023 and was first mentioned virtually; that they fixed time allocation for the matter to proceed at 10:30am that day; that together with the Plaintiff they proceeded to open court only to get lost on the way; that they managed to reach the court premises at 10:35am only to meet the Defendant's walking out; that the Defendant's counsel informed her that the suit had been dismissed; that the Defendant's counsel refused to indulge her after



explaining her predicament; that the delay in getting into the court premises was not inordinate as it was only five minutes after the scheduled time; she urged the court to allow the instant application as the Defendant shall not be prejudiced in any way.

3. The Defendant filed her Replying Affidavit dated March 3, 2023 in response to the application. She deposed that as advised by her advocates the hearing date for February 22, 2023 was taken by consent of both advocates on November 14, 2022.
4. She stated that as per the court traditions courts usually start at 8:30am and thereafter parties proceed to open court for hearing. She further deposed that the matter was given time allocation for hearing at 10:30am. She deposed that it is not the first time this suit has been dismissed for want of prosecution. The defendant further deposed that vide a ruling dated November 10, 2021 this court reinstated this suit. She deposed that the Plaintiff has taken minimum efforts in fixing the matter for hearing from the time of filing to the time it was dismissed. She further deposed that the Plaintiff is not keen on prosecuting the suit and thus he will suffer no prejudice if the suit remains dismissed as it is not the first time.
5. The Defendant stated that the orders sought are discretionary and a party seeking the same ought to approach the court with clean hands which is not the case with the Plaintiff herein. She urged the court to dismiss the instant application with costs.

Submissions

6. The Plaintiff filed his submissions dated March 8, 2023 on the same day where he relied on numerous cases including the case of *Shah V Mbogo* (1979) EA 116 as quoted with approval in the case of *John Mukuba Mburu v Charles Mwenga Mburu* [2019] eKLR and *Racheal Njango Mwangi (Suing as Personal Representative of the Estate of Mwangi Kabaiku) v Hannah Wanjiru Kiniti & another* [2021] eKLR.
7. He submitted that for the court to exercise its wide discretion to set aside a default judgment or an order for dismissal of a suit for non-attendance, the applicant ought to meet certain conditions. The Plaintiff argued that they mentioned the matter virtually where the same was fixed for hearing at 10:30am. That they took time to locate the physical court as the matter has always been handled virtually there before.
8. He reiterated the contents of his supporting affidavit to the application and submitted that the explanation given by his counsel is justifiable and meets the set conditions for reinstatement of a suit for non-attendance. He further submitted that the present application was filed timeously on the same day the suit was dismissed hence he has demonstrated that he still has interest in prosecuting his matter.
9. In conclusion, he submitted that the Defendant has not shown any prejudice he would suffer that cannot be adequately be remedied by costs. He urged this court to therefore allow the instant application.
10. The Defendant on the other hand filed her submissions dated March 16, 2023 on March 17, 2023. She gave a brief background of the application and reiterated the contents of her Replying Affidavit dated March 3, 2023. She relied on Order 12 rule 3 (1) of the *Civil Procedure Rules* and submitted that the Plaintiff's counsel had ample time to come to court and incase they were not sure of its location they still had enough time to trace it. She submitted that there is no reasonable cause why the Plaintiff or his counsel was not present in court on time.
11. She further relied on the Court of Appeal Case No. 80 of 2007 *Rajesh Rughani v Fifty Investments Limited & Another* and submitted that the instant application is without merit and should be dismissed with costs. She argued that the rights of parties have to be balanced in both ways and the



Plaintiff's right cannot be superior to that of the Defendant. She also argued that if it was indeed true that the Plaintiff and his counsel had gotten lost, nothing barred them from contacting the Defendant's counsel seeking for some indulgence as they found their way to court.

12. In conclusion she submitted that the Plaintiff's explanation is an afterthought and urged the court to find as much.

Analysis and Determination

13. This court has considered the Application, and the issue for determination is whether this court should reinstate the present suit.

14. Order 17 Rule 2 provides as follows:-

- “2. In any suit in which no application has been made or step taken by either
(1) party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.
(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.
(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.
(4) The court may dismiss the suit for non-compliance with any direction given under this Order.”

15. Order 12 Rule 7 of the [Civil Procedure Rules](#) provides that where judgment has been entered or the suit has been dismissed, the court on application may set aside or vary the Judgment. The power to set aside ex parte orders are discretionary, and the court must use its discretion to come to a conclusion while also ensuring that justice has been done.

16. In the instant case, the Plaintiff contends that the delay in getting into the court premises was not inordinate as it was only five minutes after the scheduled time. He argued that they took time to locate the physical court as the matter has always been handled virtually.

17. The Defendant on the other hand submitted that the Plaintiff's counsel had ample time to come to court and in case they were not sure of its location they still had enough time to trace it. She added that the Plaintiff has taken minimum efforts in fixing the matter for hearing from the time of filing to the time it was dismissed.

18. This court has considered the reasons afforded by the Plaintiff and the stage of the proceedings. The delay in attending court has been explained by the applicant.

19. Furthermore, the instant application was timely filed and this court shall exercise its discretion and order the matter to be reinstated.

20. In view of the foregoing, the application dated February 22, 2023 has merit and the dismissal order issued on the same day is hereby set aside.

21. For the further progress of this case I direct that the parties shall meet at the registry within 7 days from the date of this order and fix a hearing date by consent which shall not be beyond 90 days from the date of this order. The plaintiff shall invite the defendant and in default of attendance the hearing date shall be granted ex-parte.



22. In addition, the defendant being innocent in the whole scenario, I hereby award her costs of the present application and of the attendance on February 22, 2023 which I assess in the sum of Kshs 20,000/= (Twenty thousand) which shall be paid in 7 days from today in default of which also, the orders setting aside the dismissal shall stand vacated automatically. The matter shall however be mentioned on May 18, 2023 to ascertain compliance.
23. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 21ST DAY OF MARCH 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

