



REPUBLIC OF KENYA



**Kapset Tea Factory Company Limited v Cheruiyot (Environment & Land
Case 25 of 2020) [2023] KEELC 18324 (KLR) (27 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18324 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE 25 OF 2020**

**CG MBOGO, J
JUNE 27, 2023**

BETWEEN

KAPSET TEA FACTORY COMPANY LIMITED PLAINTIFF

AND

JOHNSON KIPTUMAI CHERUIYOT DEFENDANT

RULING

1. Before this court for determination is the Notice of Motion application dated February 9, 2023 and filed in court on February 14, 2023 by the counsel for the plaintiff/applicant which is expressed to be brought under Order 12 Rule 7 of the *Civil Procedure Rules*, Section 3A of the *Civil Procedure Act* and Article 159 (2)(d) of the *Constitution* seeking the following orders: -
 - i. Spent.
 - ii. That the honourable court be pleased to set aside the orders made on the January 24, 2022 (sic), dismissing the plaintiff/ applicant's suit for want of prosecution and all other consequential orders thereto.
 - iii. That the honourable court be pleased to reinstate the suit and the same be heard on merit.
 - iv. That the costs of the application be in the cause.
2. The application is premised on the grounds on the face of it and in the supporting affidavit of Geoffrey Chepkwony-the applicant's factory unit manager sworn on even date. The applicant deposed that this matter was dismissed for want of prosecution on January 24, 2023. The applicant further deposed that it has at all times been eager to have the claim dispensed with but was derailed by the filing of another suit ELC Suit No 9 of 2022 over the same property and which they filed an objection to the same on the grounds that it is related to this matter and to ELC Case No 270 of 2017.



3. Further, that they have been under the mistaken impression that the court directed that this matter be mentioned alongside ELC Case No 9 of 2019 and ELC Civil Suit No 270 of 2017 on October 3, 2022.
4. The plaintiff/applicant further deposed that guided by their advocates indication that further directions of this matter would be taken upon disposition of the application and preliminary objection filed in ELC Case No 9 of 2022, they were under the mistaken impression that this matter would be heard after disposal of the objection filed in the said matter. Further, that they got to learn of the dismissal on February 2, 2023 when they obtained the court's ruling on dismissal of the matter.
5. The plaintiff/applicant deposed that the application has been brought without undue delay and that the mistakes of counsel should not be visited on litigants.
6. The application was opposed by the replying affidavit of the defendant/respondent sworn on March 28, 2023. The defendant/respondent deposed that the application is defective as the applicant lacks the blessings and authority of the plaintiff to swear the affidavit for lack of evidence thereof.
7. The defendant/respondent further deposed that the applicant is economical with the truth as they have not told the court why the suit could not be concluded within a span of one year. Also, that it beats logic for the applicant to state that they were under an impression that the two suits were pending for consolidation. Further, that the applicant has lost interest and all that is being done is trying their lack.
8. The application was canvassed by way of written submissions. The plaintiff/applicant filed written submissions dated May 16, 2023. The plaintiff/ applicant raised three issues for determination as listed below: -
 - a. Whether the applicant has raised reasonable grounds for reinstatement of the suit.
 - b. Whether the applicant will suffer irreparable prejudice if the suit is not reinstated.
 - c. Whether the defendant will suffer any prejudice if the suit is reinstated.
9. On the first issue, the plaintiff/applicant deposed that they have raised reasonable grounds to warrant this court to reinstate the suit. The plaintiff/applicant relied on the case of *[John Nabashon Mwangi versus Kenya Finance Bank Limited \(in liquidation\) \[2015\] eKLR](#)*.
10. It was the plaintiff's/applicant's submission that all along they have attended court and have been under the impression that the court directed that this matter be mentioned on October 3, 2022 alongside ELC Civil Suit No 9 of 2022 and ELC Civil Suit No 270 of 2017. The plaintiff/applicant relied on the cases of *[Gold Lida Limited versus NIC Bank Limited & 2 Others \[2018\] eKLR](#)* and *[Hanson Muindi Mutula & 8 Others versus Kennedy Mutua Ngunu & 3 Others \[2022\] eKLR](#)*.
11. On the second issue, the plaintiff/applicant submitted that they stand to suffer irreparable prejudice and harm if the application is not allowed and that they have demonstrated that the mistake of the counsel should not be visited on the litigant. Reliance was placed in the case of *[James Mwangi Gathara & Another versus Officer Commanding Station Loitoktok & 2 Others \[2018\] eKLR](#)*.
12. On the third issue, the plaintiff/applicant submitted that the respondent will not stand to suffer any prejudice if the suit is reinstated and it is fair that any inconvenience that may be suffered by the defendant/respondent can be cured by an award of costs.



13. The defendant/respondent filed written submissions dated March 28, 2023. The defendant/respondent submitted that the application is meant to try lack in a court of law for the reason that it beats logic when one attends court and is given a date for a ruling which cannot be confused with something else. Also, that litigation has to come to an end as there cannot be two suits touching over the same subject matter in court and that the only open avenue for the plaintiff/applicant in this case is to file a counter claim in his case.
14. I have considered the application, the replying affidavit and the written submissions filed by both parties and the issues for determination is whether this court ought to reinstate the suit to be heard on merit.
15. Reinstatement of a suit dismissed for want of prosecution and non-attendance is discretionary. The discretion is couched under Order 12 Rule 7 of the Civil Procedure Rules that 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.'
16. A perusal of the proceedings herein indicates that this court on July 14, 2022, issued a notice to show cause upon the plaintiff/applicant on the basis that the matter had been mentioned severally as was noted by the counsel for the proposed 1st to 6th respondents.
17. The applicant has advanced reason that it was under the mistaken belief that this matter would be heard after disposal of the preliminary objection raised in ELC Case No 9 of 2022. The plaintiff's/applicant's counsel relied on notes jotted down and presumed to have arisen out of the court proceedings in ELC Case No 9 of 2022.
18. The proceedings in this file recorded on September 21, 2022 shows that the court noted the relation of this case with ELC E009 of 2022. In the circumstances, I directed a further mention on October 3, 2022. On October 3, 2022, the counsel was present and this court gave directions as to the hearing of the suit which was to be on January 24, 2023.
19. On January 24, 2023, none of the parties was present before court and as a result, dismissed the suit for want of prosecution.
20. My analysis of the reasons advanced by the plaintiff/applicant point towards a party that was awaiting the outcome of the court's determination in ELC E009 of 2022 to decide whether or not to proceed with the instant suit. In the case of *Shah versus Mbogo (1967) EA 116*, it was stated that the exercise of discretion of the court to set aside ex-parte orders is to avoid an injustice or hardship from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought by evasion or otherwise to obstruct or delay the course of justice.
21. In a bid to ensure that justice is served upon both parties, this court hereby sets aside its orders issued on January 24, 2023 and reinstates the suit herein for hearing. The respondent is awarded costs. Mention on July 11, 2023 for purposes of taking a hearing date. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 27TH DAY OF JUNE, 2023.

HON. MBOGO C.G.

JUDGE

27/6/2023

In the presence of:



