



**Kamuri v Kihara & another (Suing for and on behalf of Shangilia
Baba na Mama Self Help Group) (Environment and Land Appeal
E027 of 2021) [2023] KEELC 17847 (KLR) (29 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17847 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E027 OF 2021**

A NYUKURI, J

MAY 29, 2023

BETWEEN

KIHURIA KAMURI APPELLANT

AND

SAMUEL N KIHARA 1ST RESPONDENT

JANE NDUATA MWANGI 2ND RESPONDENT

**SUING FOR AND ON BEHALF OF SHANGILIA BABA NA MAMA SELF HELP
GROUP**

(Being an appeal against the judgment of Hon. C. Ocharo SPM, delivered and dated 3rd June, 2021 in the Chief Magistrates Court at Machakos Law Courts in Civil Suit No. 86 of 2018)

RULING

Introduction

1. Before court is a Notice of Motion dated December 6, 2021 filed by the Appellant seeking the following orders;
 - a. Spent.
 - b. That this Honourable Court be pleased to reinstate the amended Notice of Motion dated September 6, 2021 and vacate/set aside the orders issued by the court on November 24, 2021 for the interest of justice.
 - c. That costs be in the cause.
2. The application is supported by the affidavit sworn on December 6, 2021 by Kihuria Kamuri. The Applicant's case is that when the amended application dated September 6, 2021 came up for hearing,



counsel for the Applicant was unable to log into the court's link leading to his unattendance and the dismissal of the application for want of prosecution. That he craves to be heard on merit.

3. The application was opposed. Andrew Nduva Kitonga, counsel for the Respondents filed a replying affidavit sworn on February 9, 2021. He stated that on September 1, 2021, the Appellant's counsel took a hearing date for the hearing of the application dated December 6, 2021 and served the hearing notice thereof on the Respondent's counsel on the same day for hearing on November 24, 2021.
4. It was his case that on November 24, 2021, he logged onto the court's link for the virtual proceedings without any network challenge and that the Appellant's counsel was not in attendance. He faulted the Appellant's counsel stating that the latter did not explain the alleged failure of the court's link or failure to reach the court registry. His view was that the application was an afterthought and that the Applicant had not come to court with clean hands.
5. The application was disposed by way of written submissions. On record are submissions filed by the Applicant dated March 19, 2022 and the submissions filed by the Respondents dated September 27, 2022.

Submissions

6. Counsel for the Applicant referred to the case of *Joel Pheneas Nyaga & Another v. Aloysius Nyaga Kanyua & Another* [2019] eKLR to argue that before a matter is dismissed for want of prosecution, parties must be served so that they have opportunity to show cause why the suit should not be dismissed. Counsel submitted that this procedure was not followed. Counsel argued that the Applicant has a suit that raises triable issues and dismissal of his suit exposes him to dispossession of his property being Land Registration No. Mavoko Town Block 2/1195.
7. Counsel referred to Articles 159 and 50 of the *Constitution* to argue that it is a fundamental principle of justice that a party ought to be heard on merit. Counsel contended that this court has the discretion to set aside an ex parte order in the interest of justice. Reliance was placed on the case of *Multiple Hauliers v. Enock Musundi & 2 Others* [2021] eKLR, for the proposition that nothing limits the court's inherent power to make orders necessary for the ends of justice.
8. On their part, counsel for the Respondent argued that the Appellant in the suit is called Kihuria Kamuri but the name in the supporting affidavit is Hikuria Kamuri and that therefore the deponent is a stranger to these proceedings. Further, counsel submitted that the deposition that the link of the court failed when counsel for the Appellant tried to log onto it, were matters not within the knowledge of the Appellant but his counsel and that the counsel's name has not been disclosed to court hence the same is hearsay. Reliance was placed on the case of *Osbe Amba Toge v Hirbe Amba Toge* Marsabit Succession Cause No E001 of 2021 for the proposition that an affidavit sworn by a person who did not have personal knowledge of the facts is hearsay. On the same issue, counsel also referred the court to the case of *Mwalimu David v Teachers Service Commission* Kitui High Court Civil Appeal No E031 of 2021.

Analysis and Determination

9. I have carefully considered the application, the replying affidavit and submissions. The sole issue that arise for determination is whether there is good cause to set aside the orders of November 24, 2021.



10. The law governing the setting aside of *ex parte* orders is provided for in Order 12 Rule 7 of the [Civil Procedure Rules 2010](#), which 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.

11. The provision in Order 12 Rule 7 of the Civil Procedure Rules is amplified by Order 51 Rule 15 which states that the court has jurisdiction to set aside *ex parte* orders.
12. Where sufficient cause is shown by an Applicant seeking setting aside of *ex parte* orders, the court may grant the order. But what constitutes “sufficient cause” depends on the circumstances of each case as no specific definitions can be given to “sufficient cause”. (See *Philip Onyom, Capt v. Catherine Nyero Owota* Civil Appeal No. 14 of 2001 [2003] UGSC 16 (20th March 2003).
13. In the case of *Registered Trustees of the Archdiocese of Dar es Salaam v The Chairman Banju Village Government & Others* Civil Appeal No 147 of 2006, the Court of Appeal of Tanzania held as follows;

It is difficult to attempt to define the meaning of the words “sufficient cause”. It is generally accepted however that the words would receive a liberal construction in order to advance substantial justice when no negligence, or inaction or want of bona fide, is imputable to the Appellant.

14. The court should be concerned with facilitating substantive justice in a manner that is efficient, just, affordable and expedient as Article 159 of the [Constitution](#), Sections 1A and 1B of the [Civil Procedure Act](#) and Section 3 of the [Environment and Land Court Act](#), dictate.
15. In the instant matter, this matter came up on November 24, 2021 on the court’s virtual platform for the hearing of the Appellant’s amended application dated September 6, 2021. As counsel for the Appellant was absent, the application was dismissed for want of prosecution. Counsel has explained that he was unable to log into the court’s link. He filed the application herein on December 8, 2021 which was two weeks after the *ex parte* order. While the court is keen to ensure access to justice by use of technology, it is common knowledge that at times, parties may face challenges in logging onto the court’s virtual platform. There is no reason to doubt the Appellant’s explanation that his counsel was unable to log onto the court’s link. I do not agree with the Respondent’s argument that the Applicant cannot have personal knowledge of the facts herein, as the case belongs to the Applicant and his counsel is merely an agent and therefore what the agent does are matters which are deemed to be within the principal’s personal knowledge, and therefore his affidavit in his own matter cannot be termed as hearsay.
16. In the premises, the application dated December 6, 2021 is merited and the same is allowed as prayed. Consequently, the orders made herein on November 24, 2021 are hereby set aside and the amended Notice of Motion dated September 6, 2021 reinstated for interpartes hearing. I make no order as to costs.
17. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 29TH DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;



Mr. Wakiaga for Applicant

Mr. Kitonga for Respondents

Ms Josephine – Court Assistant

