



**Ngure v Ndungu & another (Environment & Land Case  
E032 of 2022) [2023] KEELC 17648 (KLR) (22 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17648 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE E032 OF 2022**

**FM NJOROGE, J**

**MAY 22, 2023**

**BETWEEN**

**PETER NDUNGU NGURE ..... PLAINTIFF**

**AND**

**FIDELIS MUTHONI NDUNGU ..... 1<sup>ST</sup> DEFENDANT**

**PALSUNTER CAPITAL LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of the plaintiff's Notice of Motion application dated 10/03/2023 which is expressed to be brought under Article 159(2) of *the Constitution* of Kenya, Order 12 Rule 7, Order 51 Rule 1 of the Civil Procedure Rules, Section 1A and 3 A of the *Civil Procedure Act* which sought the following prayers:
  - a. Spent
  - b. That this honorable court be pleased to review, set aside and/or vary the orders made on the 7/03/2023 dismissing the application dated 31/01/2023 for want of prosecution.
  - c. That upon granting prayer 2 of the application, this honorable court be pleased to reinstate the said application for hearing and determination.
  - d. That the costs of this application be provided for.
2. The application is supported by the affidavit of Peter Chege counsel for the plaintiff sworn on 10/03/2023. The grounds on the face of the application and the supporting affidavit are that on 01/02/2023 counsel for the plaintiff filed the application dated 31/01/2023 seeking to reinstate the suit. The suit was dismissed on 25/01/2023. The said application was set down for hearing on 7/03/2023. On 07/03/2023 he attempted to log into the virtual court but experienced some technical and network problems and so he had to log out and log in with a different gadget; that by the time he



logged in, the application had already been dismissed for want of prosecution; that his absence was not deliberate but was due reasons beyond his control; that the application dated 31/01/2023 is crucial as it seeks that the plaintiff's reinstated; that the merits of the said application can only be addressed after it has been reinstated; that the plaintiff is ready and willing to prosecute the matter to its logical conclusion and that it is in the interest of justice that the application be allowed as prayed.

3. In response to the application the 2<sup>nd</sup> defendant filed a replying affidavit sworn by Samuel Macharia Kimani its director on 31/03/2023. He deposed that the plaintiff herein filed the present suit on 24/06/2022 together with an application filed under certificate of urgency; that the court granted an interim injunction and the 2<sup>nd</sup> defendant filed its application dated 04/10/2022 seeking to lift the said injunction; that both applications were heard together and the court in its ruling delivered on 22/11/2022 ordered that the plaintiff ensures service of summons on all the defendants within seven days; that the suit was mentioned on 25/01/2023 to confirm compliance but neither the plaintiff nor his advocates were present in court on that day and the suit was therefore struck out on the same date; that the plaintiff then filed the application dated 31/01/2023 seeking to reinstate the suit; that it was upon perusal of the court file that the 2<sup>nd</sup> defendant discovered that the said application was scheduled for inter partes hearing on 7/03/2023; that on the said date neither the plaintiff nor his advocate were present in court; that counsel for the 2<sup>nd</sup> defendant brought to the court's attention of the failure by the plaintiff and his advocates to prosecute motions; that the plaintiff has always been in disobedience and in contempt of the orders of the court to procure the attendance of the 1<sup>st</sup> defendant; that the application dated 31/01/2023 was then dismissed; that the plaintiff has now filed the present application seeking for the reinstatement of the application dated 31/01/2023; that counsel for the plaintiff alleges that the application was dismissed for his non-attendance which is not true; that the application was dismissed for failure to comply with the orders issued on 07/03/2023; that the Civil Procedure Act and the rules do not provide a remedy for reinstatement of applications; that the plaintiff has delayed and distracted the course of justice and has wasted precious judicial time; that since the suit was struck out and not dismissed for non-attendance, the plaintiff cannot make an application for reinstatement of the suit and so both applications should be dismissed with costs.
4. The application was canvassed by way of written submissions. The plaintiff filed his submissions dated 4/04/2023 on the same date while the 2<sup>nd</sup> defendant also filed its submissions dated 4/04/2023 on the same date.
5. The plaintiff in his submissions identified the following issues for determination:
  - a. Whether there is a reasonable excuse why the applicant's counsel did not attend court;
  - b. If the orders to reinstate the application are not issued would there be prejudice on the part of the applicant?
  - c. In any event what are the appropriate orders to be granted by this court?
6. On the first issue the plaintiff submitted that the court needs to reinstate his application for hearing on merit so that he is not condemned unheard as he had filed the present application timeously. He further submits that if the orders sought are not granted, he will suffer great prejudice. He relied on Article 159 of the Constitution of Kenya and the case of Joseph Kinyua vs G.O Ombach [2019] eKLR in support of his arguments. The plaintiff reiterated the contents of his supporting affidavit and relied on the cases of Dennis Odhiambo v Elius Njoka & another [2021], Esther Wamaitha vs Safaricom (no citation given) in further support of his arguments.



