



REPUBLIC OF KENYA



Ojwang v Owino (Civil Appeal 9 of 2022) [2022] KEHC 14383 (KLR) (27 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14383 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL 9 OF 2022
RPV WENDOH, J
OCTOBER 27, 2022**

BETWEEN

DOROTHY ACHIENG OJWANG APPLICANT

AND

MARGARET ANYANGO OWINO RESPONDENT

RULING

1. The applicant, Dorothy Achieng Ojwang, filed the application dated 26/4/2022 seeking the following orders:-
 - i. Spent.
 - ii. That this court be pleased to review and/or set aside its orders made on 29/3/2022.
 - iii. That this court be pleased to reinstate the applicant's application dated 31/1/2022 and the same be fixed for hearing.
 - iv. Costs be in the cause.
2. The application is premised on the grounds found on its face and the supporting affidavit of George Ngala Awino, Counsel for the applicant. Counsel deponed that this court delivered a ruling on 17/1/2022; that the applicant made an application for orders of stay of execution *vide* an application dated 31/1/2022; that the application for stay of execution was scheduled for mention for directions on 29/3/2022; that on the said date, while driving to the court, his car experienced mechanical breakdown; that due to the situation, he procured services of a mechanic who did not arrive soon as he had expected.
3. Counsel further deposed that by the time he made it to court, the matter had already been dismissed for non - attendance; that the failure to attend court was not deliberate and not by design and thus should not be visited on the applicant; that the applicant is desirous of prosecuting the intended appeal thus making an application for orders of stay of execution; that there is sufficient reason to justify making



of the present application seeking reinstatement. Counsel urged this court to allow the application as prayed in the wider interests of justice.

4. The application was not opposed. On 19/7/2022, the court confirmed that Counsel for the respondent has never filed a response despite being given an opportunity to do so.
5. The applicant filed submissions dated October 21, 2022 which I have considered. The applicant's submissions are in relation to their dismissed application dated 31/1/2022. This cannot be the case since the application dated 31/1/2022 was already dismissed for want of attendance. It is the application dated 26/4/2022 which is for determination, and it seeks to reinstate the dismissed application dated 31/1/2022. The issue for determination is whether the application has merit.
6. Order 12 Rule 7 of the [Civil Procedure Rules](#) provides:-

“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.”

The principles upon which the court may set aside an order for dismissal of a suit or application were elaborated in the case of *Shah vs Mbogo* (1967) EA 166. The Court of Appeal held that it is a matter of discretion and the court should exercise this discretion in such a manner as to avoid injustice or hardship resulting from an accident, inadvertence or mistake but it is not designed to assist a person to deliberately seek evasion, obstruction or delay the cause of justice. In essence, there has to be sufficient cause shown by the litigant as to why they failed to appear in court before the court can set aside a dismissal order.

In the case of *Wachira Karani vs Bildad Wachira* (2016) eKLR the court referred to the Supreme Court of India case *Parimal vs Veena* which discussed what constitutes sufficient cause and held as follows:-

“The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgment impugned before it. The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause.”

7. In the instant application, Counsel deponed that he was on his way to court when he experienced a mechanical breakdown. Although the veracity of this averment cannot be put to test, it is a plausible explanation and the court will give Counsel the benefit of doubt. The subject application was dismissed on 29/3/2022. The present application to reinstate it was filed on 5/5/2022 a period of about one month later. I wonder why it was not made immediately if the counsel found out about the dismissal on the same day. The failure of Counsel to attend court because of a mechanical breakdown which was beyond his control, cannot be visited upon an innocent litigant.
8. In exercise of this court's discretion, I find that the application has merit and I issue the following orders:-



1. The application dated 31/1/2022 is hereby reinstated;
2. The applicant to serve the application dated 31/1/2022 upon the respondent within three (3) days hereof;
3. The respondent to file and serve a response within 7 days of service;
4. The application be canvassed through written submissions.
5. The applicant is at liberty to file a supplementary affidavit if need be and submissions within 14 days of service;
6. The respondent to file and serve its submissions within 14 days of service;
7. Since the subject matter of the dispute involves land, status quo shall be maintained;
8. The applicant will bear the costs of this application.
9. The matter shall be mentioned on 17/1/2023 to confirm compliance.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 27TH DAY OF OCTOBER, 2022

R. WENDOH

JUDGE

Ruling delivered in the presence of:-

No appearance for the Applicant

No appearance for the Respondent

Nyauke Court Assistant

