



Gitonga & another v Athi Water Services Board & another (Environment & Land Case 452 of 2016) [2023] KEELC 17658 (KLR) (25 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17658 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 452 OF 2016**

MD MWANGI, J

MAY 25, 2023

**(IN RESPECT OF THE PLAINTIFFS' APPLICATION DATED 9TH
FEBRUARY 2023 SEEKING TO SET ASIDE THE DISMISSAL ORDER
MADE ON 20TH JUNE 2022 AND THE REINSTATEMENT OF THE SUIT.)**

BETWEEN

LUCY NYAMBURA GITONGA 1ST PLAINTIFF

MARY NJOKI GITONGA 2ND PLAINTIFF

AND

ATHI WATER SERVICES BOARD 1ST DEFENDANT

GIBB AFRICA LIMITED 2ND DEFENDANT

RULING

Background

1. The main suit herein was set down for hearing on 20th June 2022. The Plaintiffs' Advocate however, sought to adjourn the case on the basis that his client, the 1st Plaintiff, who was to testify on behalf of both Plaintiffs was sick.
2. The application to adjourn the case was vehemently opposed by the Advocate for the 2nd Defendant who pointed out that a similar application had previously been made on behalf of the Plaintiffs when the matter had come up for hearing. In any event, no evidence had been adduced before the court to prove that the 1st Plaintiff was sick. The Advocate for the 2nd Defendant therefore prayed for the dismissal of the Plaintiff's case.
3. The Plaintiffs' Advocate in rejoinder stated that he had hoped that his client would have recovered by then. He asserted that he had always been ready to proceed but for his client's sickness. He expressed his willingness to provide evidence of his client's sickness if so required.



4. The court then directed the Plaintiffs' Advocate to avail the evidence of his client's sickness at 11.45 a.m on the same day. He did not oblige. He told the court that he had encountered challenges reaching his client and had therefore been unable to obtain the medical evidence. It was at that juncture that the Plaintiff's Advocate informed the court that his client was actually out of the country, in the USA.
5. The court in dismissing the Plaintiff's case observed that the Plaintiffs had actually been granted a last adjournment. Further, the court noted that no evidence had been provided to prove the 1st Plaintiff's sickness.
6. Over 7 months after the dismissal of the suit, the Plaintiffs made the application before the court seeking to set aside the dismissal order and reinstate the suit. The grounds upon which the application is based are on the face of the application, mainly that: -
 - a. The 1st Plaintiff who was the Plaintiffs' sole witness was in the USA when the case came up for hearing.
 - b. The 2nd Plaintiff had donated authority to the 1st Plaintiff to testify on her behalf and could not therefore have testified on the material date.
 - c. The Plaintiffs are desirous of having their case determined on its merits.
 - d. The setting aside of the dismissal order and reinstatement of the suit will not prejudice the Defendants.
 - e. In the interest of justice and fairness, it is appropriate that the suit be reinstated.
 - f. The court has wide discretion to grant the orders sought.
7. In her supporting affidavit, the 1st Plaintiff deposes that she came back to Kenya from the USA on 7th December 2022. However, she explains that, earlier in the month of April 2021 her accounts had been hacked forcing her to change her addresses including her mobile phone number. She unfortunately did not furnish her Advocate with her new mobile number hence the breakdown in communication between her and the Advocate.
8. The 1st Plaintiff further stated that she only learnt about the dismissal of her case on 6th February 2023 upon visiting her advocate to inquire about the progress of the case. She pleads with the court to allow the application further expressing her willingness to comply with any terms and conditions that the court may impose for reinstatement of the suit. She asserts that she is ready and willing to have the suit heard forthwith and determined on its merits.
9. The Plaintiffs' application was opposed by the 2nd Defendant, by way of the replying affidavit sworn on 6th March 2023. The 2nd Defendant's position was that the application was unmerited and ought to be dismissed with costs. The 1st Defendant did not file a response to the Plaintiffs' application.

Court's Directions.

10. The court's directions were that the application be canvassed by way of oral submissions. The parties through their advocates submitted orally before the court on 24th April 2023. The court allowed the 1st Defendant's Advocate to submit on points of law only since the 1st Defendant had not filed a response to the application. The submissions form part of the record of this court.



Issues for Determination.

11. The only issue for determination is whether the Plaintiffs have established justifiable cause for the setting aside of the dismissal order and reinstatement of the suit.

Analysis and Determination.

12. It not in doubt that the court has the discretion to set aside an order dismissing a suit for non-attendance and reinstating the suit under the provisions of Order 12 of the Civil Procedure Rules, 2010. However, the court must only do so on such terms as are just.
13. The Advocate for the 1st Defendant, Mr. Odoyo, rightly pointed out the onerous task before the court of balancing the interests of all the parties in an application of this nature. Both the Plaintiffs and the Defendants are entitled to justice. Justice must cut both ways. Article 50 of the Constitution must therefore not be misinterpreted as being applicable to the Plaintiffs only. The Defendants too have a right to a fair hearing.
14. Article 159 of the Constitution obliges the court to do justice to all and without delay. Sections 1A and 1B of the Civil Procedure Act to enjoin the court to facilitate the just, expeditious, proportionate and affordable resolution of disputes. Section 3 of the Environment and Land Court Act reiterates that obligation of the court in similar wordings. The court shall therefore in exercising its powers under the Act or interpreting any of its provisions seek to give effect to the overriding objective.
15. The main concern of the court in exercising its discretion is to avoid an injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but not to obstruct or delay the course of justice {*Shah vs Mbogo* (1967) E.A 116}.
16. In the case of *Simion Waitim Kimani & 3 others vs Equity Building Society* (2010) eKLR, Koome J (as she then was) held that the courts have discretion generally to reinstate a suit which has been dismissed for non-attendance. However, in all matters involving the exercise of the courts' discretion, it must be exercised judiciously based on facts and the law. Further that, the party seeking to reinstate the suit must also demonstrate good faith and the application should be brought to court without unreasonable delay.
17. Having considered the Plaintiffs' application, the explanations offered and the argument by all sides, the court considers it just and appropriate to allow the application, which I hereby do albeit conditionally; the condition being that the Plaintiffs pay throwaway costs of Kshs. 20,000/- to each of the Defendants in the next 30 days from the date of this ruling. A hearing date shall be given by the court for the hearing of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF MAY 2023.

M.D MWANGI

JUDGE

In the virtual presence of:

Mr. Manyara for the Plaintiffs.

Mr. Kimanzi h/b for Mr. Kihara for the 2nd Defendant.

N/A for the 1st Defendant



Court Assistant – Yvette.

M.D. MWANGI

JUDGE