7. On the second issue, the plaintiff relied on the case of Philip Chemuolo & another vs Augustine Kubende 1982-88 KLR 103 and submitted that the loss to be sustained by the plaintiff will be insurmountable and cannot be replaced by an award of damages.
8. On the third issue, the plaintiff relied on the cases of Solomon Kitundu & 2 Others vs Park Towers Ltd & 2 Others (citation not given), Anaj Warehousing vs National Bank of Kenya [2006] eKLR, Enock Kirao Muhangi vs Hamid Abdalla Mbarak [2013] among other cases and reiterated that the issues between the parties herein have not been dealt on merit and so the application should be reinstated for hearing on merits.
9. The 2<sup>nd</sup> defendant identified the following issues for determination:
  - a. Whether the suit was properly struck out;
  - b. Whether the court is functus officio;
  - c. Whether the court can sit on its own appeal;
  - d. Whether the court can set aside its judgement;
  - e. Whether mistake of an advocate should be overlooked.
10. On the first issue, the 2<sup>nd</sup> defendant submitted that the court struck out the plaintiff's suit under Order 2 Rule 15 of the Civil Procedure Rules. It then relied on the case of Gladys Jepkosgei Boss vs Star Publication Limited [2021] eKLR and submitted that the court rightfully struck out the suit because it had legally acquired the suit property in the year 2020. The 2<sup>nd</sup> defendant then went into the merits and demerits of the plaintiff's suit and submitted that the plaintiff's suit was unfounded. It relied on the cases of Ephraim Miano Thamani vs Nancy Wanjiru Wangai & 2 Others [2022] eKLR, Satya Bhama Gandhi vs Director of Public Prosecutions & 3 Others [2018] eKLR in support of its arguments.
11. On the second issue, the 2<sup>nd</sup> defendant reiterated the contents of its replying affidavit and stated that the suit was struck out on 25/01/2023 and even if the suit had been dismissed for non-attendance, this court would still be functus officio. The 2<sup>nd</sup> defendant relied on the cases of Njue Ngai v Ephantus Njiru Ngai & another [2016] eKLR, David Bundi vs Timothy Mwenda Muthee [2022] eKLR, Raila Odinga & 2 Others vs Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR among other cases in support of its arguments.
12. On the third issue the 2<sup>nd</sup> Defendant submitted that since the court is functus officio, it cannot sit on appeal on its own orders. It relied on the cases of Okello & another vs Osonga [1988] eKLR, Johnson Ondimu Mogusu v Elkana Moenga Ondieki & 2 Others [2020] eKLR among other cases in support of its arguments.
13. On the fourth issue, the 2<sup>nd</sup> defendant submitted that the court cannot set aside its own judgement and relied on Order 12 Rule 7 of the Civil Procedure Rules and the case of Josphat Oginda Sasia versus Wycliffe Wabwile Kiiya [2022] eKLR in support of its arguments.
14. On the fifth issue, the 2<sup>nd</sup> defendant submitted that the plaintiff has repeatedly ignored the orders of the court which mistakes it implores this court not to forgive. It relied on the cases of Charles Omwata Omwoyo vs African Highlands & Produce Co. Ltd [2002] eKLR and Teacher Service Commission v Ex parte Patrick M. Njuguna [2013] eKLR among other cases in support of its arguments. The 2<sup>nd</sup> defendant concluded its submissions and sought that the plaintiff's application be dismissed.



## Analysis and determination

15. After considering the application, replying affidavit and the submissions, the only issue that arises for determination is whether the court should review or set aside its orders made on 7/03/2023 and reinstate the application dated 31/01/2023 for hearing and determination on merit.
16. Section 80 of the *Civil Procedure Act* provides as follows:
- “Any person who considers himself aggrieved—
- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
  - b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”
17. Order 45 Rule 1 of the Civil Procedure Rules provides as follows:
- (1) Any person considering himself aggrieved;
    - a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
    - b. by a decree or order from which no appeal is hereby allowed...
  - (2) A party who is not appealing from a decree or order may apply for review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate Court the case on which he applies for the review.”
18. Notably the instant application has not been brought under any of the foregoing provisions. Nevertheless, the failure to cite the appropriate provisions of the Rules can not afford a good ground for dismissal of an application and I must at this point deem review to be part of the orders sought. It is also the view of this court that failure to cite the provisions of Order 45 and Section 80 by the applicant are not fatal to the application but a mere flaw which can be cured by amendment.
19. The court in the case of *Republic v Public Procurement Administrative Review Board & 2 others* [2018] eKLR held as follows:
- “Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”
20. The plaintiff in this matter is seeking that the court reviews and or sets aside its orders issued on 7/03/2023 on the grounds that his advocate on record was unable to attend court because he had experienced a system failure and it is in the interest of justice that the said orders be set aside and his application be heard on merit. The 2<sup>nd</sup> defendant on the other hand argues that it was never served with



the application dated 31/01/2023 and only came to know about it upon perusal of the court file and further that it was indeed true that the plaintiff failed to attend court on 7/03/2023. The 2<sup>nd</sup> defendant also argued that the plaintiff's application was not dismissed for non-attendance but was dismissed for failure to comply with the orders of the court issued earlier which in my view is the correct position.

21. A perusal of the court record indicates that the application dated 31/01/2023 that the plaintiff seeks to reinstate came up for hearing on 14/02/2023 when the court issued the following directions in the presence of counsel for the 2<sup>nd</sup> defendant and in the absence of counsel for the plaintiff:

“Hearing of the application dated 31/01/2023 is hereby adjourned. Hearing shall be by way of written submissions. The directions as to the oral submissions made on 01/02/2023 are revoked. The applicant shall serve all the respondents with the application and shall file an affidavit of service in the court file. The respondents shall respond to the application within 7 days of service. The application shall be disposed by way of written submissions. The applicant shall file and serve submissions within fourteen days of this order. The respondents shall respond to those submissions within seven days of service or in any event file submissions within 21 days of this order. In default of submissions by the applicant as ordered, the application shall stand automatically dismissed for want of prosecution. Mention on 7/03/2023 to ascertain compliance and for further directions”

22. On 7/03/2023, counsel for the 2<sup>nd</sup> defendant was present while counsel for the plaintiff was absent. The court issued the following directions:

“There are no submissions filed by the applicant in respect of the motion dated 31/01/2023. Owing to the automatic effect of the orders of 14/02/2023, there is no application before court as it stood dismissed at the expiry of 14 days from 14/02/2023. Consequently, the application dated 31/01/2023 is marked as dismissed with costs.”

23. The plaintiff's application dated 31/01/2023 was therefore dismissed for failure to comply with the court's orders that had been issued on 14/02/2023 and not because he or his counsel had failed to attend court. As indicated before, the plaintiff's counsel alleged that he was unable to log in to court on 7/03/2023 due to a system failure and he is desirous to have the application dated 31/01/2023 heard on merit. 7/3/2023 was a mention date for ascertaining whether parties had complied so that further directions including a hearing date, may be issued. The plaintiff however failed to explain why he had not complied with the court's directions issued on 14/02/2023.

24. As was held in the case of Republic v Public Procurement Administrative Review Board & 2 others (supra), the court can only review its decree or order upon discovery of new and important evidence which after the exercise of due diligence could not be adduced at the time the decree or order was issued, on account of mistake or error apparent on the face of the record and any other sufficient reason.

25. It is to be noted that the applicant relied on Order 12 Rule 7 and on Section 1A and 1B of the Civil Procedure Rules. Order 12 Rule 7 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.”

26. That order relates to dismissal of suit and not of an application and this court does not find it relevant to the instant application.



Section 1A and 1B of the *Civil Procedure Act* state as follows:

- “(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
  - (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
  - (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.”
- “(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
- (a) the just determination of the proceedings;
  - (b) the efficient disposal of the business of the Court;
  - (c) the efficient use of the available judicial and administrative resources;
  - (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
  - (e) the use of suitable technology.”

Also, Order 51 Rule 10 of the Civil Procedure Rules provides as follows:

- “(1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.
- (2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.”

27. I have noted that the 2<sup>nd</sup> respondent has dwelt mainly on the merits of the main suit which should not be the case at this juncture as the suit has not been heard and in my view such focus is premature. The court is also concerned with the motion dated 10/3/2023 and not that dated 31/1/2023 for reinstatement of the dismissed suit and so the submissions on the merits of the main suit are misplaced.

28. The sole question that this court is called upon to answer at the present moment is whether there are any grounds upon which the application dated 31/1/2023 may be reinstated. That application was on 7/3/2023 marked as dismissed for failure to comply with court orders issued on 14/2/2023. Those orders of 14/2/2023 set out the timeframes within which written submissions ought to have been filed but which were not subsequently filed by the applicant. In those orders it was stated that failure to comply would lead to dismissal of the motion for want of prosecution. Clearly, notwithstanding whatever was stated by the court on 7/3/2023, the reason for dismissal of the motion dated 31/1/2023



was lack of prosecution. The application dated 31/1/2023 was therefore not heard on its merits. The tenor of the applicant's prayers in the instant motion is that there should be reinstatement of the dismissed application so that it can be heard on the merits.

29. This court is aware that the dismissed motion is of central importance to the applicant as it seeks to reinstate his suit which was earlier on dismissed for want of compliance with the court's orders issued on 22/11/2022. Therefore, though the plaintiff demonstrated considerable lethargy earlier on, he has now sprung back into action to save his claim from being wasted by the dismissal.
30. I do not subscribe to the respondent's submissions that this court was rendered functus officio by its orders striking out the main suit, or that it is now sitting on appeal against its own orders. That view by the respondent is inconsistent with the provisions as to review or setting aside contained in the *Civil Procedure Act* and Rules, as this court is not re-hearing the instant motion or the application dated 31/1/2023 for the simple reason that they have never been heard on their merits before. The dicta cited by the respondent from the Johnson Ondimu case (supra) only frowns on the revisiting of an order made by one court by another court of concurrent jurisdiction and in any event, in that dicta, the right of review is recognized.
31. The respondent laments that the applicant has disregarded orders of court and left it to "prosecute application after application filed adversely against his (sic) interest" and likens it to "hanging himself with a rope provided by a man who is disinterested in the task," and implores this court not to forgive the applicant for its missteps in this matter; that it is not always that the court will exercise its discretion in favour of the party if the mistake is committed not by it but by its advocates, and that the client is not left without a remedy since professional indemnity insurance cushions the advocates against such acts and omissions by way of damages. It cited *Kettleman –V- Hansel Properties Ltd [1988] 1 ALL E.R at page 62* as cited in the case of *Charles Omwata Onwoyo –Vs- African Highland Produce Co. Ltd [2002] eKLR* as follows:

"Another factor that a judge must weigh in the balance is the pressure on the courts caused by great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted, efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than allowing an amendment at a very late stage of the proceedings."
32. The respondent also cites *John Onger Mariaria & 2 others –Vs- Paul Matundura Civil App. No. Nairobi 301 of 2003 [2004] 2 E.A 163* for the same proposition, that advocates should be made to shoulder the consequences of careless and leisurely approach to their work.
33. Finally, it cites *T.S.C –Vs- Patrick M. Njuguna* for the proposition that a case belongs to a litigant and not to an advocate, and that the omissions of his counsel in this case were done with his constructive knowledge and participation.
34. Looking at the circumstances of this case, this court gets the idea that the plaintiff's advocates have not woken up to the fact that business of the court can be considerably expedited in contrast to days of yore when sluggish progress of litigation occasioned by case backlog was the norm. Counsel must be disabused of this rather lackadaisical approach to issues. What happened in the preparatory stages of present case was a clear and deliberate effort by this court to expedite the hearing of the main suit, in that, had there been full compliance by the parties, the court may have on 25/1/2023 issued a hearing date for the suit on 10/6/2022, and the matter not being overly complex, there was possibility of



judgment within 365 days from the filing date. That however is not what happened and that is why up to now, May 2023, parties and court are still mired in not one, but two applications for setting aside.

35. Be that as it may, this court is inclined to take the view that a lesser role is played by litigants in motions and chamber summons applications after they have proffered their evidence by way of affidavits. It is therefore, the duty of the advocate hired by a litigant to attend court for the prosecution of motions and other applications where oral testimony is not needed and this is where the submission by the respondent that the offending advocate should bear the consequences of his own negligence become relevant. It is a salutary approach to have advocates shoulder the consequences of their own sins but it is clear that courts have in the past only applied it on a case by case basis.
36. In this case I am satisfied that sufficient punishment would be achieved by justifiably foisting the costs of the present application on the shoulders of counsel for the applicant for his sloppy handling of the suit. I can not shut my eyes to the nature of the claim, being fraud, which was brought by the plaintiff through his plaint. That dispute would remain unresolved were the instant secondary application dismissed, and the truth may never be known. It would be more preferable if the door was finally closed in the applicant's face after the trial of the first application dated 31/1/2023 which is the one seeking reinstatement of his suit and I would rather have the parties have their day in court in respect of the motion dated 31/1/2023 before any such eventuality is reached.
37. Consequently, I allow the motion dated 10/3/2023 in terms of prayers Nos. 1 and 2 and I also order as follows:
  1. The costs of the present application which this court assesses in the sum of Kshs. 12,000/=, shall be paid to the 2<sup>nd</sup> respondent by the Law firm of Munene Chege & Co. Advocates within 14 days hereof.
  2. Parties shall comply with the directions issued on 14/2/2023 with the timelines therein being computed from the date of this ruling.
  3. Parties shall appear before this court for a mention to issue a ruling date on 7/6/2023 at 8:30 am.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 22<sup>ND</sup> DAY OF MAY 2023.**

**MWANGI NJOROGE**

**JUDGE, ELC, NAKURU**

